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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. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
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Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee [2]..Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[1] Died March 15, 1908.

[2] Appointed May 18, 1908.

SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
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Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

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Hon. JOHN C. POLLOCK, District Judge, Kansas.....Topeka, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota[3].....Minneapolis, Minn.
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Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....Helena, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[3] Resignation accepted April 3, 1908, to take effect on qualification of successor.

CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

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

BACON v. PULLMAN CO.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1908.)

No. 1,555.

1. CARRIERS—SLEEPING-CAR COMPANIES—LOSS OF "BAGGAGE"—JEWELRY.

While a passenger is entitled to carry with her and retain in her immediate custody as baggage a reasonable quantity of personal effects for her use, comfort, and adornment during the journey, according to her station in life, a carrier or sleeping-car company owes her no duty with respect to valuable jewelry carried by her in a hand bag for transportation merely, without any intention or purpose of using it during the journey; the jewelry under such circumstances not being regarded as baggage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1583.

For other definitions, see Words and Phrases, vol. 1, pp. 663–670; vol. 8, p. 7586.]

2. SAME—ACTS OF SERVANT—SLEEPING-CAR PORTER—THEFT.

A sleeping-car company, being under no duty to care for the jewelry, which did not constitute baggage, of a passenger carried by her into her stateroom, was not responsible for the theft of the jewelry by its porter, such act being outside the scope of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1585.

Duties and liabilities of sleeping-car companies, see notes to Duval v. Pullman Palace Car Co., 10 C. C. A. 335; Edmundson v. Pullman Palace Car Co., 34 C. C. A. 386.]

3. SAME—ACTIONS—COMPLAINT.

Where, in an action against a sleeping-car company by a passenger, for loss of her hand bag containing medicine and stimulants which she had purchased for use during the journey, she being sick and in charge of a nurse, the complaint alleged a duty on the part of defendant's porter as its agent and servant to care for such bag as a part of plaintiff's effects, and that the duty was breached by the porter's wrongful act in taking and carrying away the hand bag, medicine, etc., while acting within the scope of his employment, the complaint stated a cause of action ex delicto, and not ex contractu.

4. SAME—DAMAGES—PHYSICAL SUFFERING AND MENTAL DISTRESS.

Plaintiff, while sick and in charge of a nurse, took passage on defendant's sleeping car, with medicine and stimulants, prescribed by her physician for the journey, in a hand bag. Shortly after the beginning of the journey, she was deprived of the medicine and stimulants by the theft of the bag by the porter, and suffered, unrelieved, during the night, pain and distress

incident to her diseased condition, and was taken from the train at the end of the journey in a state of physical collapse, which could have been prevented and relief afforded to her by the use of the medicine and stimulants. *Held*, that the theft of the bag and a deprivation of the medicines, etc., at least contributed to the result complained of, and that plaintiff was therefore entitled to recover damages for her physical suffering and mental distress, and was not limited to a recovery of the value of the medicine, stimulants, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1597–1600.]

Pardee, Circuit Judge, dissenting.

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

Willie C. Bacon, plaintiff in error, brought this action against the Pullman Company, defendant in the court below, claiming $50,000 damages for the loss of certain toilet articles and pieces of jewelry and the hand bag which contained them, the same alleged to have been lost by the negligence of the defendant, or by the theft of its porter, while plaintiff was an occupant of a stateroom on one of the defendant's sleeping cars as a passenger between Cincinnati, Ohio, and Chattanooga, Tenn.; and for physical pain and mental anguish suffered by her because of the loss and consequent deprivation of the use of certain medicine and stimulants also carried by her in the hand bag. The testimony of the plaintiff was to the effect that on the 10th day of March, 1904, she purchased from the agent of the defendant at Cincinnati, Ohio, the use of a stateroom from Cincinnati, Ohio, to Chattanooga, and at 8 o'clock on the night of March 10th, in company with her mother, she boarded the sleeping car and occupied and used a stateroom thereof between those two cities; that at the time she boarded the car she was physically ill, and had in her hand bag certain medicine and stimulants prescribed by her physician to stimulate and maintain the action of her heart, and certain medicines to be taken at given intervals for her illness; that the hand bag likewise contained a cameo pin set with pearls, a pearl brooch, and toilet articles; that at the time the plaintiff was in mourning for the death of her husband, and was not wearing the jewelry, but was carrying it to her home in Gadsden, Ala.; that she had not worn the jewelry at any time during the journey upon which she then was, nor did she expect to; that she was not carrying it for the purpose of wearing, and that she had intended to pack the jewelry in her trunk, but that it had been forgotten and was placed in her grip. There was also evidence tending to show the value of these articles. Plaintiff also offered testimony tending to show the loss of the grip with its contents shortly after leaving Cincinnati. She testified that she took a dose of medicine from the hand bag, and at that time the porter of the sleeping car was in the stateroom making down her berth, and that in about 30 minutes she desired to take another dose of medicine, and discovered that the hand bag and its contents were missing; that no one entered the stateroom between the time she took the first dose of medicine and the time she missed the hand bag, save and except the porter of the car, and that no one else was in the stateroom except her mother, who was traveling with and nursing her in her illness. She further testified, over the defendant's objection, that she was physically ill, and that being deprived of the use of her medicine from Cincinnati to Chattanooga during the space of an entire night caused her to suffer pain, and that when she reached her destination she was in a state of collapse. Upon motion of the defendant this testimony as to her physical suffering was excluded. The court also sustained an objection to a question propounded to the plaintiff seeking to elicit a statement by her that she suffered mental anguish. The court also, on motion, excluded the testimony of plaintiff's witness Dr. Camp and Mrs. Staunton as to her physical suffering and the relief the medicine and stimulants would have afforded if administered; also the evidence of Dr. Camp as to her physical condition when taken from the train at Gadsden, Ala., on the morning of March 11th.

The court charged the jury that plaintiff was not entitled to recover any damages for the loss of the cameo pin or the pearl brooch. Under instructions

submitting the question to it, the jury returned a verdict in favor of the plaintiff for the value of the toilet articles and the grip containing them.

Alex C. Birch and Jos. J. Willett, for plaintiff in error.
John B. Knox and W. P. Acker, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

MEEK, District Judge. While the assignments of error are numerous, they in effect raise but three points that need be considered. The first is, whether the plaintiff in error is entitled to recover damages for the loss of the jewelry she was carrying with her in the hand bag. According to her own testimony, she was carrying it not with any purpose or intention of using during her journey, but simply to transport it. The jewelry, therefore, cannot be considered baggage within the definition of that term as used in this connection. She had the right to carry with her and retain under her possession and control as baggage a reasonable quantity of personal effects for her use, comfort, and adornment during the journey, having in view her station in life. 6 Cyc. p. 661; Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Pullman Palace Car Company v. Adams, 120 Ala. 581, 24 South. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53; Cooney v. Pullman Palace Car Company, 121 Ala. 368, 25 South. 712, 53 L. R. A. 690; Pullman Palace Car Company v. Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771; Miss. Central R. v. Kennedy, 41 Miss. 671. As to such baggage the duty is imposed upon the sleeping-car company to exercise reasonable care to prevent loss or theft. See authorities, supra. But as to articles not intended for such use in the course of the journey and being carried solely for the purpose of transportation, the company owes the passenger no legal duty whatever. As to these the status of the parties is not changed by the contract to afford sleeping-car facilities. Therefore, the attitude of the company toward the jewelry carried by the plaintiff in error was no different after she had purchased the stateroom in the sleeping car and occupied it than it was before. The contention is that if the porter stole the jewelry the company would be responsible for the loss. Such responsibility could not attach unless there was a duty to be performed by the company with reference to the jewelry and the failure to perform the duty arose from the negligence or wrongful act of the porter delegated to perform it. This was not the case. If the porter stole the jewelry, he was acting outside the scope of his employment, and with regard to property concerning which there was no duty imposed upon the company. Levins v. New York, N. H. & N. H. R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434; Root v. New York Central Sleeping Car Co., 28 Mo. App. 199; Illinois Central Railroad Co. v. Charles Handy, 63 Miss. 609, 56 Am. Rep. 846; Cooney v. Car Co., supra; 3 Sutherland on Damages (3d Ed.) p. 2818.

Second. It is urged by counsel for plaintiff in error that the action as stated in the several counts of the complaint sounds ex delicto and not ex contractu, and that the trial court erred in treat-

ing it in his charge to the jury as an action in assumpsit. The gravamen of the action as stated is for the breach of duty on the part of the defendant company through the wrongful act of its porter in taking and carrying away the plaintiff's hand bag containing the medicine and stimulants while acting in the scope of his employment. It is true, there is no direct affirmative allegation of the duty on the part of the defendant company arising out of the contract to furnish sleeping-car facilities such as indeficient pleading would require, but the counts do allege a duty on the part of the porter as agent or servant of the defendant company, and that the duty was breached by his wrongful act. Facts are stated from which the law will imply a duty on the part of the defendant. The contract is alleged, as is also the breach thereof. Upon the subject of proper pleading in an action ex delicto, when the duty breached arises from contractual relations, the Supreme Court of Alabama has ruled as follows:

"When the duty springs out of the relation of the parties growing out of a contract, of necessity the contract and the terms of it must be averred in the complaint in order to show the duty, and, if a recovery is sought for breach of duty growing out of a breach of contract, a breach of contract must also be shown by the averments." Western Union Telegraph Company v. Krichbaum, 132 Ala. 535, 31 South. 607.

The pleading in the several counts is in a measure loose and meetly the subject of criticism, but we are of the opinion that its fair and reasonable intendment supports an action ex delicto.

Third. Is the plaintiff in error entitled to recover in this action for the physical suffering and mental distress alleged to have resulted from the deprivation of her medicine and stimulants? Counsel for the defendant in error contend that the act of negligence charged against the defendant was not such that physical suffering and mental anxiety were reasonably to be anticipated as the result thereof; in other words, that the defendant could not reasonably have anticipated that the plaintiff would undergo physical suffering and mental distress because of the deprivation of her hand baggage. Whether or not a result can reasonably be anticipated as likely to flow from a negligent act is not a sufficiently comprehensive test for imputability. Mr. Wharton in his excellent work on the Law of Negligence, § 73, thus accurately defines causation as pertaining to negligent acts:

"A negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being as in ordinary natural sequence immediately results in such injury."

He continues (section 77):

"Nor, on the other hand, * * * can we claim that the fact that a particular consequence could not be reasonably foreseen relieves its negligent author from imputability. The fact is that the consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defense that a particular injurious consequence is 'improbable' and 'not to be reasonably expected,' if it really appear that it naturally followed from the negligence under examination."

In the case of Stevens v. Dudley, 56 Vt. 158, Judge Ross, in commenting upon the text of Mr. Wharton, says:

"The learned author shows that the test of reasonable expectation of the injurious consequences for which recovery is sought as determinative of the liability of the person who committed the negligent act has been abandoned by the great majority of the courts of last resort, both in England and in this country, and especially in the more recent decisions."

In the case of Mentzer v. Western Union Telegraph Company, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, Judge Deemer expresses the conception of the Supreme Court of Iowa as to the true test of legal imputability as follows:

"He who is responsible for a negligent act must answer 'for all the injurious results which flow therefrom by ordinary or natural sequence, without the interposition of any other negligent act or overpowering force.' Whether the injurious consequences may have been reasonably 'expected' to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom."

The rule in the present day as given sanction by courts of high authority is concisely and aptly expressed by Chief Justice McClellan in the case of Armstrong v. Railroad Company, 123 Ala. 233, 26 South. 349, as follows:

"The logical rule in this connection, the rule of common sense and human experience as well, * * * is that a person guilty of negligence should be held responsible for all consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow if they had occurred to his mind."

This statement of the rule is reannounced and adhered to by that court in the later case of Railway Company v. Quick, 125 Ala. 553, 28 South. 14.

The plaintiff in error had provided herself with medicine and stimulants, and carried them with her in a hand bag to afford relief from the physical pain and mental distress occasioned by her condition of disease. Because of the contract relations existing between her and the defendant company, unquestionably the legal duty was imposed on the latter to use reasonable care to protect and guard her in the possession of these, and to prevent their loss. At the trial evidence was either introduced or offered tending to show that this duty was breached by the wrongful act of the porter in taking and carrying away the hand bag containing the medicine and stimulants; that the plaintiff was thereby deprived of their use; that she suffered unrelieved during the night the pain and distress incident to her diseased condition, and was taken from the train at the end of her journey in a state of physical collapse; that the medicine and stimulants, if administered, would have effected the desired relief. Did not her suffering follow in direct and logical sequence as the result of the act of the porter?

It is true her suffering resulted primarily from her disease; had she not been afflicted she would not have suffered, and she would not have needed medicine and stimulants. But she was afflicted, and she,

suffered mentally and physically. Relief could have been afforded by the use of medicine and stimulants. These were provided her, and they were at hand to be administered. The porter carried away the hand bag containing them, and she was thereby deprived of her relief, and as a result she suffered the effects of her sickness. In this action she seeks to recover for the suffering consequent upon her condition of disease, but endured because of the deprivation of relief. Her suffering during the night and her condition of collapse at her journey's end may be attributed to two concurring causes, to wit, her sickness and the deprivation of relief. The latter must be said to be the result of the act of the porter in carrying away the hand bag. Obviously there is direct causal connection between this act and the suffering of the plaintiff. Being acquainted with conditions as they actually existed, a person need not have had much prudence or experience to readily realize that the consequences that did follow the porter's act would so follow. The fact that the sickness of the plaintiff concurred with the wrongful act of the porter in contributing to the result complained of does not at all relieve the defendant of responsibility for its negligence. The authorities are uniform to the effect that the negligence of the defendant, in order to create liability, need not be the sole cause of plaintiff's injuries. We cite a few of the cases: Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; St. Louis, etc., R. Co. v. Commercial Union Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; S. W. Tele., etc., Co. v. Robinson, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; Flaherty v. Minneapolis, etc., R. Co., 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654.

The wrongful act of the porter, having been viewed in the light of its consequences, logically and in right reason, seems to deserve a classification with those acts of negligence for which full compensatory damages are awarded. The unusualness of the facts involved make difficult the task of assimilating the case with any well-recognized class of negligence cases. Mr. Thompson in his Commentaries on the Law of Negligence, vol. 1, § 150, says:

"The duty of care and of abstaining from injuring another applies to the sick, the weak, and the infirm, as well as to the strong and healthy. When this duty is violated the measure of damages is the injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated."

After an extended review of the decisions he deduces that "if A., through his negligence, aggravated an injury or a disease from which B. is already suffering, B. may recover damages from A." We find this deduction amply justified on the authority of the decided cases. Railroad Co. v. Lockhart, 79 Ala. 315; Railway Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Railroad Co. v. Shafer, 54 Tex. 641; Railway Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732. Some of the courts have adopted the view that a person may recover compensatory damages for physical injuries resulting solely from fright or other mental disturbances caused by the negligent act of another where there has been no im-

pact or injury to the person from without. Dulien v. White & Sons, 2 K. B. 669 (1901); Bell v. Railway Co. L. R. 26 Ir. 428; Purcell v. St. Paul, etc., R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; Pugh v. London, etc., R. Co., 2 Q. B. 248; Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953. On the other hand, courts whose opinions are worthy of much respect and consideration refuse to permit recovery for physical injuries arising solely from such causes. The Supreme Judicial Court of Massachusetts has taken this position in the case of Spade v. Railway Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. A reading of the opinion reveals that the action of the court is based not upon an examination of the consequences of the act of negligence, with a classification accordingly, but upon the ground that it would be "unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open wide the door to unjust claims which cannot be successfully met." In reaching this conclusion it is argued that:

"Not only the transportation of passengers and the running of trains, but the general conduct of business and the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly and extra care be observed. But as a general rule, a carrier of passengers is not bound to anticipate or guard against an injurious result which would only happen to a person of peculiar sensitiveness."

In commenting upon this ruling in Homans v. Boston Elevated Railway Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, the same court, speaking through Holmes, C. J., says:

"As has been explained repeatedly, it is an arbitrary exception based upon a notion of what is practicable that prevents a recovery for visible illness resulting from nervous shock alone."

There is manifest in the case last cited a disposition to restrict rather than to extend the application of what is stated to be an arbitrary exception to the general rule.

We have not overlooked the case of Haile's Curator v. Texas & Pacific Railway Co. (decided by this court) 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774. Under the facts there alleged it was held that insanity following a shock (presumably a nervous shock, although this is not made quite plain) received by plaintiff's ward in a wreck of a passenger train upon which he was a passenger, was too remote and the result of such an unusual combination of circumstances that there could be no recovery. Without criticising or reaffirming the doctrine there announced, we consider that the facts of the present case render it distinguishable from Haile's Curator Case. It is also distinguishable from Spade v. Railway, supra, and the class to which it belongs. This is made quite plain by the testimony of the plaintiff's

mother, Mrs. E. S. Staunton, from a narrative statement of which, as found in the bill of exceptions, we quote:

"She is the mother of the plaintiff, and was with her when she boarded the sleeping car 'Remwick' at Cincinnati, Ohio, at about 8 o'clock on the night of March 10, 1904, in company with plaintiff, and that together they occupied the stateroom of said sleeping car; that at the time the plaintiff was physically ill, and that she had certain stimulants and medicines consisting of digitalis, strychnine, and morphine, in a traveling bag, together with certain articles of personal use, comfort, and ornament; that shortly after leaving Cincinnati the ticket or coupon for the use of the stateroom was surrendered to the conductor of the sleeping car, and shortly after passing Grand Junction, near Cincinnati, the plaintiff took a dose of medicine which was procured from the hand bag, and that at the time the porter of the sleeping car, who was a colored man and whose name witness did not know, was in the stateroom making down plaintiff's berth, and that in about 30 minutes after taking the first dose of medicine she started to give her daughter, Mrs. Bacon, another dose of medicine, when the hand bag was missed, and between the time of the taking the medicine and the missing hand bag no one was in said stateroom except the plaintiff, witness, and the porter; that the Pullman conductor, when he got the tickets, did not come into said stateroom, but stopped at the door; that the porter was the only person in said stateroom besides herself and daughter, Mrs. Bacon. Witness further stated that, when she went to give plaintiff the second dose of medicine and missed the hand bag, she rang for the porter, who came to the stateroom and appeared to be very much excited as soon as he came, without waiting to be told what she had rung for. Witness further stated that she requested and begged the conductor several times during the night to search for the hand bag, and told him how plaintiff was suffering, and the conductor promised that he would, from time to time, as soon as he got through checking up his business, collecting tickets, etc., and that every time the conductor came to the door of the stateroom the colored porter would come with him and stand within hearing of the conversation between her and the conductor, although he had not been asked or sent for."

The plaintiff was sick and suffering physically and mentally, and the affirmative wrongful act of the porter directly resulted in depriving her of alleviation or relief from her suffering. The wrongful act for the result of which it is sought to hold the defendant responsible did not transpire from any act taken in the management or operation of the train of a carrier of passengers, and which of necessity must affect all alike, the well and the sick, the strong and the weak; so that the reason of the rule as announced in Spade v. Railroad Co. has no application. The act of the porter affected, and was calculated to affect, the plaintiff alone, and while in the scope of his employment was not such an act as was required even in the management or proper care of a sleeping car. The circumstances bearing upon the disappearance of her hand bag, her condition of disease and resultant suffering, are susceptible of proof which may be controverted. The effect of the medicine and stimulants upon the suffering occasioned by her sickness, and whether or not they would have alleviated or relieved her, were questions which could be answered by witnesses skilled in medicine, as could also the effect of their withdrawal. We do not consider this a case where analysis of consequences and logical conclusion therefrom should give way to expediency, nor where the rights of the individual should yield because to recognize and vindicate them might open the door and give rise to unjust claims. To adopt such a course would not only involve the denial of redress in meritorious claims, but would as

well imply a distrust of the ability of our courts to adequately examine into and find the truth of such claims.

For the conversion of personal property the rule of damages is that a person is entitled to recover compensation for the loss sustained, measured by the value of the property taken. Sedgwick on Damages (8th Ed.) § 40; 2 Joyce on Damages, §§ 1035–1037. Under the facts and circumstances obtaining here, this measure of relief would be wholly insufficient and inadequate to compensate for the wrong done. The porter's wrongful act worked double injury to plaintiff in error. It deprived her of the value of her drugs, and also deprived her of the relief from suffering their administration would have afforded. The value of the drugs becomes inconsequential when compared to the suffering entailed from their theft. If the theft cannot be accurately stated to be the infliction of a physical injury, it was at least a personal injury which approximately caused physical suffering and distress. Could the drugs have been forthwith resupplied, then their value would be compensation for their wrongful taking. But the owner was a sick traveler who had taken passage for the night on a railway train, and the journey was commenced before the loss took place or was discovered. If upon a trial of the case the jury should find that the porter's wrongful act deprived the plaintiff in error of her medicines and stimulants, and that if these had been administered as prescribed they would have relieved her of the physical pain and mental distress caused by her diseased condition, and that because of being deprived of their administration she suffered physical pain and mental distress, the resulting damages could not go uncompensated any more justly than could the loss to her of the value of the drugs or the receptacle in which they were carried. We conclude that, if plaintiff was injured in the manner claimed, she is entitled to her remedy in the nature of compensatory damages.

It follows that the trial court erred in its ruling excluding the testimony offered by plaintiff in error, tending to show physical suffering and mental distress as resulting from the deprivation of her medicine and stimulants, and in peremptorily instructing the jury to find for the defendant on this phase of the case. Therefore the judgment of the court must be set aside, with directions to grant a new trial.

PARDEE, Circuit Judge. I dissent from the opinion and judgment of the court. In my opinion, the action is one ex contractu, and therefore the ruling denying the plaintiff below the right to recover for jewelry which she was not carrying as baggage was correct. If, however, the action is one ex delicto, as my Brethren hold, then it seems to me that the plaintiff below would have the right to recover for her jewelry carried in the bag alleged to have been stolen by the Pullman porter, whether it was baggage or not, on the theory that the loss directly and naturally resulted from the claimed wanton act of the porter, for which it seems the Pullman Company is to be held liable.

In my opinion, it is immaterial whether the action is one ex delicto or ex contractu, it being essentially a case where a principal is to be held liable for the negligence of his servant, and the damages to be

allowed under such circumstances are "those that are the ordinary natural result of the negligence, such as are usual and might therefore have been expected," and remote damages should be rejected. It must be conceded that the sufferings of the plaintiff below were caused by her disease, and only indirectly affected by the loss of her medicines. But I do not care to elaborate or cite authorities other than the decision of this court in Haile's Curator v. Texas & Pacific Railway, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774, and authorities there cited.

DAVIS v. CHICAGO, R. I. & P. RY. CO.

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

No. 2,464.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCIES.
Where a person without fault on his part is brought suddenly into a situation of imminent danger, he is not chargeable with culpable negligence because he fails to take the best means of escape, and the party whose negligent act brought him into such perilous situation is not relieved from liability for his injury if he acts as a person of ordinary prudence might have done under the same circumstances.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 99, 100.]

2. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.
Where plaintiff and another driving a horse approached to within 25 feet of a railroad crossing, well known to them to be dangerous, at a trot, and even there could not see along the track for more than 50 to 150 feet nor hear signals given by an approaching train because of an intervening bluff and an adverse wind and the noise made by their vehicle, their action in driving upon the crossing without stopping to look and listen was negligent, and precluded plaintiff from recovering damages from the railroad company for an injury received by jumping out of the vehicle to avoid danger from an approaching train which they did not see until the horse had stepped upon the track.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1043–1070.]

3. NEGLIGENCE—IMPUTED NEGLIGENCE—PERSONS DRIVING TOGETHER.
That a plaintiff at the time of his injury at a railroad crossing was riding in a vehicle with a friend who owned the horse and was driving did not relieve him from the duty of exercising ordinary care to avoid injury, and where he sat beside the driver, and made no objection when the latter negligently drove upon the track in front of an approaching train, such negligence is imputable to him.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 147, 148.]

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

Robert J. Brock, for plaintiff in error.

Paul E. Walker (M. A. Low, on the brief), for defendant in error.

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

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the plaintiff) sued the defendant in error (hereinafter desig-

nated the defendant) to recover damages for personal injuries. As the trial court at the close of the plaintiff's evidence directed a verdict for the defendant, a review of the case made is rendered necessary.

The plaintiff, a man of middle age, and one Pfeutze, resided in the town of Manhattan, Kan., a few miles distant from the crossing of the public highway over the track of the defendant railroad company where the accident in question occurred. On the morning of October 16, 1904, they left home in a two-seated rig drawn by one horse belonging to said Pfeutze, the latter driving, to visit some point in the country of mutual interest. They were close personal friends, and so traveled together in companionship. They approached the crossing in question from a northeasterly direction, the roads intersecting each other at right angles. A bluff from 150 to 200 feet high arose just west of the crossing, extending back some distance, cutting off the view of a train of cars coming from the west when the traveler approached this crossing, under conditions hereinafter disclosed. It was regarded as a very dangerous railroad crossing, a fact well known to the plaintiff and Pfeutze. They were quite familiar with this situation, having used this crossing frequently for a number of years. They admitted that as they approached the crossing they were engaged in general conversation, and trotted the horse to within 20 or 25 feet of the crossing before the driver slowed him to a walk. They did this when, according to their testimony, they knew that at a distance of about 30 feet from the track they could not see a train coming through the cut from the west a greater distance than 50 feet; though the actual measurement and experiments made demonstrate that 34 feet back from the track a train could have been seen at a distance of about 90 feet. At a distance of 15 feet from the crossing the proof showed that the train could be seen 232 feet. They comprehended the fact on approaching the point of intersection that a train might appear at any time, and therefore they testified that in approaching the crossing they looked and listened therefor; that hearing no signal they drove onto the track without stopping; and just as the horse's forefeet reached the north rail the plaintiff observed the train coming, when the driver applied the whip to the horse and safely cleared the crossing before the engine arrived. The plaintiff, taking alarm, sprang from the vehicle, alighting on the south side of the track, and in the fall received injury to one of his knees, more or less serious, for which injury this action was instituted. If the plaintiff's own negligence or want of due care did not contribute to bringing him into such perilous situation, it is to be conceded that his act in leaping from the vehicle, although he would not have been injured had he remained seated, would not disentitle him to maintain action for damages. When a person, without fault on his part, is brought suddenly into a situation of imminent danger, not admitting of opportunity for the exercise of deliberate judgment as to the better means of escape, culpable negligence is not to be imputed to him for not selecting the better course. If under such circumstances he makes such choice as a person of ordinary prudence placed under like conditions would

make, and injury thus comes to him, it would not relieve the party from accountability therefor whose negligent act brought him into such perilous situation. Omaha Water Company v. Schamel, 147 Fed. 502, 78 C. C. A. 68, loc. cit. The same may be said of the action of Pfeutze in not pulling his horse back off the track when he discovered the approach of the train if his forefeet were already over the first rail, provided he was not guilty of contributory negligence.

The actionable negligence of the defendant charged in the petition is as follows: In propelling said train over said crossing without ringing the bell or sounding the whistle, and without giving or attempting to give any sufficient warning or signal of its approach, when the defendant well knew that it was a most dangerous crossing, and that the ordinary warning of the bell and whistle would be wholly ineffectual to protect persons entering upon said crossing; and in approaching said crossing at a dangerous rate of speed; and failing to maintain a watchman and gates at the crossing, and not providing proper signals giving notice of the approach of trains.

The plaintiff knew that neither watchman nor gates, nor appliances for signals, were kept and maintained at said crossing. Of what avail would the presence of a watchman to operate gates have been in view of the plaintiff's evidence? As the train was not running on schedule time, being about three hours late, a watchman would not have known the moment of its coming. And as the plaintiff and Pfeutze, if they are to be credited, notwithstanding their vigilance, did not discern the approach of the train until the horse was on the near rail, it must be conceded that the watchman, if there, would have been in the same predicament in giving timely warning. If it be said that he could have warned them not to enter upon the track without first stopping, the answer is that they already possessed the same knowledge as would the watchman, that the place itself was a warning of danger, and therefore they should have stopped with or without such outside warning. Any warning by a watchman would have conveyed to them only what they already knew as well as he did. If they could not hear any signals the watchman could not have heard any. They therefore had the same reason for stopping before entering upon the crossing that the watchman would have had for warning them to do so. They knew, on approaching this crossing, that no appliances were employed there by the railroad company for giving signal of the approach of a train, and therefore that they could not rely thereon for their protection and safety. All the more, therefore, should they have depended upon their quickened senses and increased precaution in approaching the crossing.

The allegation respecting the dangerous rate of speed of the train is not supported by any evidence that would have warranted the jury in finding the existence of such fact. The only witness to this issue was one Cooper, who, according to his statement, was about 150 yards northeast of the crossing, following on the same road in the rear of the plaintiff. Remarkably enough, in view of the plain-

tiff's evidence that they could not see the crossing until they were within about 30 feet of it, this witness claimed that he saw the train 150 yards to the northeast, when it was about 50 feet from the crossing, although he did not see the accident. Indisputably, he had but a mere glimpse of one or two seconds of the train. From which it is manifest that any expression of opinion by him as to its rate of speed was the merest speculation and guesswork. He said he thought it was running from 40 to 45 miles an hour. There was nothing whatever at the instant to fix his mind upon the matter of the speed, and his cross-examination developed that he had never experimented from a side view to determine the rate of speed of a passing train. As said in McGrail v. McGrail, 48 N. J. Eq. 532–536, 22 Atl. 582, 584:

"Nothing is more uncertain and unreliable than the testimony of witnesses as to the time occupied in a transaction."

Recognition of such mere guesswork as sufficient to carry the question to the jury of the rate of speed of a train has a long column of injustice to its account. This testimony, doubtless, and properly so, was treated as utterly worthless by the experienced judge who presided at the trial.

The only remaining ground of negligence worthy of consideration is the imputed failure of the defendant to sound the whistle or ring the bell when approaching the crossing. The statute of the state requires that one or the other of such signals should be given at least 80 rods from such public road crossing. The evidence on behalf of the plaintiff was that although they listened they did not hear such signal, as did also the witness Cooper. But the plaintiff's testimony was that on account of the obstruction of the long, high bluff and the adverse direction of the wind blowing at the time they might not have heard the sounds if given. The petition itself alleges that the defendant, on approaching this crossing, knew that "the ordinary warning of the bell and whistle would be wholly ineffectual to protect persons crossing the said crossing;" and in the brief of counsel for plaintiff it is admitted that "by reason of the obstruction caused by the bluff it was impossible for them to hear the train until it was dangerously close." In view of the rule of law that the servants of the defendant are presumed to have performed their duty in respect of giving the required signal, it devolved upon the plaintiff to overcome this presumption by satisfactory evidence to a reasonable mind. When the plaintiff himself thus, in effect, conceded that the whistle or bell, if sounded, probably would not have reached such traveler, it is somewhat remarkable that he should assume the position that he is entitled to recover damages by reason of the failure of the defendant to have given such signal, when the burden of proof rested upon the plaintiff to establish such omission by satisfactory evidence. If, however, this doubt should be resolved in favor of the plaintiff, what of the conduct of these travelers in approaching the crossing as they did? With full knowledge of the situation, as hereinbefore stated, they approached the crossing engaged in general conversation, indicating that their

minds were not fixed upon the probable approach of a train and giving heed to any sounds, on a slight down grade they suffered the horse to trot until they reached within 20 or 25 feet of the railroad track, and then in a walk entered upon the crossing without taking the precaution to stop; when, according to their statement, from the point where they stopped trotting, it was almost a physical impossibility for them to have discovered the approach of a train from between 50 and 100 feet away. Courts will take judicial cognizance of physical facts of common knowledge. Judges know without evidence taken that the clatter of a horse's hoofs on a road when trotting, and a vehicle thus in motion, under the most favorable circumstances, will make such an amount of noise as will obstruct the conveyance of sounds to the ear—that they lessen the chances of hearing distinctly. And therefore, on approaching a known place of danger at a railroad crossing, they should exercise a degree of care commensurate with the hazard to be encountered demanded of them, and, where both the senses of vision and hearing were thus obstructed, they should take the next ordinary, practical, and sensible course of stopping to look and listen. Instead of doing this, they drove onto the track; and in this connection it is important to note the evidence on behalf of the plaintiff. It is that when they first discovered the engine it was within 120 feet of them, and at that time the forefeet of the horse were over the first rail of the track. The uncontradicted evidence is, demonstrated by actual measurements and observations since made, that at a distance of 34 feet from the track an engine from the west could be seen 90 feet, and at a distance of 15 feet from the track the engine could be plainly seen 232 feet. Physical facts, it has been pungently said, never lie, but witnesses sometimes do. If the plaintiff and Pfeutze did not discover, as they testify they did not, the engine until it was within about 120 feet of them, it is clear proof that they were not looking for the engine when they drove onto the track; and that had they discovered it, as they should have done in the exercise of due vigilance, when it first came in view, the horse could have been readily stopped before entering upon the railroad track, or they would have had ample time to have passed clear of the track. The law is that in the absence of any tangible proof, as we have shown, of the rate of speed of the train, the presumption must be indulged that the engineer approached the crossing with due care, measured by a conscious sense of the danger that might likely be encountered there, and that after discovering the presence of the vehicle he did not recklessly run it down.

Pfeutze, touching this matter, testified as follows:

"Q. At a point up the road from where you came beyond twenty-five feet from the crossing, what could you observe in the direction of the railroad? A. Hardly nothing at all, except right at the crossing in front of the horse."

He further said:

"We expected a train from the west."

It is to be conceded, it seems to us, that under such conditions common prudence dictated that it was careless to recklessness to trot

on even a slight down grade up to within 25 feet of the track, and then walk immediately onto it without stopping to look and listen. Had he done so the injury would have been avoided beyond question. It is not a sufficient answer to this to say that the parties might have reasonably considered that, if they did stop and satisfy themselves that no train was in view and then proceeded, still they might have been caught before accomplishing the crossing. This suggestion, it seems to us, could be with equal logic employed in any instance where the party thus injured had failed to stop and listen. From a point known at the time to plaintiff and Pfeutze where the horse could have been stopped in safety, they could see the engine over 200 feet away, just as they did see it when the horse was in motion at the north rail of the track; so that the stubborn fact remains that if they had stopped for three or four seconds this lawsuit would have been avoided. Judge Day, sitting with Judges Lurton and Severens, in Shatto v. Erie Railroad Company, 121 Fed. 678–682, 59 C. C. A. 1, speaking to such suggestion, said:

"It is argued that it would have done no good to stop and listen. We cannot agree to this supposition; certainly not to the extent of exonerating the plaintiff from using the precautions obviously necessary for his protection, because they could not have changed the result. We think it only reasonable to suppose that, had he stopped and listened with open ears before going between the open cars, he would have heard the noise of the approaching train. Had he halted for a moment before going between the cars, the train would have passed in safety."

Chief Justice Doster, in A., T. & S. F. Railway Company v. Willey, 60 Kan. 819–825, 58 Pac. 472, 473, discussing a germane question, said:

"The pertinent facts, then, are that the plaintiff below could not see the approaching train because of obstructions to his view, nor could he hear it because of the noise of the wind in the grove of trees. He was, however, familiar with the crossing and all its surroundings. He knew that a train was liable to pass at any time. He knew that he could neither see nor hear its approach. He could, however, have seen or heard it if he had stopped just before his team passed to the end of the hedge nearest the track, which point was 28 feet from the nearest rail. He knew that he could not, for the reasons stated, either see or hear an approaching train without stopping at or about the end of the hedge. Under these circumstances the legal proposition of his obligation to stop, in order to assure himself of safety, is unquestionable. The law first laid him under the obligation to look and listen. This is undisputed. The exercise of the senses of sight and hearing were unavailing, and were known by him to be unavailing. The very contingency, then, in which the law laid him under the necessity of further precaution arose."

This rule has been again recognized by the Supreme Court of Kansas in C., R. I. & P. Railway Company v. Palmer, 61 Kan. 860, 60 Pac. 736, Walker, Receiver, v. Mercer, 61 Kan. 736–737, 60 Pac. 735, and in the recent case of M., K. & T. Railway Company v. Jenkins, 74 Kan. 487, 87 Pac. 702.

We are not called upon in this case to approve of the extreme proposition laid down by so distinguished a judge as Mr. Justice Sharswood in Railroad Company v. Beale, 73 Pa. 504, 13 Am. Rep. 753, "that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but

negligence per se, and a question for the court." The duty to stop is a relative one. It depends upon the situation of the particular case, the knowledge the traveler has of the situation, and the reliance he may reasonably place under the circumstances on his opportunities for seeing and hearing without taking the last precaution of stopping. The authorities are quite in accord on the proposition that if the view is unobstructed so that an approaching train, before it reaches the crossing, can be seen, there is no occasion for the special exercise of the sense of hearing—listening; and therefore there is no reason why he should stop for that purpose. On the other hand, if the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively. And if there is any noise or confusion over which he has control, such as that of the noise of the horse's feet, or the grinding sound of the wheels, or the ordinary noise of the vehicle, interfering with the acuteness of the sense of hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track.

Mr. Chief Justice Alvey, in Railroad Company v. Hogeland, 66 Md. 149–161, 7 Atl. 105, 59 Am. Rep. 159, said:

"It is negligence per se for any person to attempt to cross tracks of a railroad without first looking and listening for approaching trains; and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross. Especially is this required where a party is approaching such crossing in a vehicle, the noise from which may prevent the approach of a train being heard. And if a party neglects these necessary precautions, and receives injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed, by his own negligence, to the occurrence of the accident. * * * This is the established rule, and it is one that the courts ought not to relax, as its enforcement is necessary as well for the safety of those who travel in railroad trains as those who travel on the common highways."

So in Chase v. Railroad, 167 Mass. 383, 45 N. E. 911, it is said:

"If there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety."

Quite apposite to the case in hand is that of Seefeld v. C., M. & St. P. R. Company, 70 Wis. 216–222, 35 N. W. 278, 5 Am. St. Rep. 168, where the plaintiff drove toward a crossing where his view was obstructed, and the wind was blowing, and there were vehicles present which may have rendered hearing more difficult, the plaintiff being familiar with the dangerous condition of the crossing, and with knowledge that a train might be expected to pass at any moment. Mr. Justice Lyon, after full consideration of the authorities, approved the action of the trial court in directing a verdict for the defendant. He concluded by saying:

"The rule to be deduced from these cases is this: If the view of the traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity,

whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train."

In Shufelt v. Flint & P. M. R. Company, 96 Mich. 327, 55 N. W. 1013, the court said:

"These trains must run where the view is obstructed by cuts, by embankments, by trees, and by other things. He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence."

In Henze v. St. L., K. C. & N. Ry., 71 Mo. 640, the evidence on the part of the plaintiff showed that with his infant child he was driving in a two-horse wagon, at a slow walk, along a highway where it crossed the railroad, when they were run over and killed by an extra train not running on time. The evidence tended to show that while no whistle was sounded or bell rung, the train made such noise that it could have been heard if the party had stopped and listened. Judge Henry said:

"If Henze had used the precaution which common prudence dictates, it is not likely that the calamity would have occurred. If he had stopped to look and listen when near the track, and could neither see nor hear the approaching train, on account of the cut or other obstructions, and no signal was given from the train, he would have been justifiable in attempting to cross, and no negligence would have been imputable to him. But he had no right to drive along over a dry, hard road in a two-horse wagon, the noise of which might prevent him from hearing an approaching train, and, without stopping an instant to see or hear, go upon the railroad track, except at his own peril."

In Stepp v. C., R. I. & P. Ry. Co., 85 Mo. 235, Judge Black said:

"If the crossing is obstructed from view increased caution is required on the part of the traveler as well as the company, and if, from noise, such as a gale of wind, or the rattling of a wagon, hearing is rendered difficult, then it would become the duty of the traveler to stop and listen."

In Merkle v. Railway Company, 49 N. J. Law, 473, 9 Atl. 680, the court, speaking of a case where the party is approaching the crossing with a wagon loaded with boxes and bottles, where he could not see an approaching train until within a few feet of the track, said:

"Inasmuch as he could not see an approaching train at any considerable distance from the track, ordinary prudence required him to stop when he was near enough to the railroad to ascertain, at least by listening, whether there was any danger or not."

In Blackburn v. So. Pac. Ry. Co., 34 Or. 215, 55 Pac. 225–229, the court, speaking of the instance where the noise of a wagon over hard streets, more or less rocky, would interfere with the sense of hearing, said:

"Ordinary care required that he stop the noise by stopping the wagon when he was near enough to the track to determine by listening whether there was danger or not. It is true the evidence indicates that his team was brought to a walk; but, notwithstanding this, the noise from the wagon and horses' feet was necessarily sufficient to interfere with the effective use of the sense of hearing. If they had been brought to a full stop, there would have been no disturbing sound which the plaintiff could control; and, under the circumstances, we think he was bound to exhaust this source of information."

This court in Denver City Tramway Co. v. Norton, 141 Fed. 599, 607, 608, 73 C. C. A. 1, speaking to the instance where the view of

an approaching street car was obstructed, said that the "general rule in respect of the driver of a vehicle in approaching a railroad crossing —a known place of danger—requires that he should stop and listen where his view is cut off." We are mindful of what is said by the Supreme Court in Grand Trunk Railway Company v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, respecting the duty of a traveler to stop before driving upon a railroad crossing. The question before the court in that case was predicated of an instruction asked by defendant below, which it was held was properly refused because it confined the consideration of the jury to a few particular enumerated circumstances and excluded others of equal importance.

The facts in the case at bar were palpable and undisputed. On them the law pronounced the judgment without any finding of fact by the jury. The case presented by the evidence is one where it is admitted in argument of counsel that the signals required by the statute to be given would not, probably, have reached the plaintiff, because of the obstruction of a bluff nearly 200 feet in height and extending back some distance, with the wind blowing in such direction as rather to have taken the sound away from the ears of the travelers, with no view of an approaching engine until within some 30-odd feet of the track to have afforded them any reasonable opportunity to avoid a collision if a train was at hand; they approached the point in a trot to within 20 or 25 feet of the track, and, without stopping, walked immediately into the hazard rather than lose 3 or 4 seconds of time, when and where, without alighting from the vehicle, they would have seen the train coming over 200 feet away, and thus have avoided the accident.

The final contention on behalf of the plaintiff is that he cannot be held to have been guilty of contributory negligence, for the reason that the conveyance belonged to Pfeutze, and was being driven by him. Reliance for this position is based principally upon the case of Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. In that case it was held that a person who hires a hack and gives the driver directions as to his destination, and exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered in a collision of the hack with a train, caused by the concurring negligence of the managers of the train and of the driver. This is based upon the proposition that such a hack driver is not the agent of the passenger, over whose conduct and action he has no right of control, and whom he does not undertake to direct. In the case at bar the plaintiff did not hire the conveyance and the driver to carry him to his destination; but they were traveling together in companionship in Pfeutze's vehicle on a mission of mutual interest, the plaintiff having as much right as Pfeutze to direct their course. Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion, without a word of warning or protest. It is now the better recognized rule of law that as to such a person

situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observation of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury. As said by the Supreme Court of New York in Brickell v. N. Y. C. & H. R. Co., 120 N. Y. 290–294, 24 N. E. 449, 450, 17 Am. St. Rep. 648:

"The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and avoid it if practicable."

This is supported by persuasive authority. Whitman v. Fisher, 98 Me. 575, 577, 578, 57 Atl. 895; Township of Crescent v. Anderson, 114 Pa. 643–647, 8 Atl. 379, 60 Am. Rep. 367; Dean v. Penn. Ry. Co., 129 Pa. 514, 525, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; Illinois Cent. Ry. Co. v. McLeod, 78 Miss. 334, 341, 29 South. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630; Bresee v. Traction Company, 149 Cal. 131, 85 Pac. 152, 154, 5 L. R. A. (N. S.) 1059; Hoag v. N. Y. Cent. & H. R. R. Co., 111 N. Y. 199, 18 N. E. 648; M., K. & T. Ry. v. Bussey, 66 Kan. 735, 745, 71 Pac. 261; U. P. Ry. Co. v. Adams, 33 Kan. 427–430, 6 Pac. 529; Bressler v. C., R. I. & P. Ry. Co., 74 Kan. 256, 86 Pac. 472. If the law were otherwise, A. and B., having occasion to drive through the country on a matter of mutual business or pleasure, riding in a conveyance owned by A., who should drive, their course of travel leading across a railroad track, the situation of the intersection being very dangerous on account of it being "a blind crossing," with which A., the driver, was not familiar, but B. having full knowledge of such danger, he could sit in his seat and suffer A., without a word of warning or suggestion, to drive into the death trap, and if injured himself, when charged with contributory negligence, say, as A. was not his servant or agent he was not responsible for A. driving heedlessly onto the track. The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of one as of the other.

Under the facts of this record the Circuit Court should stand justified in directing a verdict for the defendant. The judgment is affirmed.

THE INDIAN.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,688.

1. SALVAGE—NATURE OF SERVICES—"SALVAGE SERVICE."

The rescue of a vessel already on fire, tied to a burning dock, an immense warehouse, filled with merchandise, giving out such heat as to drive men from decks of ships tied alongside, was a salvage service of a high order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 18–20.

For other definitions, see Words and Phrases, vol. 7, pp. 6316–6318.]

2. SAME—VALUE OF SERVICES.

The Indian, a steam vessel with a gross measurement of 9,191 tons, 4 boilers, twin screws, and triple expansion engines, and a valuable cargo, was set on fire from a burning wharf and large warehouse, to which she was tied. Though the pumps were immediately started and water thrown over the decks and the woodwork within range of the flames, the fire extended rapidly until the woodwork and other inflammable materials on all the after part of the vessel took fire, and as fast as extinguished in one place would break out again. The heat was intense, preventing effectual work whereupon two tugs, one of 569 tons, with an indicated horse power of 2,500, and equipped with pumps of great capacity, and the other of 150 tons, with an indicated horse power of 875, and equipped with good pumping machinery, came to the Indian's relief, and, after some delay owing to the position of another vessel, succeeded in pulling the Indian away from the burning wharf, when she was burning fiercely from the stern to the main bridge. After some pumping by the heavier tug, her hose was carried by her master and a number of his crew up to and upon the after deck, where they rendered valuable assistance in keeping down the fire and assuaging the heat. Both tugs acted in concert, and succeeded in extinguishing the flames, after which the appraised value of the Indian and her cargo was fixed at $463,229.17. *Held*, that a salvage allowance of $5,000 to the larger tug, and $2,500 to the smaller one, was inadequate in so far as the larger tug was concerned, and that the award as to it should be increased to $7,500.

[Ed. Note.—Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

3. SAME—VOLUNTARY SERVICES.

Where the master of a burning vessel was in command, and refused to accept the services of certain voluntary salvors, and ordered them off as soon as he learned of their presence and offered assistance, the fire being then under control of two efficient tugs, such voluntary salvors were not entitled to an allowance for services rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 28.]

4. APPEAL—COSTS—REVIEW.

A decree in the exercise of discretion, declaring that each party should pay his own costs, cannot in general be made the subject of appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 823–825.]

5. SALVAGE—ALLOWANCE—DIVISION.

Where a tug and crew were entitled to $7,500 for salvage services the amount was distributable—$4,500 to the owner of the tug, and $3,000 to the crew.

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

John D. Grace, Chas. S. Rice, and R. B. Montgomery, for appellants.

Henry P. Dart and Benjamin W. Kernan, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. February 26, 1905, the Stuyvesant Dock was a large structure built upon piling extending out to deep water along the river front in the port of New Orleans from Louisiana avenue up to near Napolean avenue, a distance of about 4,800 feet. It was inclosed more or less and roofed above, extended well back, and in the rear were grain elevators, machine shops, etc. It was divided transversely into four compartments by brick or fire walls, and the river front was divided into parts or berths, some 400 feet in length for the berthing of ships. The dock was used for the reception and handling and deposit of all kinds of goods to be shipped, and for the unloading of railroad cars from the rear side and the loading of steamships from the river side. Along the front and over the roofing of the dock extending from the rear to the river side was a wooden box construction called a conveyor, containing the apparatus necessary, and used for, carrying grain from the elevators in the rear to vessels to be loaded while lying along the dock. On the evening of the day mentioned, the British steamship Indian was moored at berth 5 of the dock, her bow extending into berth 6 a little above the first fire wall. Outside the Indian, and with lines on the Indian, lay the steamship Brayhead. In berth 6, just ahead of the Indian, lay the steamship Victoria. Outside the Victoria, and tied to her port side, was a coal palace, a coal boat, and pump boat so fastened that the stern of the palace was a little off of midship of the steamer, while the stern of the coal boat extended some 80 feet or more below the stern of the palace. In berth 4, astern of the Indian with head close up, was the steamship Cycle. In berth 2 was the steamship Royal. In all, lying at the dock in the immediate vicinity of the Indian, were some 10 steamships.

The steamship Indian is a steel vessel 489 feet long, 57 feet in breadth and in depth to her ballast tanks 39 feet 7 inches, with a gross measurement of 9,191 tons, 5,190 net, 4 boilers, twin screws, and triple expansion engines. She had taken on as part cargo 350 bales of cotton, 50 tierces of lard, 192,857 bushels of wheat, a small quantity of staves, handles, and gum lumber. While the hull, decks, and masts of the Indian were steel, there was a large amount of wood on the decks—a part of the superstructure; her ropes and some of her rigging were of manila rope and some of wire; and, altogether, there was a large amount of inflammable material on and about her decks. She had steam under one boiler to use for sanitary arrangements of the ship. In this condition of matters, about 6 o'clock in the evening, a fire broke out in the conveyor about 1,600 feet from the lower end of the dock nearly opposite the steamship Indian. As soon as the fire was observed the alarm was given, and the master of the Indian called his crew to fire service. They at once covered the hatches, battened them down and covered them with tarpaulins. In a very few minutes the fire hose were placed and the pumps were started with the boiler

under steam and used for throwing water over the decks and woodwork within range of the flames from the fire on the dock. But the fire extended rapidly and burned with such great heat that, notwithstanding all the efforts of the crew of the Indian, the woodwork and other inflammable materials on all the after part of the Indian took fire, and as fast as extinguished in one place would break out again. The heat became so intense that the crew of the ship serving the hose and elsewhere about the starboard after decks of the Indian were compelled to use wet towels over their heads. While the master and crew were fighting the fire on the after deck, the mate made an ineffectual effort to get the ship away from the dock, but as to such effort and its success the evidence is conflicting, and in this case the matter is not very material. At the time the fire broke out and the alarm was given, the tugs R. W. Wilmot and W. G. Wilmot and Corsair were lying on the Algiers side of the Mississippi river, a short distance above the Canal street ferry, with steam up. In response to calls for assistance, the three tugs at once hurried to the burning dock. The Corsair was in the lead and her services were tendered to and rendered to the Cycle lying in the berth astern of the Indian. As the two Wilmot tugs got within calling distance, the captain of the Indian called upon them to come to his assistance and get his ship away from the wharf. By this time the dock was on fire and burning fiercely from the stern to the main bridge of the Indian, a distance of 300 feet, and had also spread rapidly towards the lower end of the dock, so that nearly the whole compartment of the dock, roof, framework, floor, and merchandise were a mass of flames. The steam tug R. W. Wilmot has a gross measurement of 569 tons and cost about $155,000, with an indicated horse power of 2,500, and was equipped with pumps of great capacity. The W. G. Wilmot has a gross measurement of 150 tons, cost about $80,000, with an indicated horse power of 875, and she was fully equipped as a tug and with good pumping machinery. Under the direction of the master of the Indian, the W. G. Wilmot took a line from the port bow of the Indian to pull her out into the stream away from the wharf, and the R. W. Wilmot at the same time fastened to the port quarter of the Indian with two lines, 5 and 11 inch, for the double purpose of assisting to get the Indian out from the wharf, and also to assist in putting out the fire burning on the deck and superstructure of the Indian. After some pumping on the deck by the R. W. Wilmot, at the call from the ship, her hose was carried by her master and a number of his crew up to and on the after decks of the Indian and there under the handling of the R. W. Wilmot's men rendered valuable assistance in keeping down the fire and assuaging the heat that prevailed upon the deck of the Indian. While this was going on, the R. W. Wilmot was backing with strength on the port quarter of the Indian and the W. G. Wilmot, acting in concert, was pulling on the bow to get the ship away from the wharf. For some reason not apparent, there was delay in getting the ship from the wharf even with this powerful assistance which ordinarily would have moved her out in a few minutes. Numerous suggestions were made as to the delay, of which two, though not fully developed by the evidence, are worthy of attention. One arises from

the statement by the engineer of the Indian, in answer to the question, "Did they (the Wilmot tugs) move you out rapidly or slowly?" (answer) "Well, it was not very fast, but there were reasons for that. It was at night. There were a number of other vessels getting away to safety from the wharf, and we had to move out slowly to avoid collisions with other ships." In this connection, we notice that Garland of the W. G. Wilmot testifies, and he is not disputed, that the Brayhead was in the way, and on request did raise her anchor and sheer off so that the W. G. Wilmot could straighten its line; and, further, that as the Indian was being pulled out from the dock a collision was imminent with the Victoria which was only avoided by the work of the R. W. Wilmot in getting stern way on the Indian. There is no evidence in the record showing when and by whom or how the lines of the Indian were ever cast off from the wharf or loosed from the ship, while there is a statement by the berthing master of the dock that, at the time the Wilmot tugs came up, the Indian's lines were still attached to the wharf and there was nobody to unfasten them, and the fire was too heavy to get to them. If the after line of the Indian to the dock was not cast off at the beginning of the fire, the ineffectual attempt of the Indian's mate to get her head out in the current and the hindrance to the first efforts of the Wilmot tugs are both accounted for. However this matter of delay may be accounted for, it is not shown to have been the fault of the Wilmot tugs, which very soon overcame the obstacle, whatever it was; and, both working together, they soon had the Indian out from the burning dock. Immediately this was accomplished, the W. G. Wilmot threw off her line and coming around to the starboard quarter put up two lines of hose and commenced pumping water on the sides and burning decks of the Indian while the R. W. Wilmot towed the vessel to the middle of the river where she was anchored. After anchorage, both Wilmot tugs pumped water on the decks and sides of the Indian until all fire was extinguished.

Under the voluminous and conflicting evidence, it is difficult to say exactly what would have happened to the Indian and her cargo but for the services of the Wilmot tugs; but the evidence leaves us in no doubt that the Indian was at the time of the arrival of the tugs in a position of the greatest peril as to her top-hamper, superstructure, and cargo, and in decided danger of injury to her sides and hull from the excessive heat from the burning dock, and the fire already caught and burning on her decks and in her rigging. It is not to be disputed that the services rendered to the Indian by the Wilmot tugs were salvage services entitling them to be rewarded in a court of admiralty; but it is contended, and the lower court so found, that the services of the tug were of a low order of salvage services, and that the awards should be on that basis. To this contention we cannot agree. The towing of a disabled vessel in still water, the pulling off of a grounded vessel with no circumstances of extra peril, the rescue of a steamboat blown from her wharf with no steam up, and other like cases, are instances of a low order of salvage services rendered by tugs and towboats; but to rescue a vessel already on fire, tied up to a burning dock like the Stuyvesant Dock, an immense warehouse filled with mer-

chandise and giving out such heat as to drive men from the decks of ships tied alongside, is a salvage service of a very high order.

On the theory that the services of the tugs were of a low order of salvage, the lower court awarded the W. G. Wilmot $5,000 and the R. W. Wilmot $2,500, making a total of $7,500, and this amount we consider inadequate under the facts of the case. There is no fixed rule based on value of property salved and character of services rendered to determine the amount of salvage rewards. In practice in this circuit, the courts have used their best judgment, sometimes awarding a percentage and other times a gross sum. The large size general capacity of the Wilmot tugs has been hereinbefore given. The appraised value of the Indian after the fire was $347,256.47, and of her cargo $116,035.64, making for both $463,229.17. Three per cent. of this total is $13,896.87, and on the percentage basis this sum would appear to be not excessive as an allowance for salvage. The judge a quo allowed a gross sum, and on that line we can well approve of the sum of $12,500. Considering the decree of the lower court, all the circumstances developed by the evidence, and the services rendered by the Wilmot tugs severally, we are of opinion that the award to the W. G. Wilmot is not so inadequate as to require correction; but that the award to the R. W. Wilmot is inadequate. Considering the greater capacity and value of the R. W. Wilmot and the fact that her valuable services were rendered not only in helping materially to get the Indian away from the burning dock, but also with her master and men in getting aboard the burning ship with hose, and there, in great discomfort if not in actual peril, rendering valuable services in keeping the fire down, we conclude that the award to the R. W. Wilmot should be increased to $7,500.

In the main case in the court below William A. Bisso, master of the tug Baton Rouge Belle, for himself and others, and Joseph A. Bisso, master of the towboat Leo, for himself and others, intervened, claiming for salvage services rendered to the steamship Indian in rescuing her from the fire at Stuyvesant Dock. From an adverse decree, they also appeal. The judge of the lower court disposed of their interventions as follows:

"The intervening libelants, the owner and crews of the Bisso tugs, the Belle of Baton Rouge and the Leo, claimed to have rendered salvage service in extinguishing the fire in the woodwork and rigging after the Indian was moved from the wharf, and while she was being towed to the middle of the river, and after she had come to anchor there. The claimant and the libelants deny that the Bisso tugs came upon the scene until the fire had been practically extinguished and was completely under control, and declare that they were ordered to desist by the captain of the Indian as they approached and began to throw water on the decks. The Bisso witnesses testify that they had been pumping on the Indian for more than 15 minutes before they were ordered off. They claim that as soon as the Indian was moved from the wharf the Belle of Baton Rouge came up between her and the wharf and lay along her port side and pumped on her while she was being towed into the river and for several minutes after she was anchored. And they insist that their position was such that they could not be seen from either of the Wilmot tugs, both of which were on the starboard side of the Indian with the flames and smoke from the fire on the rear of the Indian between them and the Baton Rouge Belle. They further insist that the same fire and smoke prevented the captain and crew of the Indian from seeing them when they first

came up. On the other hand, there is the testimony of numerous witnesses that the captain of the Indian called to the Bisso crews as they first came up and began to pump, and ordered them to desist and go away as he had no need of their services, and they were in fact injuring and not helping him. It is impossible to decide with certainty on which side is the truth. But this uncertainty is necessarily fatal to the claim of the intervening libelants. They cannot recover for salvage services until they prove by a clear preponderance of evidence that they helped to extinguish the fire. The evidence does not establish that they rendered any services at all, much less that they rendered any salvage services."

From our examination and consideration of the evidence in the case, we concur with the judge a quo as to the claim of intervening libelants, and only deem it necessary to add that the evidence is clear that as soon as the master of the Indian learned of the presence and offered services of the intervening libelants he refused to accept their assistance and ordered them off. Under nearly all supposable circumstances when the master is in command and control of his own ship he may refuse and reject salvage services, and no volunteer salvor can force on him, and be rewarded for, services which he forbids. See The Choteau (D. C.) 5 Fed. 463; Id. (C. C.) 9 Fed. 211; The Brig Susan, 1 Spr. 502, Fed. Cas. No. 13,630.

In his opinion in the case the judge a quo says:

"This record is incumbered with an enormous amount of irrelevant testimony. While the libelants are entitled to recover an allowance for salvage, in view of the condition of the record, I shall not allow them costs, and under the final decree rendered in the case each party will be required to pay his own costs."

We do not interfere with this part of the decree for two reasons: First, that the criticism of Judge Saunders is fully justified by the record; and, second, as a general rule, the costs are within the discretion of the court, and not subject of appeal. See Taylor v. Woods, 3 Woods, 146, Fed. Cas. No. 13,809.

For reasons herein given, and to give effect to our views, the decree appealed from is amended by striking out that portion of the same awarding various sums to the owner of the steam tug R. W. Wilmot and in favor of the crew of said tug, and inserting in lieu thereof the following:

In favor of the Monongahela River Consolidated Coal & Coke Company, owner of the steam tug R. W. Wilmot, the sum of.....$4,500 00

In favor of the crew of said tug as follows, to wit:

Name	Salary	To receive	
C. J. Mott, master,	$175 00	$904 80	
S. Hogan, engineer,	125 00	646 50	
M. Kornbacher, second engineer,	70 00	362 10	
A. Thomas, deck boy,	40 00	207 00	
J. Helberger, deck hand,	40 00	207 00	
J. Sharp, fireman,	50 00	258 60	
M. Baer, oiler,	40 00	207 00	
J. Lincoln, coal passer,	40 00	207 00	
			3,000 00
Total			$7,500 00

And as thus amended the same is in all respects affirmed.

In view of the peculiar circumstances attending the rejection of the

interventions and the award as to costs in the lower court, the costs of this court should be paid by the appellees, other than the Monongahela River Consolidated Coal & Coke Company and the officers, employés, and crews of the steam tugs W. G. Wilmot and R. W. Wilmot.

And it is so ordered.

FREEMAN v. EVANS.

(Circuit Court of Appeals, Third Circuit. August 30, 1907. On Motion to Rehear, October 21, 1907. On Rehearing, March 16, 1908.)

No. 28.

1. TRIAL—RECEPTION OF EVIDENCE—EFFECT OF VERDICT ON RULING.

The action of a court in admitting or rejecting testimony must be viewed from the standpoint of the time when the testimony was offered, and not from that of the verdict, and in an action on the case in the nature of conspiracy against two defendants, in which the gist of the action was the tort, and not the conspiracy, and the acts charged were such that they might have been committed by both or either defendant, so that a judgment against both or either was permissible, evidence that was competent and admissible on the question of conspiracy in the trial of both defendants could not become incompetent or inadmissible by reason of a verdict against one alone.

On Rehearing.

2. FRAUD—REPRESENTATIONS MADE TO AGENT—LIABILITY TO PRINCIPAL.

Where, in a transaction involving an exchange of real estate between plaintiff and defendant, plaintiff was represented by an attorney, who personally conducted all the negotiations in her behalf, his knowledge and opportunity to investigate matters of title and statements made by defendant were in law those of plaintiff, and defendant is not liable for fraud and deceit, in the absence of conspiracy between him and the attorney, unless the latter could have recovered on the same ground if he had been the principal.

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

For opinion below, see 149 Fed. 1020.

George P. Rich, and John G. Johnson, for plaintiff in error.

George T. Hunsicker, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. Regina Evans, the defendant in error, brought, in December, 1904, an action of trespass in the Circuit Court of the United States for the Eastern District of Pennsylvania, against Henry G. Freeman, Jr., the plaintiff in error, and Wynne James. In her statement of claim, she set forth in substance, among other things, that she was the owner of a farm of 95 acres, in Bucks county, Pa., of the value of $5,400, above all incumbrances, and of live stock, crops and farming implements thereon, of the value of $3,000; that Freeman was the owner of four old brick houses in Philadelphia, assessed at the sum of $21,800, which was in excess of their value; that James was an attorney at law and was employed by the plaintiff for the purpose of effecting a cash private sale of her farm and property thereon;

that Freeman and James "did fraudulently, deceitfully, maliciously and unlawfully conspire, combine, confederate and agree together to cheat and deprive plaintiff of her said real and personal property, by effecting a fraudulent exchange thereof for a worthless equity in said houses," and by other deceitful and fraudulent devices particularly set forth in the declaration; and succeeded in accomplishing the purpose of their conspiracy. The defendants severally having pleaded not guilty, the case went to trial and, May 3, 1905, a sealed verdict was brought in in favor of the plaintiff, for $7,273.33 against Henry G. Freeman, Jr., one of the defendants, and this verdict was formally recorded against him. James' name was not mentioned in the verdict. On May 6, 1905, motion was made by Freeman's counsel for a new trial, and also for arrest of judgment. On May 10, 1905, counsel for James filed with the clerk of the court below a præcipe for the entry of judgment in favor of James, upon the above-mentioned verdict, which judgment was entered upon the record accordingly. The motion for a new trial was granted September 6, 1905, the court, among other things, saying:

"Taking oral and documentary evidence together, there was ample proof to sustain the plaintiff's claim, and the jury found a verdict for $7,273.33 in favor of claimant but only against Freeman, one of the defendants. * * * The verdict against Freeman alone cannot be sustained in view of the fact that the statement claims for an unlawful combination between Freeman and plaintiff's attorney, James, and the evidence submitted by her tended to prove that allegation, and a new trial should therefore be granted, and it is so ordered."

On November 2, 1905, plaintiff filed a petition with the court below, praying that the motions for a new trial and arrest of judgment might be reinstated and a reargument thereof granted, stating among other things, that the then condition of the record was such that "the plaintiff is deprived of all remedy against the defendant, or either of them, in her action of conspiracy," and that "unless plaintiff's case, if retried, retains its original form of conspiracy against both defendants, and she have a new trial as to both, she is without redress." On January 8, 1906, this petition was granted. The judgment on the verdict in favor of Wynne James, entered May 10, 1905, was ordered stricken from the record, and an opinion filed, awarding a new trial as to both defendants. To this order, striking from the record the judgment on the verdict in his favor, a writ of error from this court was sued out by James.

In submitting the case to the jury, the court below had instructed them as follows:

"Whether there is a conspiracy charged or proven, or not, if the evidence shows that by false and fraudulent representations of both or one of them, this plaintiff has suffered a damage, she would be entitled to recover against the one perpetrating the wrong upon her; or if both of them had done wrong, together or separately, whether there was a conspiracy proven or not, if you find that both or one of them perpetrated and have done this wrong, if any wrong was done, the plaintiff would be entitled to recover for the amount of the damage suffered against either one or both, as you find the evidence to be, if you find in her favor, and for such an amount as the evidence would warrant."

And further:

"If, however, you find that there is no conspiracy, and one or the other made false representations of material facts in regard to this transaction, which resulted in damage, then you have a right to say that that one is responsible here."

In the opinion of this court on the writ of error sued out by James, and from which the foregoing statement of facts has been taken (149 Fed. 136), we said that we were unable to concur in the reason given by the court below for granting a new trial, to wit, that the only verdict which could be rendered in this case would be either against or in favor of both defendants; and stating that, under the pleadings, we thought the court below correctly charged the jury in such manner as to permit a verdict, should the evidence so warrant, against Freeman and in favor of James, and that the jury having on the evidence found such a verdict, final judgment was properly entered thereon. The orders awarding a new trial against both defendants, and striking from the record the judgment in favor of James, were accordingly reversed, and, pursuant to the decree entered by this court, the judgment in favor of James was reinstated, leaving the order of the court below, granting a new trial to Freeman, made September 6, 1905, to stand unamended. On January 26, 1907, the court below, upon motion of plaintiff to reconsider the award of a new trial as to Freeman and reinstate the verdict against him, granted said motion and struck from the record the order awarding a new trial as to Freeman, September 6, 1905, and on January 31, 1907, judgment on the verdict against him, as reinstated, was duly entered, with interest from January 26, 1907. To the judgment thus entered, the present writ of error was sued out, and the record therein is before us.

There are numerous assignments of error; some to the admission or rejection of evidence, others to the charge of the learned trial judge, and the last three to the order of the court below striking off the order for a new trial and reinstating the verdict against the plaintiff in error, and entering judgment thereon. The defendant in error contends that the time within which the present writ of error could be taken, was six months from September 6, 1905, the date of granting a new trial as to both defendants below. The present writ of error, however, is to the judgment entered on December 31, 1906, after the order for a new trial had been stricken from the record, and the time prescribed for suing out the writ commenced to run from that date.

A careful reading of the record, in relation to the exceptions to the admission or rejection of testimony, does not disclose reversible error. The exceptions allowed, and the assignments of error based thereon, are too numerous to admit of detailed discussion, and no good purpose would be achieved thereby. The same may be said as to the numerous exceptions taken to the charge of the court. The stress of the argument of counsel for plaintiff in error, was directed to those assignments alleging error in the action of the court in setting aside its first order for a new trial against the plaintiff in error, and entering judgment on the verdict against him. The principal ground of plaintiff in error's

contention is set forth in the forty-seventh and last assignment of error. It is as follows:

"(47) The learned court below committed further error in entering judgment against the defendant, Henry G. Freeman, in this, that on the trial of the case evidence was admitted against him of James' statements and transactions made in Freeman's absence, which testimony was only admitted by the court and could not be competent as against Freeman, on the ground that he and James had engaged in a fraudulent conspiracy to defraud the plaintiff. The verdict of the jury in favor of James establishes not only that there was no conspiracy, but that no implication of wrongdoing towards the plaintiff could be drawn from this testimony as against James. Yet on the same testimony the jury found a verdict against Freeman, testimony which in a suit against him alone was utterly inadmissible."

As has been seen, this court has already in the case of James v. Evans, above referred to, decided that, under the pleadings, the court below correctly charged the jury in such manner as to permit a verdict, should the evidence so warrant, against Freeman and in favor of James, and that final judgment was properly entered upon such a verdict. It was held that, in substance the action was one on the case in the nature of conspiracy, and being a civil remedy, the gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff. The tort in its nature was capable of commission, either by both defendants jointly, or by Freeman alone, or by James alone. Such being the law, the evidence that was competent and admissible in the trial of both defendants, in an action as of conspiracy, could not become incompetent or inadmissible by reason of the permissible verdict against one of said defendants. The action of the court, in admitting or rejecting testimony, must be viewed from the standpoint of the time when it is offered, and not from that of the verdict.

The language of this court in the case of Lear v. United States, 147 Fed. 349, 77 C. C. A. 527, though referring to a somewhat different situation, is applicable here. We there said:

"It has been suggested, however, that the ruling of the court below should now be regarded, not as of the time at which it was made, but with reference to the verdict that was subsequently rendered, and which, it is supposed, has had the effect of excluding some of the evidence from present consideration."

This suggestion was not acceded to, and after further discussion, we said:

"We are not at liberty to indulge in conjecture respecting the grounds of a verdict, or add to its terms by inference."

It would be absurd to say in such actions as this, that the jury may find both defendants guilty of the tort which was the subject of the conspiracy charged, or that they may find that there is no conspiracy and that one or other of the defendants made false representations of material facts to the damage of the plaintiff, and then say that when a jury has thus found one of the defendants guilty, the verdict cannot stand, because testimony properly relevant to the charge of conspiracy was admitted at the trial. The presumption is, however, that when a jury find only one of the defendants guilty, they have considered the evidence as to conspiracy insufficient, and confined themselves to that

which affected the individual action of the single defendant, but, as we have already said, we are not at liberty to indulge in conjecture respecting the grounds of a verdict, and unless it shall appear that positive injustice would be worked by permitting the judgment to stand, the court should not interfere therewith.

An examination of the record has not convinced us that the testimony admitted on the ground that a conspiracy had been prima facie proved to the satisfaction of the court, prejudiced the case against the plaintiff in error, in view of the testimony as to his individual conduct in regard to the tort charged. We feel constrained, therefore, to affirm the judgment against the plaintiff in error, as it stands in the court below.

On Motion to Rehear.

PER CURIAM. Upon consideration of the petition of Henry G. Freeman, Jr., plaintiff in error, for a rehearing, it is now, October 21, 1907, ordered, that a further argument of this case will be heard at the foot of the list for the present October term, but such argument must be confined to the question whether or not the court below erred in refusing to charge that there was no evidence upon which a verdict against Mr. Freeman alone could be sustained. Counsel will be limited to one hour upon each side.

On Rehearing.

GRAY, Circuit Judge. At the last March term, this case was heard upon a writ of error, and decision was then rendered affirming the judgment below. Upon the petition of the plaintiff in error, a rehearing was granted upon a single question hereinafter stated, which has been argued and considered at the present term. In the opinion already filed, we have stated at length the somewhat complicated situation which resulted in the suing out of this writ of error, and it is only necessary now to briefly recall the following facts:

The original suit in the court below was brought by the defendant in error against the plaintiff in error and one James, whom she charged with fraudulently, deceitfully, etc., conspiring and combining to cheat and deprive her of certain real estate and personal property. James, the codefendant of the plaintiff in error, was a lawyer of the state of Pennsylvania, who was employed by her as her counsel and agent to effect a sale or exchange of her farm in Bucks county, Pa. Pursuant to this employment, James opened negotiations with the plaintiff in error, which were finally carried to the conclusion complained of. The trial resulted in a verdict for substantial damages against Freeman alone, and a judgment as upon a verdict of "not guilty" in favor of the codefendant, James. We have already decided, on the writ of error sued out by James to the order striking off the judgment in his favor, that it was competent for the jury to find one of the defendants guilty, individually, of the tort charged, and to acquit the other, and that there was no error in the judgment entered on such verdict. When the present writ of error was before us at the March term, the argument of the plaintiff in error was confined principally to an en-

deavor to show that, as James, his codefendant, had been acquitted, the judgment against Freeman should be reversed, on the ground that the jury presumably found their verdict against him upon evidence admitted to prove a conspiracy, or upon evidence that was only competent when there had been prima facie proof, to the satisfaction of the court, of the existence of the conspiracy charged. It was this contention that was combated by the court in its opinion delivered after the former argument. In that opinion, we said, and we think rightly:

"The tort in its nature was capable of commission, either by both defendants jointly or by Freeman alone, or by James alone. Such being the law, the evidence that was competent and admissible in the trial of both defendants, in an action as of conspiracy, could not become incompetent or inadmissible by reason of the permissible verdict against one of said defendants. The action of the court, in admitting or rejecting testimony, must be viewed from the standpoint of the time when it is offered, and not from that of the verdict."

The stress of the argument of the plaintiff in error at the former hearing, was confined to this point, and the argument for a reversal was made, as if improper testimony had been admitted in the then state of the trial against both defendants, whereas the alleged impropriety of such evidence rests entirely upon the ground, that the jury afterwards acquitted James of conspiracy, or other wrong doing. It was urged that the testimony against James was not relevant as against Freeman alone. The fallacy of such an argument is apparent from the suggestion that we have already made, that the competency of this testimony must be determined as of the time it was offered, and not as of a time after the verdict. The court certainly committed no error in admitting this testimony while James and Freeman were being jointly tried. As we said in our former opinion:

"The presumption is, however, that when a jury find only one of the defendants guilty, they have considered the evidence as to conspiracy insufficient, and confined themselves to that which affected the individual action of the single defendant."

In view of the argument made before us, we dealt, as above stated, with this phase of the case as set forth in the forty-seventh assignment of error, to which our attention was mainly called, and we have no desire to make any amendment or modification of the opinion so delivered.

But our attention has now been called to the fortieth assignment of error, to wit, the refusal of the court to hold that:

"There is no evidence in the case under which the plaintiff can hold the defendant, Mr. Freeman, liable, and the jury are instructed to find a verdict in his favor."

The former presentation of the case was embarrassed by the great and unnecessary number of the assignments of error, by which the point just stated and urged at the rehearing was obscured, if not overlooked. Addressing ourselves, then, to the single question as to which we have asked the reargument to be confined, and aided by its thorough and able discussion by counsel on both sides, the court is of opinion that the judgment below should be reversed. No evidence has been discovered in the record, sufficient to warrant a finding of misrepresentation or deceit on the part of Freeman to Mrs. Evans,

and no statement made by him to her, upon which she was called to rely or to act. It is clear from her own testimony and that of her husband, that she had put the whole business in the hands of her attorney, James, and relied exclusively upon his advice, and acted in accordance therewith, and we discover no evidence to show that her attorney was deceived by anything said by Freeman in relation to the business in hand, or that any representations of fact were proved to have been made by Freeman to him, which were amenable to the charge of fraud or deceit. The plaintiff in error was not inops consilii, but was advised and protected by counsel throughout the whole negotiation. She was not deceived, unless he was deceived, and opportunities for investigation and inquiry open to her chosen lawyer, and of which he was bound to avail himself, were her opportunities as well. Matters and situations which, if plaintiff in error had been dealing with Mrs. Evans alone, would have required on his part clear and explicit explanation, were presumably understood by the lawyer and man of business with whom he was dealing as her agent.

In the absence of fraud and collusion as between James and the plaintiff in error (and in this connection we cannot ignore the verdict), we find no evidence in this record sufficient to support a verdict of guilty in an action in the nature of deceit against Freeman alone. Fraud and bad faith, if any, on the part of James towards his client, Mrs. Evans, could not be charged to Freeman, in the absence of evidence to prove a conspiracy between Freeman and James. The whole negotiation, therefore, must be viewed as if it had been between Freeman and James alone. In contemplation of law, they were dealing upon an equal footing, and Freeman can only be held to such duty, as to conduct and representations, as would be owing to a man equally with himself conversant with the business in hand, and whose special duty it was, as agent, to investigate all statements and questions as to title, incumbrance and value for himself. Of course, the exaggerated statements made upon both sides, as to the value of the property to be exchanged, offered no basis for a charge of deceit. "Mere expressions of opinion as to the value of property, are not actionable. They are regarded as "traders' talk," which every man of intelligence receives "cum grano salis." Bement v. La Dow (C. C.) 66 Fed. 189; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166.

"Where means of knowledge are at hand and equally available to both parties and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentation." Slaughter v. Gerson, 13 Wall. (U. S.) 383, 20 L. Ed. 627; 2 Pom. Eq. Jur. Sec. 892; Farnsworth v. Duffner, 142 U. S. 47, 12 Sup. Ct. 164 (35 L. Ed. 931); Farrar v. Churchill, 135 U. S. 615, 10 Sup. Ct. 771, 34 L. Ed. 246.

We have carefully examined all the evidence disclosed by the record. It is not necessary to discuss it in detail. It suffices to say that we are of opinion that there was no evidence upon which a verdict against the plaintiff in error alone could be sustained.

The judgment below must, therefore, be reversed.

UNITED STATES v. BALTIMORE & O. S. W. R. CO. (two cases).

(Circuit Court of Appeals, Sixth Circuit, February 19, 1908. On Rehearing, March 26, 1908.)

Nos. 1,770, 1,771.

1. STATUTES—CONSTRUCTION.

In construing a clause of a statute regard must be first had to the language of the clause itself, and then to other clauses in the same act, and that construction should be adopted which permits the whole act to stand consistently together, or reduces the inconsistency to the smallest possible limits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 285.]

2. CARRIERS—TRANSPORTATION OF LIVE STOCK—FOOD AND REST—FEDERAL STATUTE—CONSTRUCTION—PENALTY.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918], provides that no common carrier over whose road cattle, swine, sheep, and other animals shall be conveyed from one state to another, etc., shall confine them in cars, boats, or vessels for a longer period than 28 consecutive hours, without unloading for rest, water, and feeding, for a period of at least 5 consecutive hours, unless prevented by storm or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence, provided that, "on the written request of the owner or person in custody of that particular shipment," the time of confinement may be extended to 36 hours, a penalty being prescribed for each violation of the act. *Held* that, where several shipments of live stock, belonging to different owners, are contained in the same train, and the carrier fails to unload, as provided in such act, a penalty is recoverable for each shipment, the shipment, and not the train load, being the integer contemplated as the objective thing to which the offense relates.

On Rehearing.

3. CRIMINAL LAW—WRIT OF ERROR—RIGHT OF GOVERNMENT TO REVIEW.

A writ of error will not lie at the instance of the government in a criminal case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2599-2614.]

4. PENALTIES—ACTIONS—RIGHT TO REVIEW—NATURE OF PROCEEDING.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918], prohibits interstate carriers from confining live stock in cars longer than 28 consecutive hours, without unloading for rest, water, and feeding. Section 3 (34 Stat. 608 [U. S. Comp. St. Supp. 1907, p. 919]) imposes certain penalties for a violation of the act, which section 4 declares shall be recovered by civil action in the name of the United States in the Circuit or District Court. *Held* that, though the statute is penal, an action to recover the penalties is civil, and hence the government is entitled to have a judgment in such proceeding reviewed by writ of error.

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

S. T. McPherson, for the United States.

Edward Colston, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. The two causes above entitled were heard together in this court, being alike in all essential particulars.

They were 2 of 12 similar causes in which suits were brought by the United States to recover penalties for several violations by the defendant railroad company of an act of Congress entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation" from one state to another, etc., passed June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]. The suits were all brought in the District Court of the United States for the Southern District of Ohio, and each related to distinct shipments of cattle and swine made by different parties from stations of the railroad company in other states to various consignees at Cincinnati, Ohio. The petition in each case alleged a shipment over the defendant's road, from a station in another state than Ohio, by a party named, of the live stock therein described, to a certain consignee at Cincinnati; and then alleged that the time occupied in the transportation was more than 40 hours—in the first of the cases above entitled, 43 hours and 45 minutes, and in the second, 45 hours and 25 minutes—and further alleged that this transportation was made without unloading the said live stock for rest, water, and feeding, or either; "and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and, further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest."

The defendant by its answer admitted all the material allegations of the petition, but averred that the shipment mentioned in the petition "was forwarded to Cincinnati on a certain train of the defendant, known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to wit," describing 11 other such shipments by various other consignors to consignees at Cincinnati, Ohio, from stations in other states; and that in respect of each of those cases the railroad company had been in like default; and that 11 other suits brought by the United States, each for a penalty based on the same default, were then pending in that court. Upon these facts the defendant claimed that but one offense had been committed, and but one penalty incurred. On filing this answer the defendant moved that the several causes be consolidated, "in order that there may be a recovery of but one penalty for all the shipments." The court being of opinion that the statute dealt with the operation of trains by railroad companies, and not with the different shipments which the trains may carry, the motion was allowed. The district attorney moved for a judgment for a penalty, separately, in each case "for the reason that each of said causes should be treated as a different cause of action, and a separate penalty assessed in each." This motion was overruled; and the plaintiff excepted to this ruling. The court thereupon entered the following judgment:

"The court, being fully advised in the premises, finds that the defendant herein admits its liability in this cause, and therefore doth hereby order and adjudge that said defendant pay to the plaintiff herein the sum of one hundred dollars and its costs herein expended, and in default of payment execu-

tion shall issue, and the court does order, adjudge and decree that the within foregoing order in cause number 1866, shall apply to, operate upon, and be conclusive of the right of the plaintiff to recover of the defendant in each of the following causes, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884."

The causes were properly consolidated. Section 921 of the Revised Statutes [U. S. Comp. St. 1901, p. 685] provides that "when causes of a like nature or relative to the same question are pending before a court of the United States," this may be done. Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court.

The validity of the act of June 29, 1906, is not disputed; nor is the commission of the offense, or offenses, charged in the several petitions. The question presented on these writs of error relates to the penalty, and that depends upon the construction of the first section of the act which reads as follows:

"Be it enacted, etc., That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, 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 food 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: Provided, that it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours."

The contention for the plaintiff is that this statute deals with separate shipments or consignments of live stock, and that it does not matter that more than one shipment is taken by a train; and therefore that several offenses may be committed in the transportation of a single train load. The defendant insists that the train load of live stock is the integer which the statute contemplates as the objective thing to

which the forbidden act relates and that therefore the offense is single, though there may be several shipments of stock in a train which may be affected by the same neglect. It may be admitted that the statute is not so clear upon this subject as would be desirable. The language is quite general, and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the 28-hour limitation may be extended to 36 hours "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," etc. It seems to us that this gives the key by which the meaning of the act in this respect may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on. It is urged that it would be very inconvenient for the railroad company to dismember its trains by dropping out one or more cars at different stations and leaving them to be picked up by other trains which may or may not find it convenient to take them in. But the duty imposed by the statute, however construed, is highly inconvenient, and it is a difference in degree merely. Besides, we have little doubt that the company, having in mind the duty it would be under to comply with this requirement, would be able to so adjust its train service as to meet such contingencies without serious derangement. The argument based upon the supposed inconvenience to the railroad company does not impress us as being very persuasive, although if the matter were very doubtful it would deserve to have some weight.

The construction which we propose leads to the harmonious operation of the several provisions of the statute more effectively than any other which has been suggested. And if, as no one doubts, the law is not void for uncertainty and should be given effect, our only duty is to ascertain what it means and execute it accordingly. The maxims and rules adopted for the purpose of interpreting the meaning of a statute require that we attend to all its provisions, and, if possible, attribute to the language in which each is expressed a meaning which will permit other provisions to have their due effect. This doctrine is so well settled that the rules by which it is formulated have become axiomatic. Two of them, "ex antecedentibus et consequentibus fit optima interpretatio" and "noscitur a sociis," are expounded in Broom's Legal Maxims at page 555 and following. A good statement of the doctrine as applied to the case before us is contained in 26 A. & E. Encylc. of L. 616 (2d Ed.), where it is said:

"In construing a section of an act, regard must first be had to the language of the clause itself, and, second, to other clauses in the same act, and that

construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits."

We add some of the cases in the Supreme Court in illustration. Pennington v. Coxe, 2 Cr. 33, 52; Alexander v. Alexandria, 5 Cr. 1, 7, 8; Market Co. v. Hoffman, 101 U. S. 112, 116, 117, 25 L. Ed. 782; Kohlsaat v. Murphy, 96 U. S. 153, 159, 160, 24 L. Ed. 844; Neal v. Clark, 95 U. S. 704, 709, 24 L. Ed. 586.

It is conceded that the statute is penal, and that it is not to be extended beyond the fair meaning of the language employed. But there is scant room for the application of that principle here, for there is no term or language which needs to be strained or extended to similar conditions to reach a proposed conclusion, but simply a question as to the meaning of the language actually employed. The act of June 29, 1906, was enacted to take the place of the act of March 3, 1873, c. 252, 17 Stat. 584, carried into sections 4386 to 4390 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2995, 2997], which it repealed. The earlier law seems not to have been the source of much litigation. It was held by Judge Key at the circuit in United States v. East Tennessee, Virg., etc., R. Co. (C. C.) 13 Fed. 642, upon the limited construction which he gave to that act, that it did not apply to the transportation of live stock from one station to another in the same state. And in United States v. Boston & A. R. Co. (D. C.) 15 Fed. 209, it was held by Judge Nelson, also at the circuit, in a case where a large number of animals had been shipped, that the statute could not be fairly construed as making the unlawful confinement of a single animal a separate offense, and that the confinement of the entire number of animals was a single offense. It does not appear whether in that case there was more than one owner or more than one consignment. And that law did not contain the provision in the new law which allows the prolongation of the confinement of the animals upon the consent of the shipper. In United States v. Louisville & N. R. Co. (D. C.) 18 Fed. 480, Judge Key held that the time during which a preceding carrier had kept the stock confined without unloading must be counted against the second carrier, but that the latter was not liable for the continued confinement by a subsequent carrier for a period which, with the time of the confinement by the carrier sought to be charged, would extend beyond the prescribed 28 hours. In Newport News & M. Val. Co. v. United States, 61 Fed. 488, 9 C. C. A. 579, it was held by this court that the carrier could not excuse itself upon the ground of the occurrence of an "accidental cause," where, as in that case, it was an accident on the road due to its own negligence. In United States v. Harris, 85 Fed. 533, 29 C. C. A. 327, it was held by the Circuit Court of Appeals for the Third Circuit that a receiver in charge of a railroad under an order of a court was not included in the statute as one charged with the duty, and so liable to the penalty, for the reason that only "railroad companies" were mentioned in that act, a matter which is cured by the later act; and the Supreme Court affirmed that ruling in the same case, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780. In the case of United States v. St. Louis & S. F. R. Co. (C. C.) 107 Fed. 870, it was held by Judge Rogers that upon

the facts in that case the unlawful confinement of all the animals on a certain train constituted but a single offense. Those facts were that the train was made up of several cars, each containing part of an entire shipment made by the same party to the same consignee. In that case, the judge came to that conclusion in the absence of the light given by the new law by the provision we have emphasized. However, we think he was right though he reached his conclusion by lights more dim than are now available. We refer to these cases because they are cited. But they really give little or no assistance upon the particular question with which we have to deal.

For the reasons we have given, we conclude that the judgments should be reversed, and further proceedings be had in the court below in accordance with this opinion.

On Rehearing.

Since our opinion in these cases was filed, upon which we directed a reversal of the judgment, counsel for defendant in error, upon their attention being drawn to certain decisions of the Supreme Court of the United States, to which we shall presently refer, and conceiving that they militate against the right of the United States to remove these cases into this court by writ of error, moves for a rehearing to the end that the question of the jurisdiction of this court may be considered, and, if found not to exist, that the writs of error be dismissed. No doubt, the objection is one which we ought to consider and act upon if presented at any time before we lose control of the cases. The objection is that these are criminal cases, and it is urged that a writ of error will not lie at the instance of the government in a criminal case. The second of these propositions cannot be denied. The law was so settled in United States v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445. But the question remains whether these are criminal cases within the meaning of that rule.

The petition in each case was for the recovery of a penalty, and the actions are in the similitude of the common-law action of debt, the form being simplified by the rules of Code pleading. Section 4 of the act of Congress [U. S. Comp. St. Supp. 1907, p. 919], upon which the actions are based, provides "That the penalty created by the preceding section shall be recovered by civil action in the name of United States in the Circuit or District Court," etc. The contention that these are criminal cases, and that therefore the United States cannot have a writ of error, is said to find support in the decisions of the Supreme Court in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. In both of these cases the court was considering the immunities secured to defendants by the constitutional provisions of the fourth and fifth amendments in the Boyd Case, and the sixth amendment in the Lees Case. It was said that such actions were "criminal in their nature." And it was because of that similitude that, having regard to the principle and purpose of the constitutional provisions, the court held they should be applied. In the present case no such considerations apply. No right secured by the Constitution is

affected. In cases not so affected the question would be whether the statute intends that the penalty shall be recovered only by conviction upon an indictment, or may be recovered by a civil action. This distinction and the consequences are considered with attention by Mr. Justice Strong in United States v. Claflin, 97 U. S. 546, 24 L. Ed. 1082, 1085. The subject under discussion was directly involved in the case of United States v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. That was a civil action brought by the United States to recover the value of certain merchandise which it was claimed had been forfeited in consequence of the violation of the customs act. Upon the trial the government offered in evidence a deposition taken in France. The defendant objected that he was entitled to be confronted by the witness because the action involved the commission of a criminal offense. The court below sustained the objection. But the Supreme Court upon a writ of error, sued out by the United States, held that this was error, and reversed the judgment. Mr. Justice Harlan, in delivering the opinion of the court, canvassed the Boyd and the Lees Cases, and pointed out their inapplicability. It would seem that the Zucker Case presented even better ground for the objection made by the defendant in that case than the ground for the objection here. Moreover, it is significant that in the Zucker Case the writ of error was sued out by the United States, and the cause was entertained and decided on its merits. It seems hardly possible to think that if the court had regarded such an action as a criminal proceeding, it would have done otherwise than to have simply dismissed the writ of error on its own motion. So, too, in the Claflin Case, supra, the writ of error was sued out by the United States, and the cause was considered on its merits. The action of debt has long been used, and regarded as the appropriate remedy for the collection of penalties prescribed for the violation of statutes. Atcheson v. Everett, Cowper, 383; Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491; Lebanon v. Olcott, 1 N. H. 339; Garman v. Gamble, 10 Watts (Pa.) 382; Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; Webster v. People, 14 Ill. 365.

One further observation: The rule that the government may not have a writ of error is a rule of the common law, and not the subject of a constitutional guaranty. It is therefore subject to modification by the Legislature. Congress has provided in the present case that the remedy shall be by a civil action, and the fair import of its meaning would seem to be an action having the ordinary incidents of a civil action, among which is the right to have the judgment reviewed. "It is to be proceeded in, so far as the action is concerned, just as in any other action of debt," said Thompson, J., in Bartolett v. Achey, 38 Pa. 273.

Petition denied.

CHICAGO GREAT WESTERN RY. CO. v. EGAN.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1908.)

No. 2,596.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SUFFICIENT EVIDENCE FOR JURY.

Three freight cars had been placed by an engineer on a passing track opposite a platform at a station to be partially unloaded there. There was a public road crossing east of them, and east of this crossing was the forward part of the train which consisted of about 20 freight cars. The engineer was upon the ground by the side of his engine which stood upon the main track near the three cars. The conductor there told the engineer to go up when he got ready, and couple up and back down. The engineer testified that after he climbed into his cab the conductor said to him, "John, I will make the coupling at the crossing when you get ready to back up." A workman who stood by testified that the conductor said to the engineer at that time, "Look out for us, we may not be done working in the car," and there was no other testimony to this saying. The hind brakeman was then in the car unloading it. The conductor went to work in one of the three cars to aid the hind brakeman to unload them. The engineer took his engine to the east end of the passing track, coupled it up to the forward end of the train, and without farther signal backed it into the three cars, threw the conductor out of one of them by the impact, and he was killed by the fall. The engineer could not see the three cars or the rear of his train after he coupled his engine to it, and he testified that he did not know that the conductor was in one of the cars, and that he relied on the conductor's statement that he would make the coupling.

Held, there was substantial evidence of the negligence of the engineer, the evidence that the conductor was guilty of contributory negligence was not clear, and these issues were rightly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1034, 1051–1067, 1089–1132.]

2. NEGLIGENCE—TRUE TEST OF DOUBTFUL ACT CARE PERSONS OF ORDINARY PRUDENCE USE UNDER SAME CIRCUMSTANCES.

An act or omission may be in itself clearly negligent or clearly free of negligence.

If its character is doubtful, the test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise in the same circumstances. If the care exercised in such a case rises to or above that standard there is no actionable negligence, if it falls below that standard there is.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 6.]

3. SAME—EVIDENCE OF ORDINARY PRACTICE OF REASONABLE MEN IN SAME CIRCUMSTANCES GENERALLY COMPETENT.

In such a case the evidence of the ordinary practice and of the usual custom, if any, of ordinarily prudent and intelligent persons in the performance under the same or like circumstances of the same or like acts is ordinarily competent upon the issue of negligence in the performance or omission of an act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 238.]

4. MASTER AND SERVANT—EVIDENCE OF ORDINARY PRACTICE COMPETENT THOUGH IT FAILS TO ESTABLISH UNIFORM CUSTOM.

There was substantial evidence that the ordinary practice and the general custom of operators on defendant's railroad was not to move trains, or parts of trains, on verbal orders of conductors without hand signals, but this evidence was not undisputed. There was substantial evidence that it was the common practice of the crew of the train on which the injury was inflicted to move it, and parts of it, on verbal orders of the

conductor without hand signals, but this evidence was not without contradiction.

Held, a motion to strike out the evidence of the ordinary practice and general custom upon the railroad was properly denied, and a request to instruct the jury that they should disregard that evidence, and that the undisputed evidence was that the common practice of the crew on the train on which the injury was inflicted was to move it, and the parts of it, upon the verbal orders of the conductor, was rightly refused, because the latter evidence was disputed, and because the evidence of the ordinary practice of the operators on the railroad was competent and material even if it failed to establish a uniform custom.

5. APPEAL AND ERROR—PAGES OF BILL OF EXCEPTIONS IN TRANSCRIPT OF RECORD WHERE RULINGS CHALLENGED APPEAR, MUST BE SPECIFIED IN THE BRIEF.

Where counsel do not consider errors assigned of sufficient importance to point out in their brief the pages in the bill of exceptions in the printed transcript of the record, where the rulings of the court challenged with the objections and exceptions to them may be found, the court will not ordinarily deem them of sufficient materiality to search through the record, find, and discuss them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3095.]

(Syllabus by the Court.)

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

D. J. Lenehan (A. G. Briggs and L. G. Hurd, on the brief), for plaintiff in error.

J. W. Kintzinger and M. J. Wade (Oliver Longueville, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Mr. Egan was the conductor, Mr. Tully was the engineer, and Mr. Shine was the head brakeman on way freight train No. 85 going east at Graff station in the state of Iowa. This train consisted of an engine and about 26 freight cars. The passing track at this station lay on the south side of the main track, and it was about a mile in length. The train had been placed upon the passing track in such a way that three cars which contained freight to be unloaded at this station were set opposite the platform at the depot, and the hind brakeman was engaged in taking freight out of them. After the forward end of the train had been placed upon the passing track the engineer and the brakeman had detached the engine and taken it back down the main track to the coal chute which was near the three cars, and the engineer had descended to the ground. The public road crossed the railroad a short distance east of the station and platform, and the three cars to be unloaded stood west of this crossing while the forward end of the train stood east of it. As the engineer stood upon the ground by the side of his engine the conductor said to him, "You go up when you get ready, and couple up and back down. We are already to go as soon as we set out three cars." Thereupon the engineer climbed into his cab which was open. He testified that after he had climbed to his seat box the conductor said to him, "John, I will make the

coupling at the crossing here when you get ready to back up." Wilkin, a workman who was standing there, testified that as the engineer was seating himself in his cab, and as the conductor was walking away and was right beside the engine, the latter turned, faced the engineer, and "hollered" to him, "Look out for us, we may not be done working in the car." The engineer denied that Egan gave him this warning, and the testimony of these two witnesses was the only evidence of the saying of the conductor after the engineer climbed into his cab. The conductor went to work in one of the three cars to assist the hind brakeman to unload furniture from it. The head brakeman, who was not one of the regular crew, but a substitute for this trip, testified that the conductor told him to go up and couple on to the head end of the train, and back down and set out three cars. The engineer and the head brakeman took the engine out the main track to the east, backed it in on the passing track, coupled it to the east end of the 20 cars which constituted the forward part of the train, and then without signals backed them westerly against the three stationary cars for the purpose of coupling to them and as the forward end of the train struck these cars the impact threw the conductor, who was still at work unloading the furniture in one of the cars out of its side door onto his head upon the platform and killed him.

The engineer testified that he could not see the crossing or the rear end of his train after he had coupled to it, that he did not know that the conductor was unloading freight on the standing cars, and that he relied on the latter's statement to him that he would make the coupling at the crossing. He testified at the coroner's inquest that the head brakeman gave him a signal to back up after his engine was coupled to the forward end of the train, but he admitted at the trial that he received no such signal. The head brakeman testified that he knew that the rear brakeman was unloading freight from the cars at the platform when he started east with the engine to couple it to the forward end of the train, that after that coupling was effected he climbed onto the fourth car from the engine and rode back upon it, that he saw no one at the crossing and knew that the conductor was in one of the three cars, but that the couplers were automatic and that he relied on the conductor's direction to him to back down.

There was much evidence that the ordinary practice of the operators of this railroad company and their customary method of making such a coupling on such an order as that which the engineer related, was to push the portion of the train attached to the engine against standing cars only after receiving hand signals in the day and after receiving light signals in the night. There was testimony that the common practice of the crew which generally operated this particular train was to move it without such signals on the verbal orders of the conductor. But there was also testimony to the contrary, testimony that the ordinary practice on this train was when such a verbal order was given to couple the engine to the cars to be moved, then to give three blasts of the whistle as a signal that the

engineer was ready to back up and to wait for a signal to do so, and if none was immediately given, to stay there until one was given. The evidence was undisputed that if the conductor's last words to the engineer as he left him to go to the car were, "Look out for us, we may not be done working in the cars," the backing of the forward part of the train into the stationary cars without any farther signal was not an ordinary or customary movement under such circumstances, and that it is not an ordinary or customary operation of an engine or train for an engineer to run it against cars in which he knows men are at work unloading their contents. There was other evidence at the trial, but none that was material to the issues in this court.

This action was brought against the railroad company for the alleged negligence of the engineer and the head brakeman which the plaintiff below, the administratrix of the estate of the conductor, averred in her complaint caused the death of the latter, and for which, if the negligence of the engineer or brakeman caused it, the railway company was liable under a statute of Iowa. At the close of the evidence the court below denied a request of the defendant to instruct the jury to return a verdict in its favor, and this ruling is challenged by its counsel because, as they say, there was no substantial evidence of the negligence of the engineer or of the negligence of the brakeman, and the evidence was conclusive that the conductor was guilty of negligence which contributed to his injury. But if, as the witness Wilkin testified, the conductor's last words to the engineer before the latter started to couple his engine to the forward end of the train were, "Look out for us, we may not be done working in the car," the engineer certainly failed to exercise ordinary care when he backed that portion of the train against the car in which the conductor was working without giving any warning that he was about to do so, and without receiving any signal so to do. Moreover, if those words constituted the last order of the conductor, he may have relied upon the engineer's obedience to them, and upon the latter's exercise of ordinary care, and have gone to his work in the car in reliance upon them. It is not so clear that a man of ordinary prudence and intelligence would not have done so, that the duty devolved upon the court to instruct the jury that in so doing he was guilty of negligence which caused his injury.

It is contended, however, that there was no substantial evidence that the direction to look out for them was the last order of Egan. The engineer testified that it was not. He agrees with Wilkin that his cab was open, that after he climbed into it the conductor gave him farther instructions, but he testifies that the conductor said that he would make the coupling at the crossing when the engineer got ready to back up. The engineer acted as though that statement was true, for he backed the train over the crossing without farther signal, and without warning those in the car that the head end of the train was coming. His testimony, however, is not strengthened by the fact that he testified before the coroner that he received a signal from the head brakeman to back this portion of the train up before he did

so, and that at the trial below he conceded that he backed it without any signal. Wilkin, on the other hand, testified positively that the conductor's instructions were, "Look out for us, we may not be done working at the car." The conductor acted as though that was his order. He went to work in the car unloading it and remained there until he was injured, without taking any farther precautions to guard against the impact of the forward part of the train, to protect travelers on the highway from its movement, or to make the coupling at the crossing. The car in which he went to work was standing by the platform for the purpose of being unloaded, and the hind brakeman was at work in it, or in one of the two standing with it, when he gave the instruction to the engineer. The positive testimony of Wilkin, the acts of the parties, the circumstances surrounding them at the time of the accident, and the fact that there is but one witness to contradict the statement of Wilkin, constitute evidence too material to be disregarded, and there was no error in submitting to the jury the question whether the testimony of Wilkin, or that of the engineer, relative to this last instruction of the conductor, was true. The defendant's request for an instructed verdict was therefore properly denied.

Counsel for the defendant moved the court at the close of the evidence to strike out all the testimony that it was the ordinary practice and the usual custom on the defendant's railroad to move trains, and parts of trains, only on hand signals, and requested the court to instruct the jury thus, "the uncontradicted evidence established the fact that it was common practice for the conductor Egan to direct the engineer, Tully, to back down his train, or parts of his train, on verbal orders, and without waiting for any other signal before moving the same. You are instructed that the ordinary and usual practice obtaining as to other trains, or on other railways, is entirely immaterial in this controversy, and you will therefore reject all evidence upon that question." The court denied the motion and refused to give the instructions, and these rulings are specified as error. The plaintiff below averred in her complaint, and the defendant denied in its answer, that the ordinary and proper way to move an engine and cars when coupling them to other cars, was to do so by hand signals received from a person stationed at or near one of the cars to be coupled, and that the engineer and head brakeman were guilty of causal negligence in that they attempted to make the coupling in the absence of such signals. There are cases in which the act or omission is in itself so plainly negligent that the fact that other persons in the same or like circumstances have been guilty of it is futile to change its character or effect. Dawson v. Chicago, R. I. & P. Ry. Co., 114 Fed. 870, 872, 52 C. C. A. 286, 288; Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 534, 63 C. C. A. 27, 32. But where the nature of the act or omission is of a doubtful character, as in the case in hand, the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If, in a given case, the care exercised rises to or above that standard, there is no actionable negligence. If it falls below it there is. Hence in an action for damages

for negligence evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been negligently done, is generally competent evidence, because it presents to the jury the correct standard for their determination of the issue whether or not the defendant was guilty as charged. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Union Pacific R. Co. v. Daniels, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; Washington, etc., Ry. Co. v. McDade, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; Texas & Pac. R. Co. v. Barrett, 166 U. S. 617, 619, 620, 17 Sup. Ct. 707, 41 L. Ed. 1136; Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; Charnock v. Texas & Pac. R. Co., 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057. There was, therefore, no error in the admission of evidence of the ordinary practice and of the custom of the operators of the defendant in the use of hand signals in the movement of freight trains and the parts thereof. Counsel argue, however, that this evidence should have been stricken out at the close of the trial because it failed to establish a uniform custom under the rule in Chicago, Milwaukee & St. Paul Ry. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18. Conceding that it so failed, nevertheless it was competent and persuasive evidence of the ordinary practice of men of reasonable prudence and care under the same circumstances as those which surrounded the engineer at the time of this accident, and hence the motion was too broad, since it was to strike out not only the evidence of the custom but also the evidence of the degree of care which ordinarily prudent and cautious men commonly exercise in the same circumstances. Southern Pac. Co. v. Hetzer, 135 Fed. 272, 284, 68 C. C. A. 26, 38, 1 L. R. A. (N. S.) 288. It is said that the motion should have been granted and the instruction should have been given because the evidence was undisputed that it was the common practice of Egan and Tully and of the crew of their train to move it, and the parts of it, upon the verbal orders of the conductor without hand signals, so that the ordinary practice of other prudent men on other trains became immaterial. The difficulty with this contention, however, is that the testimony that this was the common practice of Egan and Tully and of the crew of their train was not without contradiction. There was substantial evidence that the ordinary practice, even on that train, was to move its parts only on hand signals, and hence the court committed no error against the defendant when it denied its motion, refused its request, submitted that question to the jury, and instructed them as it did, that if they found that the common practice on that train was to move it, and the parts of it, on verbal orders from the conductor without any signals, or if they found that it was understood between Egan and Tully that the train should be so moved, then the plaintiff could not recover.

The next objection discussed in the brief is to a ruling upon a question to which no objection appears from the bill of exceptions to have been made, and it is accordingly dismissed.

The last two paragraphs of the brief for the company call our at-

tention to nine specifications of error, and cite the pages of the transcript of the record where the assignment of these alleged errors is printed, but they fail to point out any of the pages in the bill of exceptions printed in the transcript where any of the rulings, of the court, at which these specifications of error are leveled, or the objections or exceptions to these rulings may be found. The burden of proving by the record that the trial court has erred is upon the plaintiff in error, and where its counsel do not consider the errors which they assign of sufficient importance to point out in their brief the pages in the bill of exceptions printed in the transcript where the rulings which they challenge and the objections and exceptions thereto may be found, in accordance with Rule 24, of this court, and its former rulings, the court will not ordinarily deem the questions they seek to present of sufficient materiality to search through the record to find and review the rulings. Rule 24, par. 2 (3), 11 C. C. A. lxxxviii, 47 Fed. xi, Rule 21 Supreme Court, par. 2 (3); City of Lincoln v. Sun Vapor S. L. Co., 59 Fed. 756, 8 C. C. A. 253; Orr & Lindsley Shoe Co. v. Needles, 67 Fed. 990, 995, 15 C. C. A. 142, 147.

The judgment below must be affirmed, and it is so ordered.

HENDERSON v. SULLIVAN.

(Circuit Court of Appeals, Sixth Circuit. February 19, 1908.)

1. NUISANCE—STORAGE OF EXPLOSIVES.

The storage on an island in the Detroit river of tons of dynamite, which was liable to explode, and which did explode, constituted a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 15, 145.]

2. SAME—INJUNCTION.

The government, having spent millions of dollars in improving the Detroit river in the vicinity of Powder House Island, and having contracts for the further improvement of the river, contemplating an expenditure of $6,000,000 more, in which improvement large quantities of dynamite have been, and will be, used, and dynamite having been stored on such island in various quantities, without protest, for more than 25 years, an injunction would only be granted restraining the storage of dynamite on the island in such quantity as to create danger to complainant, who resided in the vicinity, or his family personally, or danger to his property located at his place of residence.

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

Edwin Henderson, for plaintiff in error.

John H. Goff, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

RICHARDS, Circuit Judge. The defendant, Michael Sullivan, is a contractor, who for many years has been engaged under contract with the government in deepening and widening the channel in the

Detroit river, at a point commonly known as "Lime Kiln Crossing." This work necessitates the use of large quantities of dynamite for blasting the rock which forms the bed of the river at this point. It appears that this work is still going on, and there will likely be spent by the government in this neighborhood for this purpose about $6,000,000.

It appears from the record that prior to 1879 dynamite thus needed was stored on Fox Island, and in that year an explosion took place. The report made by the United States Assistant Engineer to Gen. Weitzel, then in charge of the work, leaves it to be inferred that the greater part of the nitroglycerin was stolen and a fire started to conceal the theft. Shortly after this explosion, along in the early 80's, Sullivan, then engaged in the contract work, with the consent of the government engineering officers, anchored a scow over what is known as Powder House Island, located in the Detroit river, about 2,000 feet from Grosse Isle, and used it in manufacturing and storing dynamite for the Lime Kiln Crossing work. After use for some years, the scow was sunk in the shallow water and the present island was built up, largely with rock excavated from the Lime Kiln Crossing. After thus constructing the island, some shanties were built and these were used, with the knowledge and consent of the government engineering officers, for the storage of dynamite needed in the government work. The shanties were insubstantial structures. One witness said you could throw a cat through the cracks. Dynamite required for the government work was no longer manufactured but brought there and stored. On the 27th of June, 1906, about 20 tons were stored, of which 500 or 600 boxes, or from 10,000 to 12,000 pounds, belonged to the defendant, the balance to the Dunbar & Sullivan Dredging Company in which he was interested.

On the afternoon of the day mentioned, the dynamite exploded from no known cause. At the time of the explosion, the complainant, Henderson, occupied 25 acres of land on Grosse Isle fronting on the Detroit river, and about 3,800 feet from Powder House Island. The residence was a summer one, but was used from time to time throughout the entire year. The force of the explosion shattered the windows in the house, and severly shocked the members of his family who were living there at the time. Similar injury was done to dwellings on Grosse Isle and elsewhere as near as the complainant's to the explosion. Slight injuries were inflicted on several people but nothing of a serious nature. Two boys were fishing in a sailboat in the river near Powder House Island when the dynamite exploded. Their boat was blown to pieces, but the boys were rescued without any serious injury.

The Detroit river is nearly two miles wide at the point where the explosion occurred. There are several channels for boats of considerable draught, while the whole river is used for pleasure craft, sail boats, motor boats, fishing boats, etc. One channel runs between Stony Island and Grosse Isle which passes quite near to the Powder House Island and joins the Sugar Island channel a few hundred yards below it. The Sugar Island channel passes from the head of Bois Blanc Island to Sugar Island, crossing the main stream at a distance form Powder House Island estimated from 80 to 800 feet. The main ship channel

lies a half mile or more to the east of Powder House Island, passing between Bois Blanc Island and the Canadian shore. The Sugar Island channel described was navigated at the time of the explosion by two large side wheel steamers engaged in the excursion business between Detroit and Toledo. One of them passed the scene within half an hour of the explosion. The force of the explosion destroyed the shanties containing the dynamite but they have since been replaced by permanent structures, and no doubt large quantities of dynamite will be stored there unless the court intervenes. The case was brought in the state court but removed to the court below where, after a hearing of the complaint, in which it was prayed the defendant be permanently enjoined from storing at any point in the Detroit river, and particularly in any building or buildings situated on Powder House Island, any dynamite or other mixture of nitroglycerin or high explosive, the bill was dismissed. There was no opinion. From this decree an appeal was taken to this court.

The Detroit river being a navigable stream and public highway, the complainant contends that the erection by the defendant, although with the consent of the government engineers, of the island now known as "Powder House Island," and the construction thereon of a powder house as described, constituted a trespass, and the storage on the island in the powder house of large and dangerous quantities of dynamite which exploded, damaging property and imperiling lives, and the contemplated storage of similar quantities there in the future, constitutes a public nuisance, the continued existence of which may and should be enjoined. On the other hand, the defendant insists that an injunction is a matter of grace and not of right (Edwards v. Allouez Mining Co., 38 Mich. 50, 52, 31 Am. Rep. 301); that the use of dynamite in this part of the river is necessary in connection with the contemplated improvement, and it must be stored some place; that this island has been approved by the government through its engineering officers, as a suitable place for storing dynamite, and the contract contains regulations to protect persons and property in the neighborhood from the result of such storage. It is therefore insisted that no case is presented which requires or warrants an injunction so broad as that prayed for.

We are inclined to question the legality of the occupation and improvement of Powder House Island by the defendant under the circumstances. It appears from the record that the land now occupied by Powder House Island was once submerged. We understand the title to such soil was in the state or the riparian owners. The matter was thoroughly discussed in the recent case of the United States v. The Chandler-Dunbar Water Company, 152 Fed. 25, 81 C. C. A. 221, 234, affirmed by United States Supreme Court 209 U. S. 447. 28 Sup. Ct. 579, 52 L. Ed. ——. No formal action appears to have been taken by the government or any officer thereof, giving the defendant the right to erect the island and construct the powder house on it. All that was shown was at most a verbal permission and an acquiescence on the part of the government officers in charge of the Lime Kiln Crossing work. We are also inclined to the view that the storage on Powder

House Island of tons of dynamite which the record shows is liable to explode, and which did explode, though fortunately with small damage, is probably sufficient to constitute a nuisance.

Respecting the general character of a nuisance, the Supreme Court, speaking by Mr. Justice Field, says in Bal. & Potomac & R. R. Co. v. Church, 108 U. S. 317, 329, 2 Sup. Ct. 719, 726, 27 L. Ed. 739:

"That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."

In the case of Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34, an action to recover damages for injuries to the residence and outhouses of the plaintiff below from the explosion of a powder magazine, the court held that, since the magazine was constructed on a smaller lot than the ordinance required, it was an illegal structure; the fact that it exploded showed it was dangerous, and the destruction of the plaintiff's dwelling by the explosion was convincing on the point that the storing of gunpowder in the magazine constituted a nuisance per se.

In Hazard Powder Co. v. Volger, 58 Fed. 152, 7 C. C. A. 130, the Circuit Court of Appeals for the Eighth Circuit had before it the result of the explosion of a powder magazine located in violation of a city ordinance, near the outskirts of Cheyenne. It held that its location constituted the magazine a nuisance per se, and made its owner liable for all injuries resulting from its explosion from whatever cause, whether negligent or not.

In Wilson v. Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890, the plaintiff who lived in Burlington, Ohio, opposite a point in West Virginia, where the powder mill of the defendant was located, sued for damages on account of injuries caused by an explosion there. The mill was located near the Ohio river and between it and the Chesapeake & Ohio Railway. It exploded a number of times and occasioned great damage to property, both in West Virginia and Ohio. The court held that the conduct of so dangerous a business in such a location near two great public highways, within reach of many residences and places of business, constituted a public nuisance, and those injured by an explosion could recover without averring and proving negligence.

Another case in the same line is that of the Bradford Glycerin Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740. Here the court held that nitroglycerin is a substance usually recognized as a high explosive and dangerous, the storage of which at any place is a constant menace to the property and lives in the vicinity. The court held that one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violated any provision of law regulating its storage nor is chargeable with negligence. This case discusses and follows the leading case of Fletcher v. Rylands, 1 Exch. L. R. 265. The rule laid down by Mr. Justice Blackburn in this case was that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in

at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

In the case of Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224, and Mears v. Doles, 135 Mass. 508, this general rule of law, expressed by Mr. Justice Blackburn, was approved and followed. In the first case, a defendant was made liable for excavating his land so as to let in the sea, which undermined the land of his neighbor, injuring a well by the percolation of salt water into the same. In the second, a landowner was held liable for injuries resulting from the construction of a wall which fell and injured the property of an adjacent proprietor.

The recent case of Flynn v. Butler, 189 Mass. 377, 75 N. E. 730, was an action for personal injuries resulting from the explosion of gunpowder and dynamite stored in a populous neighborhood. There were two magazines involved, one built in 1876 and the other in 1885 A verdict was directed for the defendant. There was a reversal. The case grew out of the same explosions described in Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726. The court, Braley, J., delivering the opinion, held that under proper instructions, the jury could have found that these magazines, being maintained in a populous neighborhood and likely at any time to explode, constituted a nuisance. A large number of cases are cited, page 386 of 189 Mass., page 731 of 75 N. E.

In Commonwealth v. Kidder, 107 Mass. 188 (one of the cases cited), the court by Judge Gray, afterwards Associate Justice of the Supreme Court of the United States, held that the keeping of gunpowder, naphtha, or other explosive substances in such quantities and places as to be dangerous to the persons and property of the inhabitants of a neighborhood might constitute a nuisance at common law, and this general rule was extended to the keeping of petroleum so as to emit offensive vapors.

An explosion of nitroglycerin was before this court in the case of Bradford Glycerin Company v. Kizer, 113 Fed. 894, 51 C. C. A. 524. It appears that in this case the nitroglycerin exploded spontaneously while the plaintiff was preparing to use it in shooting an oil well. The jury were instructed that if they found the nitroglycerin exploded spontaneously, and that pure nitroglycerin does not so explode, they might take that into consideration in determining whether the nitroglycerin was not impure. In other words, the explosion of the nitroglycerin, when no cause was shown, might be taken as a proof of negligence.

We have cited a number of cases holding that the storing of dynamite, or other explosives, in a populous neighborhood in such a way as to prove a menace to the property and lives of the inhabitants, would constitute a nuisance, per se. There are, however, a number of cases in this country which hold the contrary. Thus, in Tuckachinsky v. Coal Company, 199 Pa. 515, 49 Atl. 308, where the explosion of dynamite was caused by lightning, and where the magazine, when established, was not in a populous neighborhood, but buildings were erected near it subsequently, and where the quantity stored was small, the court sustained instructions for the defendant on the ground that the evidence showed no negligence.

In the case of Marshall v. Welwood, 38 N. J. Law, 339, 20 Am. Dec. 394, the Supreme Court of New Jersey held that the owner of a steam boiler, which he had in use on his own property, was not responsible, in the absence of negligence, for the damages done by its bursting. The case of Fletcher v. Rylands, already cited, was discussed and overruled.

In the case of Kleebauer v. Western Fuse Company, 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62, it was held a fuse factory incidentally used for the storage of powder, which was exploded by the criminal act of an employé, where no negligence was shown, did not constitute a nuisance.

In Dumesnil v. Dupont, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750, the court refused to abate a powder magazine as a nuisance per se, overruling the Tennessee case of Cheatham v. Shearon, 1 Swan, 213, 55 Am. Dec. 734, in which it was held that a powder house located in a populous part of the city, and containing large quantities of gunpowder stored therein, is per se a nuisance.

The Cases of Kinney v. Koopman & Gerdes, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, and Rudder v. Koopman & Gerdes, 116 Ala. 313, 22 South. 601, 37 L. R. A. 489, grew out of explosions of large quantities of dynamite and gunpowder which were stored in a wooden building in the business part of the town of Cullman. A building near the defendants' took fire, was consumed, and the fire communicated to the defendants' building, consuming it and exploding the dynamite and gunpowder. The damages sued for were caused by the explosion. In the first case, the court held that it was not sufficient merely to charge the storing of the gunpowder and the resulting explosion. It must also be averred that the explosive was stored in such a place and under such surrounding circumstances that it was dangerous.

In the second case, the Rudder Case, the court in its opinion (page 359 of 116 Ala., page 601 of 22 South. [37 L. R. A. 489]) states that the defendants stored large quantities of dynamite and gunpowder in their wooden building in a thickly settled portion of the town, so it was liable to explode and do serious injury to persons and property. The resulting explosion threw fire brands several hundred feet, setting fire to and destroying the plaintiff's property. The court held that on proof of these facts the defendants were responsible.

A large number of cases on the storage of gunpowder, dynamite, and other explosive and dangerous substances are collated in the notes to section 384 et seq. of Joyce on Law of Nuisance. It is unnecessary to comment on them at length. The line of distinction shown in the leading cases to which we have referred grows out of whether the storage constituted a nuisance per se, or not. One line of cases following the rule laid down by Mr. Justice Blackburn in Fletcher v. Rylands holds that dynamite is a dangerous substance, which is stored at the owner's risk, and constitutes a nuisance per se. The other line, while not denying that dynamite is a dangerous substance, holds that it is not sufficiently dangerous, under all circumstances, to make the owner who stores it responsible for every explosion, from whatever

cause. To make him responsible some negligence must be shown either in the quantity stored or in the manner of storage, or in the locality where stored. In the cases we have referred to where the storage was not held to constitute a nuisance per se, a careful study of the cases shows that each was distinguished by acts which justified the holding. Thus, in the Pennsylvania case (Tuckachinsky v. Coal Company), the explosion was caused by lightning. In the California case (Kleebauer v. Western Fuse Company), it was the result of the criminal act of an employé. In the Kentucky case (Dumesnil v. Dupont), the suit was brought to abate a powder house as a nuisance, so there was no explosion. The case was decided in 1857, when powder magazines were regarded as probably soon to be very useful things.

The following rule has been laid down by the War Department for the government of contractors, such as the defendant:

"41. Explosives—Explosives shall be stored in a bullet proof building or boat at a point remote from buildings with a conspicuous sign displayed thereon, indicating danger and the character of material stored therein. The nearest buildings are about 1,500 feet distant from the work, and the contractor shall so regulate the use of explosives that no damage to adjacent property will result therefrom. However, should such damage be caused in any way by the contractor's operations, he must assume all responsibility for the settlement of claims resulting from such damage."

It remains to be determined whether the decree of the lower court, which refused an injunction and dismissed the bill, ought to be affirmed. We think the record might possibly warrant an injunction, if properly limited, but we find little assistance in the complaint, or in the record, if we should reach that conclusion. In the first place, as to the prayer. It is that the defendant be enjoined from storing dynamite on Powder House Island or any place in the Detroit river. There is no limitation requested as to manner or place. We are asked to prohibit the storage of dynamite in any manner and at every place in the Detroit river. If that can be done because the river is a public highway, the reason would include every navigable stream, every railroad and every street or highway. We think this is going too far. It places an unnecessary bar against greatly needed public improvements. On the argument, the only place suggested where dynamite might be stored for use in the contemplated improvements of the Detroit river, was a barge in Lake Erie, where it would be inaccessible in stormy weather, and in Canada, where there was no assurance that storage would not be prohibited, and at any rate would be beyond the jurisdiction of the court. And yet the government has spent millions of dollars in improving the Detroit river in this vicinity, and has contracts on hand, or in view, which will require an expenditure of some $6,000,000 more. In this work enormous amounts of dynamite have been and will be used. As shown by the record, this work has been going on for more than 30 years, and it does not appear that any life has been lost or property seriously damaged through the storage of dynamite, though a number of windows have been smashed. Moreover, it does not appear that before this explosion, and for more than 25 years, any complaint about or protest against the storage of dynamite on Powder House Island, was made by any of the residents, although there was an explosion on Fox Island about 1879.

It is not necessary for us to consider the fact that so far as the record shows, the complainant himself is not really a landowner, nor now a lessee, his lease having expired on May 1, 1907, and no renewal or extension being made.

We think it apparent from the record that a reasonable amount of dynamite, for use in the public work, might be stored on Powder House Island, without injuring persons and property in the neighborhood, and to the great interest of the public in the doing of the improvement of the Detroit river now going on, and so we think that, under proper limitations, an injunction ought to be granted; the judgment of the court below is therefore reversed and the case remanded, with instructions to grant an injunction restraining the defendant from storing dynamite on the island or place described in the bill as the place where the defendant had recently been storing it, in such quantity as to create danger to the complainant or his family personally, or danger to the property, real or personal, owned by or possessed by him, at the place described in the bill as his residence on Grosse Isle.

LIFE ASS'N OF AMERICA v. EDWARDS.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 120.

INSURANCE—LIFE—BREACH OF WARRANTY.

In an action on a life policy issued in 1902, insured having died in 1903 of carcinoma of the lung, and stipulating that it was issued in consideration of the statements, etc., contained in the application, warranted by insured to be true, and made a part of the contract, it was improper to refuse to direct a verdict for insurer, where the application recited that insured had last consulted a physician in 1892, and for typhoid fever, and it appeared that he had consulted another physician infrequently from 1900 to 1903, and another several times, as to whether insured had tuberculosis, that a physician was prescribing for him in 1901, and that two months before applying for insurance a physician examined his lungs and chest, though his widow testified that he did not, to her knowledge, consult a physician between 1892 and 1902, and acquaintances testified that he appeared to them to be in good health during that period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 691.]

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

This cause comes here upon appeal from a judgment entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was upon a policy of life insurance issued to one Charles William Edwards, who died July 2, 1903, of carcinoma of the lung.

Van Schaick & Norton (W. B. Brice, of counsel), for plaintiff in error.

William D. Sawyer (Thomas F. Bayard, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The policy was issued September 15, 1902, upon an application of the same date. The policy contains the usual clause that the contract is "issued in consideration of the statements, waivers, and agreements contained in the application for this policy and the declarations to the medical examiner, all of which the assured warrants to be true, and which are made part of this contract."

In response to a group of questions in the application relating to various diseases Edwards answered that he had never had spitting of blood or habitual cough. There was some testimony bearing upon the truthfulness of these answers, which need not now be discussed. The application also contained this question: "II. How long since you have consulted a physician? For what disease? Give name and residence of such physician." To this he answered in writing: "Typhoid, 1892; Dr. Draper, Wilmington, Del." Defendant contended that this answer was untruthful and constituted a breach of warranty.

Dr. Terhune, one of the physicians, who swore to the proofs of death, was called by defendant and testified that he was the family physician of the deceased, and that for about three years from 1900 to 1903 Edwards consulted him. "He consulted me professionally during that time; very infrequently, but he consulted me. He consulted me on September 8th in 1901 in my office." A friend of deceased testified that in April, 1902, she went with him to the office of Dr. Loomis to consult the latter as to whether he had tuberculosis; that he went several times; that he remarked to witness after Dr. Chamberlain made the examination that he had not tuberculosis at all. The same witness produced a letter of deceased, dated in October, 1901, which contained this paragraph:

"I stood on the corner of Samson street for a moment, when up came an old newspaper friend, with the result that we went in to get a cigar; that is, he did, as he don't drink and I don't smoke (since the doctor has been prescribing for me)."

Another letter from the deceased was also proved, and the envelope which inclosed it, postmarked July 21, 1902. It contains the following:

"At breakfast my furrowed face was a subject of comment, and I pleaded heat, hard work, and chest trouble, with the result that I had to go to the doctor's office for an examination. He stripped me, and thumped me, and did all sorts of stunts with instruments, declared my heart action O. K., my lungs and chest in good order, intimidated that I was losing sleep, and told me to keep better hours, and if I had any more expectorations marked with blood to come and see him then."

The wife of deceased testified that he did not, to her knowledge, consult a physician between 1892 and 1902; and two of his acquaintances testified that he appeared to them to be in good health during that period. But the evidence submitted by defendant as to his consulting a physician subsequent to 1892 was not contradicted. Upon the proof as it stood at the close of the case we think the court erred in denying the motion of defendant to direct a verdict in its favor on the ground that there was a breach of warranty.

Judgment reversed, and cause remanded for new trial.

In re KEHLER.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 115.

1. BANKRUPTCY—INSANE PERSONS—ACTS OF BANKRUPTCY—COMMISSION—"BANKRUPT."

Bankrupt Act July 1, 1898, c. 541, § 8, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], provides that insanity of a bankrupt shall not abate the proceedings; and section 1 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) declares that the word "bankrupt" shall include a person against whom an involuntary petition has been filed. *Held* that, if an alleged bankrupt committed an act of bankruptcy while sane, and by reason of such act the bankruptcy court obtained jurisdiction, it could continue the proceedings notwithstanding the bankrupt's subsequent insanity, but that if the bankrupt was insane when the alleged acts of bankruptcy were committed an adjudication of bankruptcy against him was improper.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 700, 701; vol. 8, p. 7587.]

2. SAME—BURDEN OF PROOF—INQUISITION OF INSANITY.

An alleged bankrupt made certain transfers while insolvent, on January 3, 1907, which were claimed to constitute acts of bankruptcy, and on February 22d a petition was filed to have him adjudged a bankrupt. On March 2d, he was adjudged a lunatic, the inquisition finding him to have been insane from December 22, 1906, but with lucid intervals prior to February 1, 1907, whereupon his committee filed an answer to the bankruptcy petition alleging such inquisition, and claiming that the bankrupt was non compos at the time the alleged acts of bankruptcy were committed. *Held*, that the committee's answer was prima facie proof of the bankrupt's insanity at the time the acts of bankruptcy were committed, and that the burden was on the petitioning creditors to show that the transfers were made during a lucid interval, it being presumed that the previous insanity, which was shown to be progressive and incurable, continued, in the absence of evidence to the contrary.

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

On appeal from an order of the District Court for the Western District of New York dated May 29, 1907, adjudicating Frank J. Kehler an involuntary bankrupt and dismissing an answer, and an amended answer, filed by H. Franklin Schlegel, committee of said Kehler, alleging that he had been adjudged insane by the court of common pleas of Schuylkill county, Pa. The said answers were dismissed on the ground that they stated no facts which constituted a defense to the petition of the petitioning creditors. The opinion of the District Judge is reported in 153 Fed. 235.

S. M. Enterline and C. E. Berger, for appellant.

John Van Arsdale, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. On February 22, 1907, the petitioning creditors filed a petition asking that Kehler be adjudicated a bankrupt, alleging as acts of bankruptcy the transfer, while insolvent, on or about January 3, 1907, of property, aggregating $5,140 in value, to four relatives, who were creditors with intent to give them a preference; on the same day, February 22, 1907, a receiver of the property within the jurisdiction of the court was appointed. On March 21, 1907,

H. Franklin Schlegel as committee of the alleged bankrupt filed an answer to the petition in bankruptcy alleging that Kehler on March 2, 1907, was adjudged a lunatic by the court of common pleas of Pennsylvania upon petition filed February 18, 1907, four days prior to the filing of the petition in bankruptcy. Attached to the answer is a certified copy of the Pennsylvania proceedings.

The inquisition dated March 2, 1907, finds that from December 21, 1906, Kehler has been a lunatic, but with lucid intervals prior to February 1, 1907. We obtained the impression at the argument that Kehler's insanity developed suddenly about the time of his departure from Buffalo, that it was transient in character and, indeed, that doubt was entertained as to its genuineness. An examination of the testimony returned with the inquisition removes all doubt as to Kehler's insanity. Dr. Marshall who saw him last at Kirkbride's Insane Asylum at Philadelphia, testified that he was suffering from paretic dementia, or softening of the brain, which had affected his brain for over a year, and is beyond the hope of recovery. The doctor further testified that when he saw Kehler on January 2, 1907, he was much depressed, having alternating periods of laughing and crying, while his countenance was expressionless. That he was undoubtedly insane since January 2, 1907, and before that date, that he had only partial lucid intervals, that it is a case of progressive paralysis, beginning with the spine and progressing until the entire body collapses.

It is, therefore, at least possible that an insane man has been adjudged a bankrupt because of acts for which he was in no way responsible. If he committed the acts of bankruptcy alleged in the petition while insane, the adjudication is a wrong which, irrespective of technical objections to the pleadings and proceedings of his committee, should be righted. If, on the other hand, these acts were committed while sane, there was no error in continuing the case even though the bankrupt subsequently became insane.

Section 8 of the Bankruptcy Act, Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], provides that the insanity of a bankrupt shall not abate the proceedings, and section 1 provides that the word "bankrupt" shall include a person against whom an involuntary petition has been filed. It is manifest, therefore, that if Kehler committed an act of bankruptcy while sane, and by reason of such act the court obtained jurisdiction, it can continue the proceedings notwithstanding the subsequent insanity of the bankrupt.

The all-important question is, was he sane or insane on January 3, 1907, when it is alleged the acts of bankruptcy were committed? If insane at that time he could not give a fraudulent preference and should not have been declared a bankrupt. The district judge correctly states the proposition as follows:

"True, an insane person cannot commit an act of bankruptcy, but if Kehler was compos mentis at the time the acts were committed, the petition by creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceedings."

Believing, however, that the burden was upon the committee to prove that Kehler was insane on January 3, 1907, because of the find-

ings that he had "lucid intervals prior to February 1, 1907," the judge denied the motion to dismiss the petition, granted the motion to dismiss the answer and amended answer, on the ground that they do not allege facts sufficient to constitute a defense to the petition, and adjudged Kehler a bankrupt. We are unable to agree with this ruling. We think the answer should have been held sufficient prima facie proof of insanity, with leave to the creditors to file a replication and offer proof that alleged acts of bankruptcy were committed during a lucid interval.

Counsel do not agree as to the rule enunciated by the Pennsylvania decisions, but as we read them they are practically unanimous in holding that the finding of an inquisition in lunacy that a party is insane with or without lucid intervals during a given period, throws upon the party relying upon an act done by the lunatic during this period the burden of showing that it took place during a lucid interval. Rogers v. Walker, 6 Pa. 373, 47 Am. Dec. 470; McGinnis v. Commonwealth, 74 Pa. 248. The logic of the rule is apparent. The presumption that a sane man's acts are rational is no stronger than the presumption that an insane man's acts are irrational. The legal status of sanity being established, it is presumed to continue until the contrary is shown. The legal status of insanity being judicially established, why should not the same presumption attach?

He who alleges that a sane man was insane at a particular time must prove it, the presumption is against such a contention. He who alleges that an insane man's act was sane at a particular time must prove it, as the presumption is the other way. The rule is well stated in the Am. & Eng. Enc. of Law (2d Ed.) vol. 16, p. 604, as follows:

"When habitual insanity in the mind of the person whose act is in question is once established, then the party who would take advantage of the fact of restoration to a sane condition or of an interval of reason must prove it, for insanity of that character is presumed to continue until the contrary is shown."

On the same subject 22 Cyc. 1115, says:

"Insanity admitted or once proved to exist is presumed to continue, and if a recovery or a lucid interval is alleged to have occurred, the burden to prove such allegation is on the party making it * * *. The presumption arises only in cases where the insanity is continuing and permanent in its nature or where the cause of the disorder is continuing and permanent."

In Hicks v. Marshall, 8 Hun (N. Y.) 329, the court held that an inquisition is prima facie evidence of insanity before the contract was made and the burden was cast on the plaintiff to prove that the contract was made during lucid intervals or that the inquisition was erroneous. See, also, Hoyt v. Adee, 3 Lans. (N. Y.) 173, Griswold v. Miller, 15 Barb. (N. Y.) 520, Cook v. Cook, 53 Barb. (N. Y.) 180, Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

It would seem that the precise question here involved cannot now arise in this state for the reason that under section 2335 of the Code of Civil Procedure the inquiry must be confined to the competency of the alleged lunatic at the time when the inquisition is taken, the inquisition having no retroactive effect. Matter of Demelt, 27 Hun (N. Y.) 480.

While according full faith and credit to the Pennsylvania inquisition we are by no means convinced that we are under obligation to follow the ruling of the Pennsylvania courts upon a question of evidence relating to the character and weight of the inference to be drawn from such a judgment. It is, however, unnecessary to decide the point, as the courts of the two states seem in substantial accord upon the question. We think that where a person has been adjudged insane at a certain date with lucid intervals until a certain date and without lucid intervals thereafter that a presumption of insanity attaches from the first date mentioned and especially so where the insanity is chronic and progressive in character. The onus is, therefore, upon the party who is depending upon an act of the lunatic, to prove that it was done during a lucid interval.

We do not intend to indicate what course should be taken in the District Court further than to say that should the petitioning creditors desire an opportunity to rebut the presumption of insanity arising from the inquisition, an opportunity should be given them.

The order of adjudication is reversed with costs to the appellant and the case is remanded to the District Court with instructions to take such proceedings not inconsistent with this opinion as it may be advised.

INTERNATIONAL BANK & TRUST CO. et al. v. SCOTT.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,743.

1. COURTS—FEDERAL COURTS—ACTION AT LAW—COMMENCEMENT.

An action at law is commenced in the Circuit Court of the United States for the Western District of Texas, by filing a petition in the office of the clerk under Tex. Rev. St. 1895, art. 1177, providing that all civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk of such court.

2. SAME—VENUE—DIVISION OF DISTRICT—PROCESS.

Plaintiffs, who were nonresidents, commenced an action at law in the Circuit Court of the United States for the Western District of Texas against defendant, a resident of Bexar county, in such district. The petition was filed with the clerk of such court at Waco, and attachment sued out, returnable at that place, though defendant's residence was in the San Antonio, and not in the Waco, division of the district. There was but one circuit court in the district, and one clerk; nor did the statutes of the United States prescribe any particular place in the district for the location of the clerk's office, except that Act June 3, Cong. 1884, c. 64, 23 Stat. 36 [U. S. Comp. St. 1901, p. 428], provided that there should be a deputy clerk who should keep an office in El Paso, and Act June 9, 1906, c. 3063, 34 Stat. 226 [U. S. Comp. St. Supp. 1907, p. 169], required the maintenance of a clerk's office at Del Rio. *Held*, that the suit was properly commenced, and that, though defendant was entitled to have the process made returnable at San Antonio, under Act March 11, 1902, c. 183, § 9, 32 Stat. 67 [U. S. Comp. St. Supp. 1907, p. 162], making that place the place for return of process issued against defendants residing in Bexar county, such privilege was a personal one, which defendant could waive, and hence the filing of the petition and making the process returnable at Waco was not ground for dismissal.

3. SAME—JURISDICTION—DIVERSE CITIZENSHIP.

Where the jurisdiction of a federal court depends on diverse citizenship, it must be affirmatively shown by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 876–881.

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

4. SAME—CITIZENSHIP.

Where federal jurisdiction of an action by the liquidating committee of a bank depended on diverse citizenship, and plaintiff's petition only alleged that all of such committee resided in the Republic of Mexico, but there was no averment that they were citizens of the Republic of Mexico, jurisdiction was not shown, nor was the defect cured by a recital in a motion for rehearing of a motion to dismiss that it appeared on the face of defendant's pleading that the "plaintiff" is a resident citizen of the Republic of Mexico, the plaintiff referred to being the liquidating committee of the bank, and not the individuals who were the real plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 876–881.]

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

This suit was brought January 18, 1907, by Pedro M. Armendariz, Eman L. Beck, George A. Hill, George R. Pierce, and Thomas J. Semmes, "all of whom reside in the city of Mexico, Republic of Mexico," and describing themselves as "the Liquidating Committee of the International Bank and Trust Company of America in the Republic of Mexico." They sue William Scott, a citizen of the United States, and a resident of Bexar county, Tex., in the Western District of Texas, on certain promissory notes and an open account; and judgment is asked for $18,896.81. The original petition appears to have been filed at Waco in the Western District of Texas and process issued at that place, and an attachment was also sued out, all returnable at Waco. On February 25, 1907, the defendant filed the following plea, viz.: Now comes the defendant William Scott, and appearing herein only in limine for the sole purpose of claiming the privilege of being sued in the division of the Western District of Texas, in which he resides, to wit, in the San Antonio Division, demurs to plaintiff's petition, and says that the same shows on its face that this defendant resides in Bexar county, Tex., and in the San Antonio Division of the Western District of Texas, and not in McLennan county, Tex., and not in any county in the Waco Division of the Western District of Texas, and that this is a suit on written instruments and in open account for overdraft, none of which are made payable in any county in the Waco Division of the Western District of Texas. Wherefore, defendant says that said petition shows on its face that this suit is improperly brought at Waco, and prays that this demurrer be sustained and that this cause be dismissed. Upon hearing thereof the court entered the following order:

"On this 26th day of February, 1907, this cause being called on the appearance docket then came the defendant Wm. Scott by attorney and presented his plea of privilege, claiming his right to be sued in the San Antonio Division of the Western District of Texas in which he resides, and the court having heard and considered said plea and the argument of counsel for the plaintiffs and defendant, and duly considered the same, is of opinion that said plea is well taken, and that it should be sustained and this suit dismissed. It is therefore ordered, adjudged, and decreed by the court that said plea of privilege be sustained and that this cause be dismissed, and that the plaintiffs pay all costs herein incurred. And it is further ordered that the writs of attachment heretofore issued herein and the levies made thereunder be vacated, to which action of the court the plaintiffs in open court then and there excepted." On February 28th thereafter, the plaintiffs filed a motion for a rehearing, as follows: "Comes now the plaintiff herein, the liquidating committee of the International Bank & Trust Company of America and most respectfully prays the court that the order herein made on the 26th day of February, 1907, sustaining defendant's plea of privilege and dismissing this

cause, be set aside for the following reasons, to wit: First. That it appears on the face of the defendant's pleadings that he is a resident citizen of Bexar county, Texas, and that the plaintiff is a resident citizen of the Republic of Mexico, and that the general laws of the United States, conferring jurisdiction upon the Circuit Court provides that in such a case suit may be filed in the district wherein the defendant is a resident citizen. Second. That there is nothing in the act of Congress of March 11, 1902, c. 183, 32 Stat. 64 [U. S. Comp. St. Supp. 1907, p. 158], entitled 'An act to divide the state of Texas into four judicial districts,' or elsewhere in the laws of the United States, requiring suits of this character to be brought against defendants in the division of the district in which they reside. Third. That a fair construction of the act of 1902, creating the Western District of Texas, and providing for the return of process to particular divisions in said districts, shows it to have been the intention of the lawmakers and the real meaning of the law to be that process might be issued in any division of said Western District of Texas, returnable to any other division thereof, and that the utmost privilege to which defendant in this cause is entitled under the law is to have this cause transferred and tried in the San Antonio Division, and it was error in the court to dismiss the cause." Whereupon the court, after fully considering said motion for a rehearing, and being of the opinion that, though the jurisdiction of this court is coextensive with the territorial limits of the Western District of Texas, this suit should have been filed at the San Antonio Division of the court, and that the question is rather one of personal privilege and practice and not strictly a jurisdictional question. To which action of the court, the plaintiff then and there in open court excepted.

On August 5, 1907, plaintiffs filed their assignment of errors, and their petition for a writ of error. The errors assigned in this writ are: (1) The court erred in sustaining the plea of personal privilege filed by the defendant herein and in dismissing this cause on the ground that though the court had jurisdiction it would not entertain it, the judge being of the opinion that it would have been better practice and better comport with his ideas of the personal privilege of defendant to require this suit to be filed at the San Antonio Division instead of Waco, the defendant being an inhabitant of Bexar county. Because the court had never heretofore adopted or promulgated any such rule. (2) Because this suit was brought in accordance with the long-established practice at Waco, while Waco was in the Northern District, and in accordance with the rules of practice still in force in other districts of Texas. (3) Because the court could not limit or curtail its jurisdiction by rules of its own.

Richard I. Munroe, for plaintiffs in error.

Chas. W. Ogden and S. J. Brooks, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). In the Circuit Court of the United States for the Western District, an action at law is commenced by petition filed in the office of the clerk. See article 1177, Rev. St. Tex., 1895. The statutes of the United States are silent as to any particular place in that district for the clerk's office to be located except the provision in the act of June 3, 1884, c. 64, 23 Stat. 36 [U. S. Comp. St. 1901, p. 428], "that there shall be appointed in the manner provided by law a deputy clerk who shall keep his office in the city of El Paso," and except the provision in Act June 9, 1906, c. 3063, 34 Stat. 226 [U. S. Comp. St. Supp. 1907, p. 169], that the clerk of the Circuit Court shall maintain an office at Del Rio to be kept open at all times for transaction of business. As a matter of fact, the clerk, under the approval if not actual order of the court, keeps and maintains an office in the principal place in the district

where the court is held, and keeps an approved deputy in each of the other places in the district in which the court is held, but there is only one circuit court in the district and only one clerk of that court.

It follows that the plaintiffs properly commenced their suit by filing their petition with the clerk. After the suit was commenced it was the privilege of the defendant to have the process made returnable at San Antonio, that being the place fixed by law for the return of process issued against the defendants residing in Bexar county. Act March 11, 1902, c. 183, § 9, 32 Stat. 87 [U. S. Comp. St. Supp. 1907, p. 162]. The defendant could have waived this privilege, and the jurisdiction to proceed with the case would have been unquestionable, but, as he insisted upon it, the court properly allowed it. On allowance of the privilege sufficient relief would have been furnished by quashing the process with costs, and directing other and legal process issued, and we doubt whether, without some further putting the plaintiffs in default, the court was justified in going further and peremptorily dismissing the suit.

In 1883 a similar case arose in the Circuit Court for the Northern District of Texas under Act Feb. 24, 1879, c. 97, 20 Stat. 318 [U. S. Comp. St. 1901, p. 422], and was heard before the Circuit and District Judges sitting together. The court held that the question involved related only to defective process, and was not jurisdictional, therefore the suit should not be dismissed, but be transferred to the proper division for return of process and for trial. This case is not reported, but the writer hereof well recollects the case and the protracted and elaborate argument therein, and, as Judge McCormick was a member of the court and concurred in the decision, we think it a sufficient precedent, in connection with the reasoning in this present case, to warrant us in resolving the above-mentioned doubt in plaintiff's favor.

There is a jurisdictional question, however, arising on the face of the record which seems to be fatal to the plaintiffs' right to maintain this suit, unless proper amendment be made. In the plaintiffs' original petition it is alleged that all of them reside in the Republic of Mexico, but we find no averment in the record that they are citizens of the Republic of Mexico. The recital in the motion for a rehearing "that it appears on the face of the defendant's pleadings that" the plaintiff "is a resident citizen of the Republic of Mexico," even if true in fact, did not cure the defect. The plaintiff referred to and described therein was the liquidating committee of the International Bank & Trust Company of America, and not the individuals who are the real plaintiffs in the suit. The jurisdiction of the court depends upon diverse citizenship, and it should be affirmatively shown in the record. See Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057, and Stuart v. Easton, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341, and cases there cited.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to dismiss the suit for want of jurisdiction unless the plaintiffs shall in reasonable time make proper amendment showing jurisdiction, in which case an order quashing process and

directing legal process should be made, and the case otherwise proceeded with according to law. The costs of this court to be paid by the plaintiffs in error.

ADAMS EXPRESS CO. v. ADAMS.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1908.)

No. 2,595.

1. COURTS—FEDERAL COURTS—JURISDICTION—SUSTAINED IF ANY PART OF RECORD DISCLOSES REQUISITE FACTS.

The jurisdiction of a national court may not be renounced or denied where the facts requisite to confer it appear directly, or by just inference, from any part of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 816–818.]

2. REMOVAL OF CAUSES—ADMISSION THAT DEFENDANT IS CORPORATION OR JOINT-STOCK COMPANY OF A STATE IS AN ADMISSION THAT IT IS A CORPORATION AS ALLEGED.

The plaintiff averred in his petition that the defendant was a corporation organized under the laws of the state of New York. The defendant in its petition for removal alleged, and in its answer expressly admitted, that it was "a corporation or joint-stock company organized and existing under and by virtue of the laws of New York."

Held, the answer admitted that the defendant was a corporation organized under the laws of New York, and hence the citizenship of the defendant in that state sufficiently appeared from the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 92.]

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COLLISION ON STREET — SUFFICIENCY OF EVIDENCE FOR JURY.

There was the testimony of two witnesses, which was contradicted by others, that as the plaintiff, a boy about 18 years of age, was riding a bicycle along the south side of an east and west street within 10 feet of the line of its south curb across a north and south street, a driver of a horse harnessed to a covered delivery wagon who had been driving west near the middle of the east and west street toward the opposite side of the crossing, and had been examining some article in the wagon while the reins were hooked up to the cover thereof, seized one of the reins as he came near the crossing and turned the horse, which was then trotting, sharply to the south, that after the horse had gone a few feet in that direction he grasped the other rein and turned the horse sharply to the west again, and that after the horse had advanced a few feet in that direction he seized the first rein and suddenly turned the horse to the south again, when the south shaft of the wagon struck the boy who had been riding along close to the line of the south curb and seriously injured him. The driver testified, among other things, that he intended to take his team south into the cross-street and that he saw the bicycler approaching when he was at least half a block distant.

Held, there was substantial evidence for the jury that the driver failed to fully discharge his duty to exercise reasonable care to avoid a collision with the bicycler, and that his negligence in causing the team to pursue its zigzag and fluctuating course just before the collision was the proximate cause of the accident, and the evidence that the bicycler was guilty of contributory negligence was not so clear that it was the duty of the trial court to instruct the jury that he was guilty thereof.

(Syllabus by the Court.)

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

Charles J. Greene (Ralph W. Breckenridge, on the brief), for plaintiff in error.

Albert W. Jefferis (Frank S. Howell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Within a few feet of the southeast corner of St. Mary's avenue and Twenty-Sixth street in the city of Omaha, the plaintiff below, who was then about 18 years of age, while he was riding a bicycle toward the east along the south side of St. Mary's avenue, collided with the south shaft of a covered wagon to which a horse that one of the servants of the defendant was driving toward the west on that street was harnessed. Adams was seriously injured by the collision, and by his next friend he sued the company for negligence, and recovered a judgment.

The suggestion is made in this court for the first time that the court below was without jurisdiction of the action, because the requisite diversity of citizenship does not appear from the record. But the plaintiff alleged in his original petition which he filed in the state court that the Adams Express Company was a corporation organized under the laws of New York. The defendant in its petition for removal averred that the plaintiff and his next friend were citizens and residents of the state of Nebraska, and that the defendant company was a corporation or joint-stock company created under the laws of the state of New York. It subsequently filed an answer in which it expressly admitted that it was a corporation or joint-stock company organized and existing under the laws of the state of New York. Under a familiar rule of construction this was an admission that the Adams Express Company was a corporation as alleged in the original petition, and by these pleadings the requisite diversity of citizenship sufficiently appeared. The jurisdiction of a federal court may not be renounced or avoided where the facts requisite to confer it appear either directly, or by just inference, from any part of the record. Howe v. Howe & Owen Company, 154 Fed. 820, 822, 83 C. C. A. 536, 538.

At the close of the evidence the court below refused to grant a request of the defendant to instruct the jury to return a verdict in its favor, and its counsel insist that this ruling was error (a) because the act of the defendant's driver in turning into Twenty-Sixth street and the ensuing collision was not the proximate cause of the plaintiff's injury; (b) because there was no substantial evidence that his injury could have been reasonably anticipated from his act by the driver by any ordinary forecast; (c) because the negligence of the plaintiff in riding his bicycle at the rate of five or six miles an hour toward the company's wagon, which he saw coming towards him, without taking suitable precautions to avoid a collision, was the proximate cause of his injury; and (d) because if the plaintiff's injury did not result proximately as a matter of law from his own negligence, it was caused by a mere accident. The facts disclosed by the evidence which are relevant

to this issue are substantially these: St. Mary's avenue was 46 feet wide from curb to curb and it extended from east to west. Twenty-Sixth street was 15 feet wide from curb to curb, and it extended from St. Mary's avenue south. Both streets were paved with asphalt. There was some sand which had been deposited for building purposes on the south 10 or 15 feet of St. Mary's avenue 25 or 50 feet east of Twenty-Sixth street, and there was probably a horse and wagon standing close to the south curb of St. Mary's avenue about 10 feet east of Twenty-Sixth street, although some of the witnesses testified that there was no team at that place. There were six eyewitnesses of the accident. The plaintiff and two workmen, who were on the south side of St. Mary's avenue within 30 or 40 feet of the place of the collision, testified to the effect that Adams was riding east in front of the block west of Twenty-Sixth street along the south side of St. Mary's avenue within 10 feet of the south curb at a speed of from 5 to 7 miles an hour, as the servant of the Adams Express Company drove his team on a trot in a westerly direction in front of the block east of Twenty-Sixth street along St. Mary's avenue, that the driver had the reins hooked up in the cover of the wagon, and that his attention was given to a satchel which hung upon his shoulder by a strap, or to a package, or to some other article in the wagon, that as he approached Twenty-Sixth street he seized one rein and turned the horse sharply to the south, that after the horse had proceeded a few feet in that direction he seized the other rein and turned the horse sharply to the west again, that after the horse had traveled a few feet in that direction he again seized the first rein, and turned the horse again sharply to the south, and that then at a place within 15 or 20 feet of the southeast corner of the two streets the south shaft of the wagon struck the face of the boy who was riding close to the line of the south curb of the avenue extended across Twenty-Sixth street, and was trying to dodge around the team. On the other hand, the driver, and two witnesses who were riding toward the west on St. Mary's avenue about 100 or 125 feet behind the boy, testified that the boy was riding east along the south side of St. Mary's avenue within about 10 feet of the south curb as he approached Twenty-Sixth street, that he was looking to the south, and was not aware of the approach of the team until the driver shouted to him to look out just before he ran into the shaft, that the lines were not hooked up to the top of the wagon, that the driver was not examining his satchel, or anything in the wagon, but that he held one rein in each hand and was driving west on St. Mary's avenue on or just north of the middle of the street, that he did not turn his horse sharply first to the south, then to the west and then to the south, but that as the boy approached oblivious of the team the driver stopped his horse and shouted to him, but that it was too late, and that as the team stood still near the middle of the street the boy ran his face against the south shaft of the wagon and was injured. All the witnesses agreed that there was ample space for the boy to pass between the defendant's team and the sand and team on the south side of the street, if the facts were as the defendant's witnesses declared them to be, and, if they were so, the defendant was undoubtedly entitled to a verdict in its favor. The court in effect so instructed the jury,

submitted to them the question whether the facts were as testified by the plaintiff's or by the defendant's witnesses, and they found this issue in favor of the plaintiff. The positive testimony of the two witnesses who were nearest to the accident, and the surrounding circumstances established, constituted evidence in support of that conclusion too substantial to have permitted the court below to have withdrawn that issue from the jury, and the question now is whether, conceding the facts to have been as the witnesses for the plaintiff testified, it was nevertheless the duty of the trial court to instruct the jury to return a verdict for the defendant.

The driver testified that he saw the plaintiff approaching on his bicycle along the south side of the street when he was at least half a block distant. He also testified that he intended to turn into Twenty-Sixth street and to deliver a package upon that street. He knew that he was going to take his team into Twenty-Sixth street before he turned his horse toward that street, and the boy did not know it. The boy came on, and the driver turned his horse sharply to the south. The plaintiff might have inferred, doubtless he would have inferred if the horse had continued in that direction, that the driver intended to take the team into Twenty-Sixth street, and he might and doubtless would have turned his bicycle to the left, and have safely passed the team on the north side. But before the horse had traveled many feet, the driver sharply turned him to the west and he proceeded on in that direction. The plaintiff was then near the horse and he may have inferred, for that was a rational inference, that the driver intended to take the team on toward the west along St. Mary's avenue. He rode on close to the line of the south curb to pass the team on the south side when, just as he was about to pass it, the driver again turned the horse suddenly to the south and the collision occurred. These facts present a substantial basis from which any man of ordinary intelligence and prudence in the circumstances of this driver might, and probably would, have anticipated, and from which this driver ought to have foreseen, that a collision and injury were the natural and probable consequences of driving his team in such a zigzag, fluctuating, and erratic course in the face of an approaching bicycler whom he saw and whom he expected to pass him, and they were sufficient to sustain a verdict that the acts of the driver were negligent and were the proximate cause of the injury. This driver, with his knowledge that he intended to turn his team into Twenty-Sixth street, and that the plaintiff was coming toward him along the south side of St. Mary's avenue and was about to cross Twenty-Sixth street, owed this boy the duty to exercise ordinary care to avoid a collision. The full discharge of that duty required him to either keep his team out of the straight course, which he knew the plaintiff was pursuing, or by directing his horse steadily in a direction that would cross the bicycler's course, or by some other adequate signal, to give him reasonable warning that he intended to drive his team across the bicycler's evident course and into Twenty-Sixth street. His direction of his team in its suddenly changing course failed to discharge this duty.

On the other hand, the evidence of the alleged contributory negligence of the plaintiff was not so plain and conclusive that any duty was

imposed upon the court to instruct the jury that he was guilty of negligence fatal to his case. He testified that he did not know and that he did not infer from the course of the team that the driver intended to turn it into Twenty-Sixth street, that he believed from his movements that he intended to drive it on along St. Mary's avenue toward the west, nor in view of the sharp and sudden turn of the horse back into its westward course after the driver had first turned him to the south can that inference be said to have been an unreasonable conclusion. In reliance upon it the plaintiff continued upon his course close to the line of the south curb of St. Mary's avenue until the driver suddenly turned his horse sharply to the south again when it was too late for the plaintiff to go to the north, and the shaft unfortunately struck him as he was trying to dodge around the team on the south. The duty was imposed upon the plaintiff to exercise reasonable care to avoid a collision with this team, but if the facts were as the jury have lawfully found them to be, they fail to establish either by direct evidence or by rational inference that he failed to discharge that duty. Apparently he would have passed the team in safety if the driver had not suddenly swung the horse into his course at the instant he was about to pass it, and when it was too late by any care or diligence to escape the collision.

Finally, there was substantial evidence that the proximate cause of the injury was not a mere accident, because there was such evidence that the negligence of the defendant's driver was its proximate cause.

Many objections were interposed by counsel for the plaintiff to the defendant's exception and to its assignment of errors. These objections have not been considered, nor have the questions they present been decided, because the result of the case upon a consideration of the merits is the same that it would have been if those objections had been sustained. There was no error in the trial of the case, and the judgment below must be affirmed.

It is so ordered.

McINTOSH v. WARD et al.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1907.)

No. 1,340.

1. APPEAL—DECISIONS REVIEWABLE—QUESTION OF COSTS.

Where, in a suit for the dissolution of a partnership and an accounting, appellant assailed only those parts of the decree which directed the items for pay roll expended by the receiver, and the receiver's compensation to be taxed as costs and included in a personal judgment against appellant, the record presented the reviewable inquiry whether such items were taxable costs as between the parties, and was not objectionable under the rule that an appeal involving a mere matter of costs will not lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 823–839.]

2. RECEIVERS—ERRONEOUS APPOINTMENT—EXPENSES—PAYMENT.

Where the appointment of a receiver is determined to be void, or when the fund proves insufficient, the court in the exercise of its equity powers may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to meet the expenses of the receivership.

3. PARTNERSHIP—ACCOUNTING—COSTS.

The discretion of a court of equity in a suit for a partnership accounting in which a receiver was appointed did not authorize an order requiring the defendant and the sureties on his cost bond to pay to complainant, under the name of costs, items paid from partnership assets for services and expenses in administering the fund, nor any other items not within the fee-bill act [Rev. St. §§ 823, 983], providing what shall be included as costs in and form a portion of a judgment or decree against the losing party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 820.]

4. SAME—FRAUD.

Where a bill for a partnership accounting charged defendant with fraud and misconduct, defendant was answerable in that proceeding for all damages sustained by plaintiff on account of defendant's breaches of duty to the firm.

5. SAME—JUDGMENT.

Where a bill for a partnership accounting charged defendant with fraud and misconduct under which bill a receiver was appointed, who continued the firm's business, all the breaches of duty for which defendant was liable up to the appointment of the receiver were merged in a decree of dissolution in favor of plaintiff, and hence the court could not allow further damages for such wrongs by adding to the account as against defendant the amount the receiver had expended from the partnership fund for conserving and carrying on the partnership business.

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

Appellees' decedent, Benton, began this suit to dissolve a partnership between himself and appellant McIntosh, and to have a full accounting. The bill charged that McIntosh had wrongfully applied partnership funds to his individual use, had imperiled the funds in rash speculations, had mismanaged the business, and in other respects had been guilty of misconduct and fraud. The property consisted mainly of leases of coal mines in Indiana, machinery and tools. On Benton's motion the Circuit Court on the 29th of November, 1899, appointed a receiver to take possession of the assets and to continue the business by operating the mines, marketing the product, etc. McIntosh denied Benton's charges, averred that the balance was in his favor, and prayed that a full accounting be had. On the pleadings, evidence, and master's report, the court adjudged on July 18, 1903, that the averments of the bill were true; that on November 29, 1899 (the day on which the court through its receiver took charge of the property and business of the partnership), the firm owed Benton $80,376.32, and McIntosh owed the firm $34,651.63; that to equalize accounts McIntosh should pay to Benton $57,513.93, with interest thereon from November 29, 1899, $12,557 21; that until the accounts were equalized by such payment McIntosh should not be entitled to any share in the assets, and Benton should have a lien thereon and be paid therefrom; that if the accounts were not eventually equalized either by payments from McIntosh or by the liquidation Benton should have a deficiency judgment against McIntosh; that all taxable costs should be assessed against McIntosh; that the remaining assets should be sold in a lump, and the proceeds applied first to the payment of the taxable costs and the expenses and liabilities of the receivership, second, to claims of creditors, and, third, to the discharge of Benton's lien; and that any balance should be divided equally. All questions not disposed of in that decree the court reserved for further adjudication.

The assets were sold for $2,000. In the decree appealed from, entered on April 7, 1906, the court found that the $2,000 proceeds of sale should be paid to certain creditors, but that the payment could not then be made because $1,809 of those proceeds had been applied by the receiver "to the proper costs of litigation." McIntosh was ordered to pay $1,809 into court so that the

$2,000 might go to the creditors in question. The claims of those creditors were based on loans made to the receiver to enable the receiver to meet pay rolls during his operation of the mines. These payments for labor in the mines were held to be expenses of the receivership, and were adjudged to be "costs of administration in this suit." During his conduct of the business the receiver had taken from the assets of the firm for compensation for his services $13,005.81. His action in this respect was approved by the court, and his compensation was adjudged to be "costs of litigation." The court decreed that the foregoing items of "costs of administration" and "costs of litigation" should be taxed against McIntosh, and the clerk was ordered so to tax them. It appearing that Benton would get nothing from the assets, and that McIntosh had made no payment toward equalizing the accounts, the court awarded Benton a personal judgment against McIntosh for $95,966.05 as being the sum of the following separately stated items:

Amount due Nov. 29, 1899	$57,513 97
Interest thereon from Nov. 29, 1899, to July 18, 1903	12,557 21
Interest from July 18, 1903, to April 7, 1906	9,373 39
One-half of firm debts paid by Benton since July 18, 1903	1,515 67
"Costs of administration" paid as aforesaid from assets of the firm	2,000 00
"Costs of litigation" similarly paid	13,005 81

And, finally, the court reserved the right to make such further orders and decrees in the cause as might be necessary to secure the benefits of the present decree to the parties entitled thereto "either against the defendant McIntosh or the obligor or surety upon the bond or undertaking for costs heretofore filed by said defendant."

On this appeal McIntosh assails only those parts of the decree which declare the items for pay roll and receiver's compensation to be taxable costs and include them in the personal judgment against him.

R. O. Hawkins, for appellant.

John E. Scott, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Appellees insist that nothing is involved but a matter of costs, and therefore that the appeal will not lie. The assertion quite evidently begs the question. The record presents the reviewable inquiry whether certain items that are embodied in the final judgment against appellant are or are not taxable costs as between the parties.

By the ancient common law items of expense in the conduct of litigation, paid or incurred by one party, were not allowable in the judgment against the other. Such allowances were of statutory origin. Our statute of 1853 (sections 823 and 983, Rev. St. [U. S. Comp. St. 1901, pp. 632, 706]) provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." And in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, it was said that costs as between party and party are confined to the matters allowed by the fee-bill act. The challenged items are not within the statute; but appellees claim that the Circuit Court as a court of equity had power to include them in the judgment as costs. Though at law the losing party is adjudged to pay to his adversary the latter's taxable costs laid out and expended in the litigation, in equity the chancellor has a broad discretion respecting the allowance and apportionment of such costs between the parties. Courts of equity also have a wide discretion in making and controlling allowances from the fund

for services and expenses in conserving and administering a fund that has been brought into court. And when the appointment of a receiver is determined to be void, or when the fund proves insufficient, it has been held that a court in the exercise of its equity powers may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to meet the expenses of the receivership. Gluck & Becker on Receivers (2d Ed.) pp. 540, 541; Smith on Receivers, pp. 587, 588; Beach on Receivers (2d Ed.) §§ 773, 774. But, in our opinion, the discretion of a court of equity does not authorize it to require one party (and the sureties on his cost bond) to pay to the other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the fee-bill act.

A theory is advanced that, though there be no liability on the cost bond, a final adjustment of the equities of the case warranted the inclusion of the disputed items. The theory is that because the suit and the receivership were made necessary by appellant's wrongful and fraudulent conduct, because appellees had a lien upon the assets for the equalization of the partners' accounts, and because the fund was not sufficient for that purpose and had been reduced by the allowances for the receiver's compensation and expenses, therefore appellees were entitled to judgment against appellant for the amounts so taken from the fund. All the equities between the parties from the beginning of the partnership down to November 29, 1899, when the receiver was appointed, were determined and adjusted in the accounting. The bill charged appellant with fraud and misconduct. For damages on account of all breaches of duty to the firm he was answerable in the accounting. Bates on Partnership, § 780; Lindley on Partnership (2d Ed.) p. 305 et seq. Under the first decree (which in this respect has now become conclusive on both parties) all appellant's wrongs and frauds upon the firm were merged in the account as stated. After November 29, 1899, the business was in the hands of the court. No injury to assets or business by appellant after that date was claimed. For depreciation under the receiver's care and management appellant was not responsible. So the court could not, on any principle of law or equity, give to appellees further damages for the merged wrongs and frauds by adding to the account the amount the court had been expending from the partnership fund for conserving and carrying on the partnership business.

In the respects complained of, the decree must be reversed at appellees' costs, and the cause remanded to the Circuit Court.

Reversed.

JOHNSTON v. SEXTON et al.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1907.)

No. 1,391.

1. ATTACHMENT—WRONGFUL ISSUE—LIABILITY OF SURETIES.
No damages are recoverable against sureties on an attachment bond for wrongs committed by the principals apart from the attachment.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 1291–1294.]

2. PRINCIPAL AND SURETY—JUDGMENT AGAINST PRINCIPAL—ADMISSIBILITY AGAINST SURETIES.
Where, after the suing out of an attachment, the defendant in attachment brought an action against the plaintiff for various wrongs including the alleged wrongful suing out of the attachment, to which action the sureties were not parties, a judgment for plaintiff therein was admissible against such sureties in an action on the bond only to prove the fact of its existence and what was there adjudicated.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 397–401.]

3. ATTACHMENT—ACTIONS ON BONDS—EVIDENCE.
The pleadings in such former action were needful and controlling to ascertain the subject-matter involved in the adjudication, but excerpts from the bill of exceptions of rulings and instructions to the jury embodied therein offered to modify the effect of the judgment were immaterial, the pleadings not having been disturbed by the rulings referred to.

4. PRINCIPAL AND SURETY—JUDGMENT AGAINST PRINCIPAL—EVIDENCE OF LIABILITY.
After the suing out of an attachment, the defendant in attachment brought suit against the plaintiff alleging not only injury to his reputation, credit, etc., in the sum of $20,000 by the wrongful suing out of the attachment, but various other wrongs and injuries to property and reputation for which damages were claimed, for causing and procuring a consignee of cattle to sell them for less than their value, and for making false and harmful statements, aside from the affidavit, for attachment resulting in additional injury to the attachment defendant's business reputation. A judgment was rendered after trial of this action in favor of the attachment defendant for both compensatory and punitive damages, after which judgment was rendered in favor of the plaintiff in attachment for costs, the garnishment being discharged on the filing of a certificate that the debt had been paid after suit brought. *Held*, that such judgment of itself was insufficient to establish a cause of action against the sureties on the attachment bond.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 397–401.]

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

K. R. Craig, for plaintiff in error.
George F. McNulty, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The plaintiff in error, Johnston, a resident citizen of Texas, was plaintiff below in a suit against the sureties on a statutory attachment bond, executed in Illinois, to recover damages for alleged default of the principals in the bond, Tamblyn & Tamblyn, copartners. Upon trial of the issues in the Circuit Court, at

the close of the testimony on the part of the plaintiff, the evidence was excluded by the court, with direction to the jury to find for the defendants, and this writ is prosecuted for review of errors assigned thereupon. The single question arises whether the proof tendered on behalf of the plaintiff was sufficient to make out a prima facie case of liability against the defendants, as sureties on the bond in suit.

This bond was executed in an attachment suit, brought by the principals therein, Tamblyn & Tamblyn, against the present plaintiff, in the city of East St. Louis, and in the form prescribed by statute in Illinois for granting the attachment. Paragraph 5, c. 11, entitled "Attachments," 1 Starr & C. Ann. St. Ill. 1885, p. 312. It names $10,000 as the penal sum, and $5,100 as the amount sued for in attachment, and the condition reads:

"Now if the said Tamblyn & Tamblyn shall prosecute his suit with effect, or in case of failure therein shall well and truly pay and satisfy the said L. T. Johnston all such costs in said suit, and such damages as shall be awarded against the said Tamblyn & Tamblyn, his heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment then the above obligation to be void; otherwise, to be in full force and effect."

The record of the attachment suit, introduced in evidence by the plaintiff in error, shows an appearance by all parties and entry of judgment as follows:

"By agreement judgment is rendered in favor of the plaintiff and against the defendant for costs of suit, and the garnishee, St. Louis National Stock Yards, is discharged; it appearing in writing on file that debt has been paid since suit was brought."

The only other evidence offered was comprised in transcripts of the record in the Circuit Court of the United States for the Western District of Missouri, in a case purporting to be a subsequent suit by the attachment defendant in the above-mentioned proceeding, against Tamblyn & Tamblyn, the attachment plaintiffs, to recover damages for alleged malicious prosecution and other wrongs, in reference both to the attachment proceedings and other injurious conduct with which Tamblyn & Tamblyn were charged. These offers were made in two exhibits—one certified to be "a full, true, and complete copy of the amended petition, answer to amended petition, reply, judgment," and subsequent motions, writ of execution, and return, in the case referred to; and the other certified as (1) an excerpt from a bill of exceptions allowed in the case and (2) a "copy of the court's charge to the jury in the cause."

Thus the plaintiff in error rested his case below, upon the above-mentioned record exhibits, without other evidence, either of default in the conditions of the bond of damages "for wrongfully suing out the said attachment," or even knowledge or privity on the part of the defendants in error in respect of the suit in Missouri; and, resting alike upon its competency and sufficiency to establish and measure the liability of the defendants in error, reversal is sought for the adverse rulings of the trial court.

We are of opinion that no error was committed in excluding this evidence and directing a verdict, whether the contentions of one side

or the other are adopted, either in construing the obligations of the bond, or the effect of the judgment in the attachment proceedings. On behalf of the plaintiff in error, it is contended, in substance, that the undertaking of the sureties was to respond for any damages awarded against the principals "for wrongfully suing out the said attachment"; that exemplary damages are recoverable thereunder when malice or vexatious suit appears; that the principals may be sued alone, without notice to the sureties, and judgment against the principals is conclusive of liability on the part of the sureties to pay the amount thereof, to the extent stipulated in the bond; and that such liability arises, notwithstanding the above-mentioned judgment entry in the attachment proceedings, for the reason that it shows a settlement and consequent failure to prosecute the suit. On the other hand, the sureties contend that the judgment in the attachment in favor of the principals bars any claim against the sureties, as of breach of the condition to "prosecute his suit with effect"; that liability under the statutory bond is governed by the Illinois rule, as stated in Lawrence v. Hagerman, 56 Ill. 68, 77, 8 Am. Rep. 674, and is thus limited to actual damages in direct loss to the property attached and expenses incurred in defense of the suit; that the Missouri suit and judgment involved not only exemplary damages, but compensatory damages excluded by the Illinois rule, and the judgment is therefore inoperative as against the sureties; and that they were not bound by the judgment, for the further reason that they were neither made parties nor notified of the suit.

Passing these various questions—which are discussed in the briefs, but do not require solution, as we believe, on reference to the transcripts offered of the record in the suit against Tamblyn & Tamblyn —the insufficiency of the judgment thus relied upon to establish the liability of sureties under the attachment bond plainly appears when the issues there presented are rightly distinguished. The original petition of the plaintiff in that action is not an exhibit, but the amended petition (filed during the trial "by leave of the court") states as the complaint and grounds of action, not only "the wrongful and malicious acts and doings of the said defendants," in suing out and causing the levy of the attachment in question, and resulting injuries to the plaintiff, "in his business reputation, character, and credit, in the sum of $20,000," but various other wrongs and injuries to property and reputation, for which damages are claimed, namely, (a) causing and procuring his consignee, holding his cattle of the value of $6,660 as his bailee, to sell them (subsequently) for $3,743; (b) making false and harmful statements aside from the affidavit for attachment, both publicly and to individuals, at several places where the plaintiff had transacted business, which caused great injury to his reputation and business; (c) wherefore damages were claimed, aggregating $23,446.59 for "actual damages" and $30,000 for "punitory damages." Issues were joined upon all these averments, and as well upon averments respecting the settlement of the attachment suit; and the trial resulted in a verdict (as set out in the transcript), awarding the plaintiff damages, separately stated at $8,133.34 for "compensatory

damages" and $2,000 for "punitive damages." Judgment was entered for the aggregate of the awards.

Whatever the rule of damages applicable to the undertaking of the sureties, it is indisputable, under either line of authorities cited, that none are recoverable against them for wrongs committed by the principals apart from the attachment; that neither of the separate injuries above mentioned is within their undertaking for indemnity; and that the judgment referred to is without force to determine their liability. The sureties were not parties, and the judgment in question is admissible only, as against them, to prove the fact of its existence and what was there adjudicated. 2 Whart. Evidence, § 823. So the pleadings were needful and controlling to ascertain the subject-matter involved in the adjudication, but not the excerpts from the bill of exceptions of rulings and instructions to the jury embodied therein, offered by way of modifying the effect of the judgment (State ex rel. Nave v. Hawkins, 81 Ind. 486, 488), for the reason that the pleadings were left undisturbed by either of the rulings referred to. Moreover, in reference to the instructions to the jury, certified and embodied in the offer, we are impressed with no direction or ruling therein, in so far as called to attention, which appears to be calculated to exclude the above-mentioned averments of injuries not chargeable to the attachment from consideration by the jury in awarding damages.

Assuming for the purpose of this inquiry, therefore, that both of the main contentions relied upon for recovery against the sureties are tenable—namely (a) that breach of the bond may be charged against the sureties, notwithstanding the undisputed stipulation and judgment entry in the attached proceedings, and (b) that damages are recoverable in such event beyond the rule indicated in Lawrence v. Hagerman, supra—with no ruling or intimation thereupon, we are of opinion that the verdict in favor of the defendants in error was rightly directed in the case at bar, for want of competent evidence to establish, either such breach or damages caused by the attachment; and the judgment of the Circuit Court is affirmed.

In re T. E. HILL CO.

BITHER v. COLEMAN.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1907.)

No. 1,390.

1. BANKRUPTCY—JURISDICTION—APPOINTMENT OF RECEIVER.

On the filing of a petition for an adjudication of bankruptcy against a corporation and service of process, jurisdiction over the parties and subject-matter attaches, authorizing the court to appoint a receiver under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], permitting such appointment when necessary to preserve the estate, which power is not affected by the fact that an adjudication is thereafter denied.

2. SAME—ALLOWANCE FOR SERVICES.

Where, after jurisdiction had attached in a bankruptcy proceeding, a receiver was appointed to take charge of the assets of the alleged bank-

rupt, the court had power in the first instance to direct that the needful expenses and compensation of the receiver be paid out of the property in his hands, though the proceedings were subsequently dismissed, it being no part of the receiver's duty to move to recover such expenses and compensation against the petitioning creditors.

3. SAME—ATTORNEY FOR RECEIVER—FEES.
Ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify employment of an attorney, and hence no claim for the services of an attorney so employed is chargeable per se against the estate, predicated alone on the fact of employment and service rendered.

4. SAME.
Where attorneys for a receiver of an alleged bankrupt were also actively engaged throughout a protracted contest in bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, as comtemplated by an order granting leave to the receiver to employ counsel, and the bankruptcy proceeding was thereafter dismissed, an order declining to make an allowance to such attorneys for services rendered to the receiver was correct, such expense being rightfully chargeable against the petitioning creditors.

Petition and Cross-Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy.

This hearing arises upon a petition and cross-petition to review and revise an order of the District Court, sitting in bankruptcy, in the matter of T. E. Hill Company, alleged bankrupt, upon the final report and petition of the receiver appointed therein, in two particulars: (1) Under the petition of William A. Bither, assignee, etc., for allowing compensation to the receiver in bankruptcy for his services; and (2) under the cross-petition of William A. Coleman, receiver, for disallowing a claim for compensation to his attorneys. The order thus brought for review recites a hearing upon the receiver's final report and petition for the allowances in question, report of the referee thereupon under an order of reference, objections to such report filed by the receiver, and notice to and appearance of all parties in interest, followed by various provisions not in controversy, together with the allowance and disallowance, respectively, of which review is sought.

These are found and ordered substantially as follows: (1) After reciting in the orders that the services of the receiver "have been peculiarly and especially beneficial" to the estate and performed partly in the Eastern District and partly in the Northern District of Illinois; "that large financial benefits have inured to all parties beneficially interested in said estate by reason of" such services; that "it is just and equitable" that he be paid a reasonable fee therefor "out of the assets of said estate remaining in his hands"; and that "$1,500 is a just, fair, and reasonable fee" for such services, such allowance is made, to be paid to himself by the receiver out of the assets in his hands, before paying over to the assignee (Bither), the remaining funds, as further directed by the order. (2) The provision in respect of the claim for attorney's services is thus stated: "It is further ordered, that the just and reasonable value of the services of the attorney for said Coleman, as receiver, is $1,000, but the court orders that the claim for said services is not a proper charge on said trust estate, and the motion of said receiver that he be authorized to pay said sum out of the funds of said estate is denied."

Other matters involved in the consideration are sufficiently mentioned in the opinion.

Charles C. Buell, for petitioner.

Lloyd C. Whitman, for respondent.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). These petitions for review and revision of orders in bankruptcy—one for allowing expenses incurred by the receiver and compensation for his services, and the other for disallowing a claim for services of his attorney—involve no consideration of the extent or value of the services rendered in one and the other instance, nor any dispute of fact. The original petition raises the question of law, whether any allowance to the receiver out of the assets was within the authority of the bankruptcy court, and the cross-petition challenges such authority to deny compensation to the attorney for the receiver, under the circumstances found.

In reference to the bankruptcy proceedings in which the orders were entered, mention of these general facts is sufficient to indicate the jurisdictional status: The bankruptcy jurisdiction was duly invoked by a petition of creditors for adjudication of bankruptcy against T. E. Hill Company, an Illinois corporation, averring cause and liability within the act; and upon like application and showing of cause the court appointed William A. Coleman as receiver, to secure possession of a large amount of personal property located in various places. Issues were raised only under the petition for involuntary adjudication, and the hearings were protracted before a master and in the District Court, resulting in a dismissal upon the ground that the corporation was not subject to adjudication as a bankrupt. Upon appeal to this court (In re T. E. Hill Company, Alleged Bankrupt, 148 Fed. 832, 78 C. C. A. 522), the decision of the District Court was affirmed. Pending such proceedings, the receiver obtained possession of the corporate property, largely in the hands of third parties as claimants, and performed the needful services in question for its preservation and custody, including service with the property in the completion of contract obligations of the corporation; also under several orders of the court, reciting consent on the part of the alleged bankrupt, portions of the property were sold, portions removed from other districts, and leases of plant and equipment were authorized. Such custody and service extended from September 21, 1905, to February 1, 1907; and the only contest or objection raised in the course of proceedings was to the adjudication of bankruptcy. Meantime (February, 1906), the T. E. Hill Company executed an assignment of all its property, under the voluntary assignment act of Illinois, to the present petitioner William A. Bither, as assignee, and the order in question directs the receiver of the District Court to turn over to such assignee the assets in his hands, less the expenses incurred, as allowed, and the allowance for his compensation.

1. On behalf of this assignee it is contended that he is entitled to the corporate assets "without any deduction for the expenses of the receivership"—in effect, that it was not within the power of the court, after dismissal of the petition for adjudication of bankruptcy, to award payment for expenses or compensation of the receiver out of the funds in the custody of the court. The only reviewable question under his petition rests on this broad proposition, and it cannot be upheld, as we

believe, when the jurisdiction of the District Court over the subject-matter is ascertained and recognized.

Upon the filing of the petition for an adjudication of bankruptcy against the corporation and service of process, jurisdiction over parties and subject-matter was established (Denver First National Bank v. Klug, 186 U. S. 202, 204, 22 Sup. Ct. 899, 46 L. Ed. 1127, and cases cited), and was complete for the hearing and determination of all the issues involved, whatever the ultimate conclusions of the court upon such issues. In re First National Bank of Belle Fourche, 152 Fed. 64, 68, 81 C. C. A. 260; Columbia Ironworks v. National Lead Co., 127 Fed. 99, 101, 62 C. C. A. 99, 64 L. R. A. 645. So, under section 2 (3) of the Bankruptcy Act, Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], the power and duty of the court, in such case, is unquestionable, to appoint a receiver, when found necessary for preserving the estate in controversy, "to take charge of the property * * * after the filing of a petition and until it is dismissed, or the trustee is qualified." This preservation of res and statu quo is an elementary requirement in bankruptcy, when ground appears for the exercise of such power, and until the issues are decided the jurisdiction is exclusive. The receiver, upon appointment and acceptance, becomes the officer and hand of the court in performance of his duties, neither subject to the wishes or directions of the parties, nor dependent upon the result of the controversy for payment of expenses or services; and he is clearly entitled to protection by the court, in the exercise of such jurisdiction, for all expenses rightly incurred and services rendered under its orders, either in allowances out of the funds committed to his charge, or through provision otherwise made by the court to that end. The rule thus settled in reference to receivers in equity (High on Receivers, § 796, and Smith on Receiverships, § 350), applies with special force for protection of these statutory receivers. While it is the undoubted purpose of the statute to limit the functions of the receiver in bankruptcy (Boonville Nat. Bank v. Blakey, 107 Fed. 891, 894, 47 C. C. A. 43), and his performance must be confined to the statutory requirements and directions of the court thereunder, the authority vested in the court is ample, as we believe, to provide for payment of needful expenses and compensation (within the prescribed limits) out of the property thus taken custodia legis. Assuming that the court may ultimately charge such expenses, in whole or in part, against the petitioning creditors, on dismissal of the proceedings, and further assuming for the argument, that they should be so charged in the case at bar, as contended, it is not the place of the receiver to move for relief of one or the other party, nor are his rights dependent upon the equities of the parties therein. So, the authorities cited in support of the contention that the receivership expenses were rightfully chargeable to the petitioning creditors (In re Lacov, 142 Fed. 960, 74 C. C. A. 130, and cases reviewed; Link Belt Mach. Co. v. Hughes, 195 Ill. 413, 417, 63 N. E. 186, 59 L. R. A. 673, and citations) are inapplicable upon the present inquiry.

We are of opinion, therefore, that allowance out of the assets for expenses of the receivership was authorized, as within the statutory

purposes of the appointment; and no other question of law is raised by the petition to review such allowance. It must be presumed that the court observed the limitations of the statute in respect of the extent and objects of the receivership, that the expenses were rightly incurred, and that both services and compensation were within such limitations. The various circumstances entering into consideration for the amounts of allowance are not reviewable under this petition.

2. The court denied the allowance prayed by the receiver for services of his attorney, and no reviewable error appears therein, as we believe, in any view of the case. Ordinarily, the duties of this statutory receiver neither require nor justify employment of an attorney, and it is plain that no claim for such services is chargeable per se against the estate, predicated alone upon the fact of employment and service rendered. The court may well reject claims therefor, as "not a proper charge on said trust estate" (in the terms of the present order), in the exercise of a sound discretion to limit expenditures of administration within just bounds, and various considerations may enter into the disapproval, with no call for their mention of record. The contention for review in the present instance rests on the special terms of the order denying the charge, together with the fact that a previous order had granted leave to the receiver "to employ counsel to assist and advise him in and about the administration." The order disallowing the claim states "that the just and reasonable value of the services of the attorney for the 'receiver' is $1,000, but the court orders that the claim for said services is not a proper charge on said trust estate," and the motion to authorize payment out of the funds is denied. While no circumstances are stated in the order as ground for the conclusion that the claim was not properly allowable against the estate in custody, all proceedings in the case were before the court, and presumptively sufficient cause had appeared for such conclusion. Unless, therefore, the above-mentioned authority to employ counsel, together with the recital of value in the service of these attorneys, are decisive of a right to charge the estate, the order of the court must not be disturbed.

The record discloses the further fact that the attorneys for whom the claim is made were actively engaged, throughout the protracted contest in bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, within the spirit of the order referred to. It is the general rule that receivers are to select counsel not identified with the interests of one or the other party to the litigation (Beach on Receivers, § 262; Gluck & Becker on Receivers of Corp. § 47; In re Kelly Dry Goods Co. [D. C.] 102 Fed. 747, 749); and for departure from this wholesome rule special circumstances and authorization are needful. In the case at bar, whatever recognition of such employment may appear from the fact that such attorneys appeared before the District Court in both relations, no injustice appears in denial of their claim as a separate charge against the property, held in custody through their contest for the petitioning creditors, when defeated in their bankruptcy proceedings. Such expense may rightly be charged, in whole or in part, against the defeated party

(In re Lacov, 142 Fed. 960, 74 C. C. A. 130) and the view stated is sufficient for affirmance of this order, which merely denies charge upon the property held in custody, but without prejudice to other relief.

Both orders are affirmed accordingly, with the costs borne and divided equally between the parties.

REILLY v. McKINNON.

RYNKIEVICZ v. SAME.

(Circuit Court of Appeals, Third Circuit. February 5, 1908.)

Nos. 37, 38.

1. BILLS AND NOTES—ACTION ON NOTE—MISREPRESENTATION—EVIDENCE—SUFFICIENCY.

Evidence in an action on notes given to plaintiff's transferrer for corporate stock bought from the company's president's agent, defended on the ground of misrepresentation in the sale of the stock, *held* insufficient to show that plaintiff took the notes with knowledge of the illegal fraudulent representations, or with such notice of the facts and circumstances attending their execution that his acceptance must have been made in actual bad faith, though he was a director of the company and a member of the executive committee which placed the matter of the sale of the stock in the hands of the president.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1832–1839.]

2. SAME—BONA FIDE HOLDERS.

One may be a bona fide holder of commercial paper and entitled to protection as such though he knew of circumstances that might excite suspicion in the mind of a cautious person or though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith?

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 818.]

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

See 145 Fed. 863.

George L. Crawford, for plaintiff in error.

C. E. Morgan, 3d, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The above cases were tried together below by agreement of counsel, and a verdict in each case was directed for the plaintiff by the learned trial judge. From the judgments thereon entered, writs of error were duly taken to this court where the cases have been argued together. McKinnon was the plaintiff below in both actions, and the original defendants therein were John A. Reilly and Joseph Rynkievicz, but, during the pendency of the suit against Reilly, he died, and his executrix, Mary A. Reilly, was thereupon substituted as a defendant in his stead.

The facts in brief are as follows: Two promissory notes made by said Reilly and Rynkievicz, respectively, to the International Mercantile

Agency, in payment or part payment of shares of its stock, which the makers of the notes had bought through an agent of its president, were, before maturity, negotiated by the corporation as part of the collateral security for a loan of $30,000, made to it by McKinnon. McKinnon was a director of the corporation, not only then, but during substantially all the period of its existence, and also a member of its executive committee, which was composed of directors of the company and had power to act in their absence. At the time the notes in suit were made, McKinnon owned $50,000 in par value of the preferred stock of the company. He had previously owned $50,000 in par value of the common stock which he had received from McCauley, its president, and which he subsequently sold and applied the proceeds to the purchase of the preferred stock. The stock which the defendants bought was part of a subsequent issue of $1,000,000 par value, which had been authorized by the directors, and placed by the executive committee in the hands of McCauley for sale upon a commission of three-fourths of the net proceeds of sale, in excess of $50 per share; which amount per share was to be received by the company before any commissions were allowed or paid for the sale of the stock. The sale for which the notes were given appears to have been made by an agent of McCauley's at $125 per share. The defense to the notes is based upon fraudulent misrepresentations as to the assets and condition of the corporation alleged to have been made by the agent to the defendants at the time of the sale. Representations made at that time were testified to, but whether they were shown to be false by competent testimony is open to question. Many of the representations testified to may fairly be regarded as an exaggerated puffing of the stock and an exploitation of the probable future of the corporation. The representation more particularly relied upon, however, was to the effect that the company had at that time $500,000 in its treasury. An attempt to show that that statement was false was made by the production of what was claimed to be the cashbook of the company, which purported to show the monthly cash balances of the corporation at and about the time when the alleged misrepresentation was made. The proof identifying this cashbook as that of the corporation is uncertain. Beyond the fact that it purported to be such, and that it came directly from its trustee in bankruptcy, through an assistant district attorney of New York, there is no proof whatever of its genuineness; furthermore, there is no evidence to show by whom or how the book was kept, whether correctly or incorrectly, whether the entries were complete or incomplete, what the system of bookkeeping was, or whether or not there were any other cashbook or books of the company covering the same period of time. The learned trial judge only tentatively admitted the book in evidence, but we deem it unnecessary to pass upon the question of its admissibility, since the testimony does not show that the plaintiff was a party to or in any wise connected with or cognizant of either the above or any other of the alleged fraudulent misrepresentations. Considerable testimony was offered concerning the organization and early history of the corporation. It is somewhat difficult however, on account of its remoteness from the transactions in question, to perceive its relevancy,

but, from the argument of counsel for the plaintiffs in error, it may be gathered that it was intended to show thereby that the corporation was inherently weak, unstable, and in need of funds from its inception, and that a large proportion of its stock was issued for property which had been very greatly overvalued, of all of which the plaintiff was, or should have been, aware, and hence that he was, from the outset, engaged in a fraudulent conspiracy or combination. There is, indeed, sufficient evidence in the case to arouse suspicion, and engender serious doubts of the stability and ultimate success of the corporation, and we have no disposition whatever to justify much that was done during the organization and existence of this corporation. But that is not the vital question in the case. If these notes are void, they are void because they were obtained through fraud, not only, but fraud which has been satisfactorily brought home to the plaintiff. Bad faith on his part must appear. There is apparently no question that the plaintiff made the loan of $30,000 to the company, and accepted the notes now in suit, with other notes, as collateral security for the payment of the corporation's note to him for $30,000, and that the loan remains unpaid. The transaction just referred to was completed a few weeks before the bankruptcy of the corporation. There is not a word in the testimony, however, which, in our opinion, directly or indirectly connects the plaintiff with the fraudulent misrepresentations which were made to the defendants. That he was a director of the company and a member of the executive committee which placed the matter of the sale of the stock in the hands of the president is wholly insufficient for that purpose; those facts are entirely consistent, or at least are not inconsistent, with good faith on his part. Wakeman v. Dalley, Impleaded, etc., 51 N. Y. 27, 10 Am. Rep. 551; Richmond Railway Co. v. Dick, 52 Fed. 379, 3 C. C. A. 149. Furthermore, there is no evidence to show that he even knew the price at which the stock was sold to the plaintiffs in error. His own evidence is that he did not know, although he admits that he thought the notes, from their size, might have been given in payment for stock; manifestly however, such knowledge, if possessed, would not afford him any idea of the price at which the stock had been sold, since, so far as appears, he did not know how many shares either of the defendants had bought, or whether the notes they gave were given for the whole or a portion only of the purchase price, and without these factors it is manifest he could not even conjecture the price.

The corporation was organized to carry on a commercial agency of a character somewhat similar to those of Dunn and Bradstreet, and its first issue of stock was made to McCauley for the transfer of the assets and good will of other similar corporations, which, however, for the most part, had proved to be failures; such an enterprise was necessarily to some extent speculative, and of such a character that to insure its success considerable capital would naturally have to be advanced without any immediate prospect of remunerative return. At all events, the evidence does not conclusively show that the corporation was organized as a fraudulent concern, or for the purpose merely of making money by the sale of its stock. So far as appears, it may have been

honestly conceived, and under proper management might have had a reasonably prosperous career. Indeed, only a few months before its failure, a committee of the directors was appointed for the special purpose of investigating its affairs, which having been done, the committee made a flattering report of its prospects which was communicated to the plaintiff, in common with the other stockholders of the company. But, as already stated, whatever the character of the company may have been, there is no evidence of a fraudulent conspiracy or any evidence to show that the plaintiff took the notes in question with knowledge of the alleged fraudulent representations, or with such notice of the facts and circumstances attending their execution that his acceptance of them must be deemed to have been done in actual bad faith. He was ignorant of the entire transaction. One may be a bona fide holder of commercial paper and entitled to protection as such, notwithstanding he had knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith? This is generally accepted law, and might be supported by a multitude of cases; reference, however, will be made to a few only. In Murray v. Lardner, 2 Wall. 110, at page 121, 17 L. Ed. 857, the Supreme Court says:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

And again in Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645, the same court, at page 359 (22 L. Ed. 645), lays down the rule in the following language:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

In Clark v. Evans et al., 66 Fed. 263, 13 C. C. A. 433, the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the court below because the trial judge charged the jury that "if you further believe that the plaintiff * * * had knowledge of such facts as would put a prudent man on inquiry, and that inquiry, if prosecuted, would have led to a knowledge of the fraud, then you will find for the defendant." In its opinion the Court of Appeals said:

"The charge was erroneous. 'Knowledge of such facts as would put a prudent man on inquiry' would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note, before purchasing the same. His right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper. 'Knowledge of such facts as would put a prudent man on inquiry' will not suffice."

In Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, a charge to a jury very similar to the above was held to be erroneous, and the judgment below reversed on that ground. King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84, and Battles et al. v. Laudenslager, 84 Pa. 446, are illuminative of the case at bar, as well as of the point under consideration. We think the trial judge was entirely warranted in directing, as he did, verdicts in favor of the plaintiff. Any other course would have been unwarranted.

The judgments below will be affirmed, with costs.

COOPER v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 19, 1908.)

No. 1,730.

1. MASTER AND SERVANT—RAILROADS—PERSONAL INJURY—UNBLOCKED FROG—PROXIMATE CAUSE.

   In an action against a railway company for injury to a switchman, whose foot was caught in a frog while he was being dragged by an engine, evidence *held* sufficient to show that the frog had not been blocked as expressly required by Act April 25, 1898 (Rev. St. Ohio 1906, § 3365–18; 93 Ohio Laws, p. 342), and that the catching of his foot was the proximate cause of the accident.

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

   Duties of railroad companies to block switches, see note to Hauss v. Lake Erie & W. R. Co., 46 C. C. A. 98.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

   In an action against a railway company for injury to a switchman, evidence *held* sufficient to sustain a finding that he was not guilty of contributory negligence in stepping off of the footboard in front of a switch engine for the purpose of crossing the track.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 988–996.]

3. SAME—DUTY TO BLOCK FROGS.

   Act April 25, 1898 (Rev. St. Ohio 1906, § 3365–18; 93 Ohio Laws, p. 342), requiring railroad companies to block all angles in frogs, switches, and crossings in all yards, etc., where trains are made up, not only requires frogs to be blocked for the protection of employés who may step into them, but also for the protection of those dragged into them by an engine.

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

G. M. Skiles and R. B. Newcomb, for plaintiff in error.

A. E. Clevenger and S. H. Tolles, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

RICHARDS, Circuit Judge. The plaintiff, James H. Cooper, while acting as brakeman on a switching crew of the defendant, the Baltimore & Ohio Railroad Company, was severely injured through getting his foot caught in an unblocked frog. This occurred on October 29, 1906, at about 1 or 2 o'clock at night. Just before the accident oc-

curred, Cooper was riding on the footboard in front of the engine. It was about time for the crew of the engine to stop for supper. The engine, after shifting certain cars, stopped on one of the tracks not far from the shanty where the crew was to take supper. After the engine stopped, Cooper, believing and having reasonable ground to believe, that the engine would not be started again without proper notice, stepped from the footboard onto the track for the purpose of crossing the same in order to go to the shanty. He was riding on the right side of the footboard, and it was necessary to step onto the track in order to cross it, because the drawhead of the engine divided the footboard into two parts, so he could not follow the footboard to the left side of the front of the engine. After stepping on the track, and while about to cross it, the engine started slowly forward. At that time, the engine, being a leaky one, was in a cloud of steam. The night was dark. The moving engine struck Cooper and knocked him down; he fell on his back between the tracks and the footboard began to move over him. According to the testimony, the engine was proceeding at the rate of two or three miles an hour. As the footboard passed over Cooper, it caught some portion of his clothing, and he, reaching up, caught hold of the footboard, so that, thus holding on himself and being held by some part of his clothing, he was dragged on his back. He was perfectly conscious and was yelling or "hollering" all the time, trying to attract attention and have the engine stopped. If he had succeeded, and the engine had been stopped while he was thus being dragged along, he would have suffered no serious injury. Then, suddenly, something caught his left foot, he was torn loose at once from the footboard, and the next instant one of the driving wheels of the engine struck him. His left foot was mashed into the frog, and his left leg was crushed off above the knee. In some way his right foot was thrown over and half of it was crushed. Then the engine stopped and he, conscious still, was helped out. An examination of the frog was made that night and again the next morning in daylight. The frog was unblocked. What was left of the left foot was found mashed down with his shoe into the frog.

The court below, after suggesting a discussion of the questions, first, whether the plaintiff was guilty of contributory negligence, second, whether the negligence claimed was the proximate cause of the injury, and, third, whether the fact that the frog was unblocked was negligence, in view of the circumstances of this particular accident, planted itself in its opinion, in which it directed a verdict for the defendant, on the ground that in this case the plaintiff was caught in an unblocked frog while being dragged involuntarily, and that the statute requiring frogs to be blocked was intended solely to protect a person while making a voluntary move. In the course of the opinion, the court says that there was not any dispute as to the proximate cause, although there might be on the question of contributory negligence. The court rests its direction to take the case from the jury on the ground that "the statute involved here was not contemplated to keep men's feet from being caught when they were being dragged under a moving train or car." If the plaintiff was engaged in some sort of voluntary locomotion, whether he was off his balance or not, the court below

thinks the statute would protect him, but in this case he was on his back and being dragged, and so he was outside the law.

We are unable to agree with the view of the court below. The law required that "every railroad corporation operating a railroad in the state, shall, on or before the first day of June, 1899, adjust, fill or block, all angles in frogs, switches, and crossings on their roads in all yards, divisional and terminal stations, where trains are made up, with the best known sheet steel spring guard or wrought iron appliances approved by the Commissioner of Railroads and Telegraphs." Section 3365–18, Rev. St. (93 Ohio Laws, p. 342), passed April 25, 1898. This act went into effect on June 1, 1899. It required every railroad company to fill or block all angles in frogs, in all yards or stations where trains are made up. This was a frog in a yard where trains are made up. We think there was testimony tending to show that, as to this frog, the law had not been complied with, and that the catching of the plaintiff's foot in it was the proximate cause of the accident. Union Pac. R. R. v. James, 163 U. S. 487, 16 Sup. Ct. 1109, 41 L. Ed. 236. Moreover, there was sufficient testimony for the consideration of the jury to the effect that Cooper, in stepping off of the footboard in front of the engine under the circumstances he did, was not guilty of contributory negligence.

There remains the broad question as to the construction of the act in the particular stated, upon which the court below really rested its opinion. Is the act to be construed so as to protect even persons who happen to be dragged into an unblocked frog, or limited to these alone who happen to step into it? The Legislature might have intended to protect every person lawfully in the neighborhood, who might voluntarily step into an unblocked frog, but could it have contemplated or intended to cover the case of a man who happened to be struck, knocked down by an engine, and dragged into an unblocked frog? It he was an employé, as the plaintiff was, and happened to be knocked down by his own engine, when he was in the discharge of his duty, and without fault on his part, we do not see why the act should not be construed so as to protect him. He certainly had a right as much as any one to rely upon all the frogs and switches in that yard being blocked, as required by law. If there was a reason for having the frog blocked while he was walking about, able to control his movements, there was an additional reason when he was so unfortunate as to be knocked down by an engine and dragged into the frog. The accidents to which switchmen are liable are infinite in number. A switchmen is required to couple, uncouple, and cut out cars, run ahead and hang on behind, and in an instant may find himself in a situation where death or some horrible injury seems inevitable. He can only escape by some great unforeseen effort. Such was Cooper's condition. He was not expecting to be knocked down, but when he was, he did the only thing possible, he clutched the footboard and held on. As he puts it "I couldn't get out, I had to hold on to keep in." If the frog had been blocked, his left foot would have slid over, the train would have stopped in a few feet, and he would have crawled out unharmed. But the unblocked switch which every railroad employé who takes his life in his hands

for the service of the public has a right to believe is blocked was not, and the trap caught him.

The Legislature had particularly in view the perils of switchmen in all yards, and divisional and terminal stations, where trains are made up, and the sudden and unexpected calls that are made upon their coolness and strength and activity in doing their work in such places. It necessarily had in mind the necessity of making the tracks fully safe by blocking the frogs, not only to protect the switchman when he was walking and had complete control of his muscles of locomotion, but also and especially when, deprived of the voluntary use of his legs and feet, he was dragged along by a car and put at the mercy of an unblocked frog.

In the case of the P. C. C. & St. L. Ry. v. Burroughs, 6 Ohio S. & C. P. Dec. 530, the plaintiff's intestate, who was a switchman, was struck by an approaching caboose, and to protect himself held on to the hand hold of the car. He was dragged along until his foot was caught in an open frog, when he was run over and killed. The case was reversed and tried again. The second decision appears in Ry. Co. v. Burroughs, 9 Ohio S. & C. P. Dec. 324. The court says the deceased "had the right to presume that any frogs on the track were blocked, he was not compelled to so conduct himself as to avoid being struck by the car and killed by his foot being dragged into an unblocked frog. As he had the right to presume there was no unblocked frog, he had the right to conduct himself accordingly." This judgment was affirmed in 60 Ohio St. 630, 54 N. E. 1107, without report.

The case of L. S. & M. S. Ry. v. Winslow, 4 O. C. D. 242, the plaintiff below had complained to the yardmaster of an unblocked switch, and he was promised that it would be blocked. But this was not done, and afterwards the plaintiff, being a switchman, was at work about 12 feet from the frog. He had space enough to couple the cars, if there had been as usual but a slight movement of them, but the engineer backed suddenly and violently, and the plaintiff, having hold of the car with one hand, was thrown in the direction of the movement of the train, and before he could right himself, was over the danger spot and his foot caught in the frog. This case was settled and dismissed in the Supreme Court, May 14, 1895. It is true that this case, like the preceding one, was under the act of 1898, but there was no material difference between them in the respect under consideration. In both cases, the employé was virtually dragged into the unblocked frog. Both these cases were before the passage of the present act and must have been known to the Legislature, and therefore it is clear the Legislature knew that it was necessary to have frogs blocked not only for the protection of employés who might step into them, but also for the safety of those who might be dragged into them.

In the case of Herrick v. Quigley, 101 Fed. 187, 41 C. C. A. 294, the switchman had made the coupling. He then attempted to step out from between the cars, but the planking on the highway crossing was so defective that he slipped. As he did this, he grasped the grab iron and endeavored to jump out from under the car. He was about to accomplish this when his foot slipped into the hole between the ends of the two ties, and he was run over and killed. This illustrates how

necessary it is for the benefit of switchmen to have a safe and secure footing. If there had been an unblocked frog there, it might have served the same purpose that the hole between the ends of the ties did. The principal cases that have been before this court growing out of unblocked frogs, are those of the C. H. & D. Ry. v. Van Horne, 69 Fed. 139, 16 C. C. A. 182; L. E. & Western Ry. v. Craig, 73 Fed. 642, 19 C. C. A. 631; and Narramore v. C., C., C. & St. L. Ry., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

In the Van Horne Case, the plaintiff, a switchman, while in the discharge of his duties, caught his foot in an unblocked guard rail, was run over and lost a part of the foot. Judge Taft, speaking for the court, said (page 140 of 69 Fed., page 184 of 16 C. C. A.):

"There was no issue before the jury as to whether the failure to insert a block was negligence on the part of the railroad company. It was negligent, as a matter of law, and the court properly charged the jury that, if the block was not there, and the absence of it caused the accident, the defendant was liable."

In the case of L. E. & W. Ry. v. Craig, 73 Fed. 642, 19 C. C. A. 631, the court, speaking by Judge Taft, called attention to the fact that it had already held in Railroad Co. v. Van Horne, 69 Fed. 139, 16 C. C. A. 182, that the effect of this statute (the Ohio law) is to make a failure by the railroad company to comply with it negligence, as matter of law. It pointed out the ruling of the Supreme Court of Ohio in construing an analogous statute requiring mine owners to adopt safety appliances for their employés. Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886.

In the case of Narramore v. C., C., C. & St. L. Ry., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, Judge Taft, still speaking for the court, restated the rule already announced in the Van Horne and Craig Cases, that the failure on the part of the railroad company to comply with the statute requiring frogs to be blocked was negligence per se. In this opinion, the distinction is drawn between the assumption of the risk and contributory negligence, but, as that is not involved in the present case, it is unnecessary to enlarge upon it. There is no suggestion in any of these cases that the protection afforded by the law can be limited so as to exclude employés who have the misfortune to be injured through being dragged into an unblocked frog by an engine or car.

Believing that the Ohio statute requiring the blocking of frogs applied in this case, and that the court erred in directing a verdict for the defendant, the judgment is reversed, and the case remanded for a new trial.

WARMATH v. O'DANIEL et al.

(Circuit Court of Appeals, Sixth Circuit. February 20, 1908.)

No. 1,733.

1. BANKRUPTCY—PREFERENCES—RECOVERY—EQUITY JURISDICTION.
   Under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], declaring that suits in equity shall not be sustained in the courts of the United States where a plain, adequate, and complete remedy may be had at law, a plenary suit by the trustees of a bankrupt to recover a money judgment for the value of certain household furniture alleged to have been fraudulently transferred by the bankrupt to defendant in order to create a preference was not maintainable in equity over defendant's objection taken in limine, though arising in the bankruptcy proceeding, no equitable relief being required, plaintiff's remedy at law being entirely adequate.

2. EQUITY—EQUITY JURISDICTION—WAIVER.
   Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], declaring that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, secures as one of its objects a privilege personal to the defendant, which he may waive.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 173–176.]

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

The trustees in bankruptcy of Powell filed a bill in equity in the District Court, where the proceedings were pending, for the purpose of recovering the sum of $1,061.87, that being the value of certain household furniture and fittings which were sold and transferred by the bankrupt within four months preceding the filing of the petition to the appellant, Warmath, for the purpose of paying a debt which the bankrupt owed him. The bill alleged that at the time of the transfer Powell knew he was insolvent and unable to pay his creditors in full, and made the sale, transfer, and payment with the intent to prefer Warmath and to defraud his other creditors; and further alleged that Warmath had reasonable cause to believe and know that Powell was insolvent, and that the transfer, etc., was made with the intention of giving him an unlawful preference over other creditors. The prayer was that the court adjudge that Warmath had obtained an unlawful preference through the said sale and transfer, and that he became liable to the complainants for the value of the property, stated to be the sum of $1,061.87, and that they be allowed a recovery therefor. The defendant appeared and demurred to the bill, and assigned grounds therefor, the first of which was that: "The bill on its face shows no grounds for equitable relief and the equity side of this court has no jurisdiction of the matters complained of in the bill, and if complainants have any rights of action in this court it is purely of a legal cognizance." The other grounds of demurrer need not, for the present purpose, to be stated. The court overruled the demurrer, and gave leave to answer. The defendant thereupon filed an answer denying the material allegations of the bill. Proofs were taken, and upon the pleadings and proofs the court made a finding and directed as follows: "In this cause I am of the opinion that the allegations of the plaintiffs' petition are fully sustained by the proof, and the relief prayed for therein should be granted. I, therefore, direct that a decree be entered, holding that at the time of the sale of the furniture by the bankrupt to Warmath that the bankrupt was insolvent, and that both he and the defendant, Warmath, knew the fact, and that the sale was made for the purpose of giving Warmath a preference as a creditor. A decree will be entered against Warmath for the amount sued for, together with interest thereon from the day of the sale, and against the defendant for the cost." Thereupon a decree was entered, stating the facts found and ordering and adjudging as follows: "It is therefore ordered and adjudged and decreed that the plaintiffs, Henry O'Daniel and J. A. Alford,

as trustees in bankruptcy of the said A. L. Powell, bankrupt, have and recover of and from the said defendant, Jno. G. Warmath, the sum of $1,061.87, with $95.56 interest thereon, in all $1,157.43, and all costs; for which let execution issue." The trial was had before the judge. The evidence was given by the oral examination of witnesses and by depositions. Objections were made and were allowed or overruled. A bill of exceptions was tendered by the defendant and allowed and signed by the District Judge. An appeal to this court was then taken by the defendant.

T. E. Harwood, for appellant.
W. R. Landrum, for appellees.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

SEVERENS, Circuit Judge (after stating the facts as above). This is a plenary suit of a kind of which the District Court has jurisdiction under the amendment of the Bankrupt Act of July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], enacted Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031].

The question on this appeal which arises on the first two of the assignments of error is whether the court below was right in overruling the appellant's contention on his demurrer that the suit was not properly brought in equity for the reason that there was a plain, adequate, and complete remedy by an action at law. The objection was taken at the threshold, and the question is not embarrassed by the laches of the defendant in raising it.

We think the court should have sustained the demurrer. The judgment sought was for a definite sum of money, precisely that which the court by its decree awarded to the complainants. And the whole sum was recoverable, if any of it was; for the assets of the estate would not come near the amount of the debts. There was no contingency in the liability, or apportionment of the burden among several defendants to be made by the judgment. The response of the court to the demand of the complainants was simply an allowance or refusal of it. Nor was there any embarrassment in the procedure. The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustees to recover it. Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record, or is a muniment of title the existence of which would indicate ownership and the right to sell and convey or mortgage, or

do such other things with it as belong to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a devise for evading the statute forbidding a resort to a court of equity.

The right of a defendant to have his liability determined in an action at law is a substantial one, the value of which is recognized and protected by the statute (section 723, Rev. St. [U. S. Comp. St. 1901, p. 583]), which declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." The defendant is thereby given an opportunity to have his controversy tried by a jury, a privilege of sufficient importance to be secured by the Constitution and guarded by this positive statute.

In a recent case in this court we were required to deal with this subject, and to ascertain the meaning and effect of this statutory injunction to the courts of the United States to observe the rule therein given. It was not indeed a new rule; but the Congress thought fit in organizing the federal judiciary to make it a positive command, lest it should sometimes be too lightly disregarded. In the case referred to (Miller v. Steele, 153 Fed. 714, 82 C. C. A. 572), the plaintiff brought suit to recover in an action at law upon a statute of New York, which declared that the heirs and legatees of deceased persons should be severally liable, to the extent that they had secured assets, to pay the debts of creditors who had failed to prove their claims during the course of administration. The defendant objected that the case was not cognizable at law, but was one exclusively of equity jurisdiction; and contended that the assets of the deceased were, in the hands of the legatee, of the nature of a trust fund which might under some circumstances be required to pay debts; that the administration and enforcement of trusts was peculiarly a subject of equity jurisprudence, and that therefore the court had no jurisdiction at law to entertain the suit. But it was held that such a circumstance as the existence of a trust was not controlling; that the leading and dominant proposition is that when the capacity of a court of law is sufficient to give a suitable remedy, that is the proper forum in which to try the cause and obtain the proper relief, and said:

"The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the particular facts. When neither of these difficulties are in the way, there can be no reason for resorting to a court of equity"—citing Boyce's Ex'rs v. Grundy, 9 Pet. 275, 9 L. Ed. 127; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Parker v. Winnipiseogee, etc., Co., 2 Black. 545, 17 L. Ed. 333; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219.

And it was pointed out that even in cases of trust, when the conditions had been reduced to the simple fact that a certain sum of money was due from the trustee on account of his trust, a court of law was the proper forum, and a bill in equity would not lie; and several works of high authority were cited. The rule extends over all classes of cases where the condition stated in the statute exists. Another pertinent case cited in that opinion is Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476. That was a case in which a receiver under the direction of the Controller of the Currency brought suit to enforce the extraordinary liability of stockholders of a national bank to satisfy the claims of creditors. Speaking of the remedy Mr. Justice Swayne said:

"The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. When the whole amount is sought to be recovered the proceeding must be at law. When less is required the proceeding may be in equity"—

and goes on to explain the reason and the procedure in the latter case. And in Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271, it was held that although a court of equity has jurisdiction to entertain a cause of action in favor of an assignee against the debtor, yet that it should not be exercised when the plaintiff had a suitable remedy in an action at law, but only when he was embarrassed in pursuing such a remedy, as for instance, by collusive action between the debtor and the assignor, or the refusal of the assignor of the use of his name.

It is also urged that courts of equity have jurisdiction in cases of fraud; which is true enough, but the doctrine has its limitation in that the fraud is not remediable by an action at law. A man may acquire another's property by fraudulent misrepresentations; but if the latter may obtain complete relief in an action at law, as by a judgment for damages or for the recovery of the property by an action of replevin, he cannot resort to a suit in equity. In the case of United States v. Bitter Root Development Co., 133 Fed. 274, 66 C. C. A. 652, the plaintiff sought by a bill in equity to recover damages for repeated trespasses upon its property and the carrying away of timber, and the plaintiff invoked several doctrines of equity which had a specious application to the case. But in the well-considered opinions by Judge Gilbert in the Circuit Court of Appeals and by Mr. Justice Peckham in the Supreme Court, on appeal, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550, it was shown that, notwithstanding all this, the substantial fact remained that a common-law judgment for the value of the property and the damage done was a suitable remedy, and there was no reason why a jury could not ascertain and determine the amount which the plaintiff was entitled to recover.

We see nothing in the fact that this is a controversy arising in the course of bankruptcy proceedings which should take it out of the general rule. It is a suit, and must be such, and not a summary proceeding in bankruptcy. Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. And the language of the statute is that "suits in equity shall not be sustained in either of the courts of the United States," etc. As said by Mr. Justice Brown in Wehrman v. Conklin, 155 U. S. 314, at page 323, 15 Sup. Ct. 129, at page 132 (39 L. Ed. 167):

"These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action."

In holding that a court of law was the proper jurisdiction in which to obtain the remedy in this case to the exclusion of a court of equity, we do not mean to affirm that the latter court would have no lawful authority to entertain the suit and render a decree, but only that it ought not to do so. For, as we conceive, the rule was devised, and the statute was enacted, mainly to secure a privilege to the defendant; and this he might waive. In that case the court would proceed if there is a color of equitable jurisdiction in the case.

The decree must be reversed, with costs, and the cause remanded with instructions to dismiss the bill, but without prejudice to an action at law for appropriate relief.

WOLF v. LOVERING.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 90.

1. WRIT OF ERROR—DIRECTION OF VERDICT—REVIEW.

Where an order directing a verdict for defendant is objected to on a writ of error, the Court of Appeals is required to take the view of the testimony and the inferences to be drawn therefrom most favorable to the plaintiff, the question being, not whether a verdict ought to have been rendered for plaintiff, but whether it lawfully might have been.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3467-3475.]

2. RECEIVERS—CONTRACT—QUESTION FOR JURY.

Where an alleged personal contract of a receiver to procure the requisite notice of intention to transfer a seat in a cotton exchange, which was sold to plaintiff, was claimed to be established by conversations between defendant and the superintendent of the exchange, and by defendant's admissions, etc., defendant claiming that they showed nothing more than a receiver's promise in aid of a receiver's sale, it was for the jury, and not for the court, to determine what the agreement was.

3. SAME—PERSONAL CONTRACT.

Defendant, one of the receivers of a corporation, which he claimed owned a seat in the New York Cotton Exchange, standing in the name of C., and being desirous of selling the seat, communicated with the superintendent of the exchange, and was informed that it was necessary to return a written notice of intention to sell, signed by C. Defendant stated that he would obtain C.'s signature to the required notice, and placed the matter of the sale of the seat in the superintendent's hands. The superintendent arranged to sell the seat to plaintiff, but did not inform him of defendant's agreement until after the sale had been closed. Defendant failed to procure C.'s signature, and the sale was not consummated. *Held* sufficient to show an agreement on defendant's part in his individual capacity for the breach of which he was individually liable, under the rule that a personal undertaking by a receiver binds him personally.

4. SAME—PRESUMPTIONS.

In an action for breach of a receiver's contract to procure the necessary notice of intention to sell a seat in an Exchange which he sold to plaintiff, the presumption that the receiver bound himself officially and not personally, while proper to be considered by the jury in determining whether the receiver was individually liable, was no ground for withdrawing the action from the jury.

5. PRINCIPAL AND AGENT — ACTING FOR PARTIES ADVERSELY INTERESTED — KNOWLEDGE OF PRINCIPAL.

A receiver desiring to sell a seat in an Exchange applied to the superintendent of the Exchange who told him it would be necessary to obtain a written notice of intention to sell, signed by the person in whose name the seat stood. The receiver promised to obtain this, whereupon the superintendent arranged to sell the seat to plaintiff. *Held*, that the superintendent was the agent of both parties, so that his failure to inform plaintiff of defendant's agreement to obtain such notice until after the sale had been closed did not deprive plaintiff of the right to recover for breach thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 670–679.]

Lacombe, Circuit Judge, dissenting.

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

Hoadly, Lauterbach & Johnson (H. L. Schuerman, of counsel), for plaintiff in error.

Edward Bruce Hill (R. Victor, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This action is brought upon an alleged personal contract of a receiver. The substance of the complaint is that, in order to carry out an agreement made by the defendant as receiver of the American Cotton Company for the sale of a seat in the New York Cotton Exchange to the plaintiff, the defendant personally agreed to procure the requisite notice of intention to transfer such seat, signed by a third person in whose name the seat stood. Upon the close of the plaintiff's case the trial court directed a verdict for the defendant, in which action the plaintiff claims there was error. We are therefore called upon to determine whether there was sufficient evidence to support a verdict for the plaintiff. In so doing, it is our duty to take the view of the testimony, and of the inferences to be drawn therefrom, most favorable to the plaintiff. The question is not whether a verdict ought to have been rendered for the plaintiff, but whether it lawfully might have been. The testimony largely relates to conversations between the defendant and one King, superintendent of the Cotton Exchange. From these conversations, the admissions of the defendant, and all the circumstances the plaintiff claims an agreement personally binding the defendant. The defendant, on the other hand, claims that they show nothing more than a receiver's promise in aid of a receiver's sale. It was for the jury, and not the court, to determine what the agreement was. "The question whether a receiver has assumed such personal liability or not is one to be determined from the facts and circumstances of the case." Cake v. Mohun, 164 U. S. 315, 17 Sup. Ct. 100, 41 L. Ed. 447.

There was evidence in the case from which the jury might have found these facts: (1) The defendant was one of the receivers of the American Cotton Company which he claimed owned a seat in the New York Cotton Exchange. (2) The defendant was desirous of disposing of this seat and communicated with King, the superintendent of the

Exchange, with the end in view. The seat stood in the name of one Cooper, and King told the defendant that, under the rules of the Exchange, it would be necessary to obtain a written notice of intention to sell, signed by Cooper. (3) The defendant personally agreed that he would obtain Cooper's signature to the required notice, and placed the matter of the sale of the seat in King's hands. (4) King arranged to sell the seat to the plaintiff, but did not inform him of the defendant's personal undertaking until after the agreement of sale had been closed. (5) The defendant failed to procure Cooper's signature, and the sale was not consummated—to the plaintiff's damage.

These facts show an agreement on the part of the defendant in his individual capacity, and were sufficient to justify a verdict against him. A personal undertaking by a receiver binds him personally. Cake v. Mohun, supra; Farmer's Loan & Trust Co. v. Central R. R. Co. (C. C.) 7 Fed. 538; Rogers v. Wendell, 54 Hun, 540, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515; Klebisch v. Siedler, 7 Misc. Rep. 144, 27 N. Y. Supp. 417; Ryan v. Rand, 20 Abb. N. C. 313; Keene v. Gaehle, 56 Md. 343; Gluck & Becker on Receivers of Corporations (2d Ed.) § 82; Smith on Receiverships, § 128. It may well be that where a transaction relates to receivership property the presumption is that a receiver binds himself officially, and not personally. But this presumption, while proper to be considered by the jury, is no reason for taking a case away from the jury. In the present action, considering all the facts and circumstances, we cannot hold, as a matter of law, that the jury were without warrant to find this presumption overcome, and an individual obligation established. Perhaps we should not have so found had the question of fact been before us. Perhaps the jury would not have so found had the case been submitted to them. But the question is what they might have found.

The defendant contends, however, that even if he did make the personal promise to King, who was his agent in the matter, such fact was not communicated by King to the plaintiff before he agreed to purchase the seat, could not have induced the purchase, and, consequently, gave the plaintiff no right of action. The plaintiff, on the other hand, claims that King was the agent of both parties in the transaction; the defendant's agent in making the sale, and the plaintiff's agent in closing the matter.

We think the plaintiff's contention the correct one. King, as superintendent of the Exchange, was the person to whom both intending buyers and sellers of seats would naturally apply. From the very nature of his position, he acted for both parties. The alleged personal agreement of the defendant was for the benefit of any purchaser of the seat. It constituted one of the terms of the purchase, and the plaintiff was entitled to the benefit of it whether it was communicated to him before he agreed to buy or afterwards.

As a new trial must be ordered on account of the failure to submit the case to the jury upon the question of the defendant's express personal undertaking, it is unnecessary to consider the other assignments of error.

A new trial is ordered; costs to abide the event.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with the majority of the court. It is undisputed that plaintiff's agent knew that Lovering was receiver of the corporation; that the piece of property for whose sale they were negotiating was supposed to belong to the corporation, although standing in the name of an individual; that it was as a bit of receivership property that defendant was trying to sell it. Under these circumstances, it does not seem to me that the testimony is sufficient to warrant the conclusion that the minds of both parties to the negotiation met in agreement that Lovering would make himself personally and individually responsible as guarantor that a good title to the property would be made.

KLEPNER v. O. J. LEWIS MERCANTILE CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1908.)

No. 103.

1. ACTION—NATURE—CONTRACT OR TORT.

A complaint alleged that plaintiff agreed to ship defendant certain furs, which defendant was to accept on consignment and sell in St. Louis as plaintiff's agent; that on the arrival of the furs in St. Louis and delivery of the bill of lading to defendant's New York agent defendant was to advance $1,159.12, which was 50 per cent. of the consigned price, and that defendant was not to sell for less than the invoice prices, aggregating $2,318.25, and that in the event of defendant not being able to obtain such prices within a reasonable time it was to return the furs, and plaintiff was to return the advances; that defendant failed to pay the advance, and failed to sell or purchase any of the furs at the consigned prices and turn over the proceeds to plaintiff, and that nothing had ever been returned to plaintiff, except $450 advanced at the time the goods were sent; wherefore defendant wrongfully and in violation of the contract converted and disposed of the furs to its own use. *Held*, that the complaint was properly regarded as stating a cause of action for breach of contract, and not for conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 160–162.]

2. CONTRACTS—ORAL CONTRACT—SUBSEQUENT RECEIPT—EFFECT—VARIANCE.

Plaintiff alleged that she agreed to ship certain furs from New York to defendant for sale at not less than invoice prices, and in case defendant was not able to obtain such prices within a reasonable time it was to return the furs, whereupon plaintiff was to return an advancement equal to 50 per cent. of the invoice price of the goods, which defendant agreed, but failed, to make; that defendant, in violation of the contract, sold the goods for much less than the invoice prices. Plaintiff's agent and his bookkeeper testified that, several days prior to the execution of a receipt for a payment of the advances defendant agreed to make, plaintiff's and defendant's agents agreed to the terms of the consignment as alleged, and that on the day succeeding that on which the furs were shipped plaintiff signed a receipt to defendant for $200 advances, reciting that the merchandise was consigned to defendant for sale at auction or private sale without limit, and, in case the net proceeds of the sales should fall short of the sum advanced and commission and charges, plaintiff agreed to pay the deficiency. *Held* that, if plaintiff's testimony was believed, the receipt did not constitute a modification of the prior oral contract, and did not, therefore, constitute a variance from the contract alleged as a matter of law.

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

This cause comes here upon writ of error to review a judgment in favor of the defendant in error, who was defendant below. The judgment was entered upon a verdict directed by the court.

Edward A. Alexander and Jerome Buck, for plaintiff in error.

Herbert H. Gibbs (A. Delos Kneeland, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The controversy arises out of certain transactions between the parties touching the shipment of a lot of furs belonging to plaintiff in New York to defendant in St. Louis. The goods were received by defendant and subsequently sold by it for a sum less than the invoice price; it being the contention of plaintiff that the parties had agreed that the goods should not be sold at less than invoice price, and that in the event of failure to obtain such price they should be returned. There was oral testimony as to the negotiations between representatives of the respective parties, and various documents, receipts, etc., were put in evidence. At the close of plaintiff's case defendant moved to dismiss the complaint by reason of an absolute failure of complainant to prove the cause of action alleged in the complaint, contending that the complaint charged conversion of the goods, whereas the undisputed proof showed that the goods were sent to St. Louis consigned to defendant for sale, and that therefore the selling of them could not constitute conversion, and that if they were sold for a less price than had been agreed there would be only a breach of contract. The trial judge apparently ignored the point made, and treated the case as if it were an action for breach of contract, directing a verdict in favor of defendant on the ground that the proof showed the contract to be for a sale of the goods without restriction of the price.

The complaint is inartificially drawn; but it is fairly susceptible of the construction put upon it at the trial. The pleader concludes with an averment that "the defendant wrongfully and in violation of its said contract converted and disposed of said furs so intrusted to it to its own use." The fair and reasonable value of the furs is alleged to be $3,000, and damages are claimed for that sum, less $450 paid in advance. Examination of the preceding paragraphs, however, shows that the facts set forth do not sustain a charge of conversion, although they make out a cause of action for breach of contract. The case is quite similar to Conaughty v. Nichols, 42 N. Y. 83. Briefly stated, the allegations of fact are that on July 9, 1901, the parties made an agreement whereby plaintiff was to ship to defendant certain furs, which defendant was to accept on a consignment and sell in St. Louis as agent for the plaintiff; that as soon as the said furs arrived at the office of defendant in St. Louis and bill of lading was delivered to defendant's New York agent (Hall), defendant would advance $1,159.12, said sum being 50 per cent. of the consigned price of the goods; that it was mutually agreed that defendant should not sell or offer for sale said furs for less than the prices named in the invoice (aggregating $2,318.25), and that, in the event of defendant not being able to obtain the stipulated prices within a reasonable time, it would not sell the same, but return them to

plaintiff, who would thereupon return the advances; and that defendant should have an option itself to purchase the goods at the prices named. It is further alleged that defendant failed to pay and advance the said sum of $1,159.12, and failed to sell or purchase any of the said furs at the consigned prices and turn over to the plaintiff the money therefor, that demand was made for the "consigned prices" or the furs, and that nothing has been returned, except $450 advanced about the time the goods were sent.

Defendant's motion being made and granted at the close of plaintiff's case, no testimony on its behalf was taken, and we have only the plaintiff's side of the story. The trial judge disposed of the case on the strength of a receipt, which was put in evidence and which reads as follows:

"New York, July 18, 1901.

"Received of O. J. Lewis Mercantile Co. two hundred dollars, the same being advanced on merchandise belonging to the undersigned and consigned to O. J. Lewis Mercantile Co., for auction or private sale without limit, and in case the net proceeds of the sales of said merchandise shall fall short of the sum advanced and the commission and charges on the same I hereby agree to pay them such deficiency on demand.

"$200. A. Klepner."

It was held that the payment on account on that day, coupled with delivery of bill of lading and the signing of this instrument, constituted a written contract between the parties, which manifestly is very different from that alleged in the complaint. We are of the opinion, however, in view of the other testimony in the case, that there was sufficient evidence to entitle the plaintiff to go to the jury on the question as to whether or not there was a contract for the sale of these furs entered into and in part executed before the date when this payment of $200 was made and receipt signed. The plaintiff's agent undertook to explain the receipt by stating that he did not know how to read English, which, as the trial judge said, was immaterial; but he and his bookkeeper both swore that, several days before July 18th, plaintiff's and defendant's agents agreed to the terms of sale on consignment set out in the complaint, and that on July 17th the furs were shipped to defendant. If the jury credited this testimony, the contract thus entered into would not be modified by the recital in the receipt that its terms were different. What might have been the condition of the case if evidence on behalf of defendant had been put in we cannot say; but as it stood when plaintiff rested there was not such failure to prove the contract declared upon as would warrant a dismissal of the complaint.

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

STILLWAGON v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Third Circuit. February 5, 1908.)

No. 63.

1. COURTS—CIRCUIT COURT OF APPEALS—ASSIGNMENTS OF ERROR—NECESSITY FOR.

Under a rule of the Circuit Court of Appeals, Third Circuit, upon application for a writ of error, plaintiff in error, must file an assignment of errors setting out separately and particularly each error asserted and intended to be urged, and when this is not done counsel will only be heard at the request of the court, and errors not assigned according to the rule will be disregarded, but the court at its own option may notice a plain error not assigned.

2. SAME—OMISSION NOT SUPPLIED.

An omission to file an assignment of error to the refusal of leave to file an amended petition was not supplied by a statement in plaintiff in error's brief, under the heading "Specifications of Error," that "the court erred in refusing to allow the filing of an amended petition after the expiration of the statutory period for bringing the action, which simply added new specifications of error on the part of the defendant, but did not create a new cause of action."

3. SAME—PLEADING—AMENDMENT—DISCRETION.

Under Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], authorizing federal courts to permit at any time a party to amend any defect in the process or pleadings upon such conditions as it shall in its discretion prescribe, in an action brought July 7, 1905, for personal injury occurring November 2, 1903, the Circuit Court did not abuse its discretion in refusing plaintiff's application, made March 17, 1906, to file an amended statement of claim, whether the amendment set up a new cause of action barred by limitations or not.

4. WRIT OF ERROR—ORDERS REVIEWABLE.

A writ of error operates only on a record in which a final judgment has been entered, and does not lie from an order in a personal injury action refusing plaintiff's application for leave to file an amended statement of claim.

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

Rody P. Marshall, for plaintiff in error.

John S. Wendt, for defendant in error.

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

CROSS, District Judge. The writ of error in this case brings before this court for review the following order of the Circuit Court:

"And now, to wit, April 17, 1907, Thomas M. & Rody P. Marshall, attorneys for the plaintiff above, Charles E. Stillwagon, having made a motion for leave to file an amended petition in the above case, leave to file the same is hereby refused."

An exception was duly allowed and sealed to the entry of the above order. The record, however, discloses no assignment or assignments of error whatever. A rule of this court requires the filing, upon application for a writ of error, of "an assignment of errors, which shall set out separately and particularly each error asserted and intended to be

urged. * * * When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its own option may notice a plain error not assigned." A futile attempt to supply the omission was made in the brief of the plaintiff in error, where, under the heading "Specifications of Error," the following appears:

"The court erred in refusing to allow the filing of an amended petition, after the expiration of the statutory period for bringing the action, which simply added new specifications of error on the part of the defendant, but did not create a new cause of action."

This statement in no sense supplies the deficiency, and the writ of error must consequently be dismissed. Other sufficient reasons for its dismissal, however, appear and will be briefly adverted to.

An accident which happened, as alleged, through the negligence of the defendant and caused injury to the plaintiff, occurred November 2, 1903, within the state of Pennsylvania, and the present suit for damages resulting therefrom was instituted against the defendant July 7, 1905. Subsequently, on March 17, 1906, and after the expiration of two years, within which, by the statute of limitations of that state, the suit was required to be brought, application was made to the court by the plaintiff to file an amended statement of claim, and it was from the above order denying such application that the writ of error was taken. Section 954 of the Revised Statutes [U. S. Comp. St. 1901, p. 696] provides, among other things, that:

"The court may, at any time, permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion and by its rules prescribe."

In Mexican Central Railway Company v. Pinkney, 149 U. S. 194, 200, 13 Sup. Ct. 859, 862, 37 L. Ed. 699, the court says:

"The question presented by this assignment of error is that the court erred in refusing leave to file a plea during the progress of the trial on the question of the plaintiff's citizenship, and in refusing to permit issue to be joined thereon. It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and unless there has been gross abuse of that discretion they are not reviewable in this court on writ of error."

The foregoing case was cited and followed by this court in Dunn et al. v. Mayo Mills, 134 Fed. 804, 67 C. C. A. 450. See, also, Watts v. Weston et al., 62 Fed. 136, 10 C. C. A. 302; Brewing Company v. Ice Machine Company, 77 Fed. 138, 23 C. C. A. 89; Chapman v. Lumber Company, 89 Fed. 903, 32 C. C. A. 402; Buchanan et al. v. Cleveland Linseed Oil Company, 91 Fed. 88, 33 C. C. A. 351; and Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, and cases therein cited. The rule above laid down is controlling in the federal courts, and is also one which is generally followed and applied in the state courts.

Unquestionably the order which was made by the learned circuit judge rested in his sound discretion, and, irrespective of whether or not the application to amend set up a new cause of action, barred by the

statute of limitations, the amendment could reasonably and properly be denied, in view of the period of time which had elapsed between the accident and the application for the order. The record discloses no abuse, but rather an exercise of sound discretion, on the part of the judge.

Again, the order under review is clearly not a final judgment. As was recently said by this court in Morris v. Dunbar, 149 Fed. 406, 79 C. C. A. 226, and as constantly said by other courts:

"A writ of error operates only on a record in which a final judgment has been entered."

No final judgment appears of record in this case. The order in question is of a character which is frequently allowed or denied in the ordinary progress of a suit, and in no sense does it, or can it, finally determine the cause. Under the circumstances it is unnecessary to consider the question argued as to whether or not the application to amend presented a new cause of action which was barred by the statute of limitation.

The writ of error will be dismissed, with costs.

BEAMER et al. v. WERNER et al.

(Circuit Court of Appeals, Seventh Circuit. November 19, 1907.)

No. 1,392.

1. APPEARANCE—TIME—GENERAL APPEARANCE—EFFECT.

Where, in a suit to set aside a contract for the sale of land, defendants, who were served only by publication, after removal of the cause to the federal courts, elected to appear to the merits and defend, such appearance operated to convert the suit from a proceeding in rem to a suit in personam.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 67.]

2. QUIETING TITLE—CLOUD ON TITLE—REMOVAL—JURISDICTION.

Where an alleged spurious contract for the sale of land in Missouri provided for a cash payment of a portion of the consideration, or by conveyance in lieu thereof of a farm owned by one of the complainants in Illinois, such agreement when filed in Illinois constituted a cloud on complainant's title to the Illinois land, which equity had jurisdiction to remove.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 14-25.]

3. APPEAL—FINDINGS—REVIEW.

Findings of the trial judge in a suit to remove a cloud on title, while not controlling on appeal, will not be disturbed unless they rest on an erroneous view of the rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

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

The appellants were the defendants below, in a bill filed by the appellees—originally in the Circuit Court of Will county, Ill., but removed to the United States Circuit Court, on petition by the appellants—seeking equitable relief in respect of a purported agreement in writing between the appellees and the

appellant, named as Missouri Immigration Association, purporting to be a contract for sale and exchange of lands, recorded in the recorder's office of Will county, where one of the tracts of land referred to was located. After removal of the suit issues were joined; and upon final hearing of the testimony offered under bill and answers, the trial court found in favor of the appellees upon all the issues, and passed a decree accordingly, from which this appeal is prosecuted.

The bill sets forth the purported agreement, which provides for a sale to the appellee Anna Werner of lands in Missouri for $16,000, in consideration of $2,400 to be paid in cash and $9,600 to be paid either in cash or by conveyance, in lieu thereof, of a farm owned by her, in Will county, Ill., described in the paper bearing the signatures of both parties, together with $4,000 assumed in a mortgage upon the land. Facts are averred in reference to the negotiations, preparation of the writing, and procurement of signatures, which are sufficient, if true, to establish imposition in the transaction, and no intention or understanding upon the part of the appellees that a contract was executed between the parties; on the contrary, that they were led to believe and understood that the instrument signed by the appellees was the only writing so signed, and was left in their hands, undelivered and without force, to be examined by their counsel, and operative only in the event of their conclusion to make the trade after consultation, and upon their delivery of such instrument to the appellants. Further averments tend to impeach the duplicate of the writing, retained by the appellants, as obtained through false representations and recorded in Will county for the purpose of imposing upon the appellees by casting a cloud upon the title to their lands therein embraced in the agreement. The answers filed by the appellants deny these averments, and state facts tending to establish contract obligations. All parties to the transaction testified upon the hearing, and the issue between the opposing versions rests upon the credibility of witnesses, as the testimony on the part of the appellees plainly supports the averments of the bill.

In the course of the hearing, it appeared that the appellants had commenced a suit in assumpsit against the appellees in the United States Circuit Court to recover damages upon the alleged contract in question prior to the filing of the bill in equity; and the trial court granted leave to the appellees to file amendments to the bill, setting up such fact for injunctional relief against the prosecution of the suit at law. The decree adjudges the written instrument to be void and without force as a contract, conferring no valid lien or claim in favor of the appellants upon the farm in Will county therein mentioned, and provides for release upon the records; and it further enjoins the appellants from prosecution of their suit at law.

The appellants were nonresidents of Illinois, and the only service of process at the commencement of the suit was by publication. While their appearance in the state court was special, for the purpose of removal, each appeared and answered the bill, after removal, without reservation or objection; and no challenge of jurisdiction appears in the record before the trial court over person or subject-matter.

D. H. McGilvray, for appellants.

E. C. Wetten, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The complaints of rulings made and conclusions reached by the trial court are numerous as set out in the assignment of errors, but all material questions for consideration, including all which are discussed in the brief for appellants, may be resolved into two inquiries: (1) Whether the relief granted was within the jurisdiction acquired by the trial court; and (2) whether the decree was authorized

under the evidence. No reversible error appears, if these inquiries are answered affirmatively.

1. The contention of want of jurisdiction rests on the twofold propositions, in substance, that the only jurisdiction obtained was in rem (through the publication), and thus limited equitable relief under the bill to removal of an existing cloud upon the appellees' title; and that the recorded matter cast no cloud, so that equitable cognizance was unauthorized. Neither of these propositions is tenable in our view of the record. It is true that no personal jurisdiction was acquired until after removal, and without general appearance and answers no personal decree could be upheld. The appellants could have suffered default without incurring personal liability. They elected, instead, to appear to the merits and defend the transactions complained of, and the rule is well settled that such procedure, after removal, "converted into a personal suit that which was before a proceeding in rem." Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98, 105, 11 Sup. Ct. 36, 34 L. Ed. 608, 11 Notes U. S. Rep. 1051. That the subject-matter of this controversy was within the general jurisdiction in equity is unquestionable; and jurisdiction of the person may be conferred by consent or waiver, without service of process, as a personal privilege or exemption from liability to process may always be waived. St. Louis, etc., Ry. v. McBride, 141 U. S. 127, 130, 132, 11 Sup. Ct. 982, 35 L. Ed. 659; 12 Notes U. S. Rep. 19. So, equitable cognizance of the issues between the parties arose, irrespective of any question as to the relief available before appearance and answers.

The record of the alleged agreement, however, not only authorized its removal as a cloud upon the title, if spurious, under the liberal rule of the forum (Hodgen v. Guttery, 58 Ill. 431, 438; Moore v. Munn, 69 Ill. 591, 595), but it purported to give the appellants an equitable claim against the appellees' farm if the purchase money for the Missouri lands were unpaid, and thus raised a cloud, in any view of the rule applicable for relief. With equitable jurisdiction established over subject-matter and persons, the power of the court to grant leave to amend the bill for extension of relief is undoubted; and the objection to its exercise in the case at bar is without force.

2. The contentions that the evidence was insufficient to impeach the alleged contract rest on a misconception of the force of the conclusion of the trial court as to the facts. Failure or deficiency of testimony in support of any material averment of fact in the bill is not pointed out in the brief for appellants; and the various matters complained of are, in effect, the findings of fact by the court in favor of the proof furnished on behalf of the appellees, instead of accepting the adverse testimony of witnesses on the part of the appellants as the credible version. Examination of the evidence, certified in the record, discloses direct, clear, and positive testimony which fully sustains the decree. This testimony is controverted in material points by witnesses for the appellants, and the issue between the parties rests upon the truth of one or the other version. The witnesses testified in open court so that each was heard and observed by the trial judge, and his determination of the credible testimony, if not controlling in equity as in law, will in no in-

stance be disturbed, unless it rests on an erroneous view of the rights involved, as to the burden of proof or otherwise. We are satisfied, however, with the deductions of fact, as found by the trial court in the suit at bar, irrespective of their presumptive value, and they clearly authorize the relief granted.

The decree of the Circuit Court accordingly is affirmed.

DENISON v. SHAWMUT MINING CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 62.

1. WRIT OF ERROR—VERDICT—VACATION—INADEQUATE DAMAGES—REVIEW.

Denial of a motion to set aside a verdict for plaintiff in a federal court because the damages awarded were inadequate, in the exercise of the trial court's discretion, is not subject to review in an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3864.]

2. CONTRACTS—CANCELLATION OF PRE-EXISTING CONTRACT—CONSIDERATION—MUTUALITY.

A contract between plaintiff and defendant by which an existing contract for the sale by plaintiff of the output of a coal mine on certain terms was canceled, a controversy settled by plaintiff's payment to defendant of $600, and a new agreement made by which defendant agreed to sell and deliver to plaintiff the output of the mine from the date of the new contract until April 1, 1903, for which plaintiff agreed to pay certain specified prices monthly, was based on a sufficient consideration and was not void for want of mutuality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1119–1122.

Mutuality in, see notes to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

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

Plaintiff, Charles L. Denison, was a wholesale coal dealer in Buffalo. On March 13, 1902, one B. E. Cartwright, having charge of the coal sales of defendant, a coal mining company, contracted on defendant's behalf for the sale and delivery to plaintiff at the mine from April 1, 1902, until April 1, 1903, of the entire output of the Brock Mine operated by defendant in Pennsylvania. Defendant, acting under such contract, thereafter delivered the coal as ordered, and received payments therefor. This contract was made by Cartwright with the knowledge and authority of defendant's president, one Byrne. On July 1, 1902, the relations between Byrne and Cartwright having become hostile, the latter left defendant's service, and one D. F. Maroney took his place. In the latter part of July, Byrne notified plaintiff that Cartwright had deceived him by representing that the Erie Railroad Company had withdrawn a rebate, whereas plaintiff was getting the benefit of such rebate. Byrne asserted that plaintiff was a party to the deception, and demanded that the contract of March 13th be canceled. Plaintiff denied participation in any deception, but said he was willing to cancel the contract in case a satisfactory substituted contract could be agreed on. It was thereupon arranged that Maroney, who was defendant's vice president, should take up the matter with plaintiff and adjust it, and, as a result, Denison and Maroney made and agreed on the terms of a substituted contract to be executed in consideration of the cancellation of the contract of March 13th, the relinquishment by Denison of any rights with respect to a certain switch, and

a compromise payment by Denison of $600. Defendant's contract, dated August 14, 1902, before being delivered, was submitted by Maroney to defendant's general sales agent and to defendant's attorney, both of whom approved it. By its terms, the contract of March 13, 1902, was canceled, and it provided that defendant should sell and deliver the output of the Brock Mine from August 1, 1902, until April 1, 1903, and that plaintiff should pay therefor at the rate of $1 per ton for the first 50,000 tons and $1.15 per ton for the balance. The action was brought for breach of this contract, defendant claiming that it was without consideration and void for indefiniteness and want of mutuality. A judgment was rendered for plaintiff for much less than the relief demanded, from which both parties brought error. Affirmed.

For opinion below, see 135 Fed. 864.

Rogers, Locke & Milburn (Charles G. Miller and Harrington Putnam, of counsel), for C. L. Denison.

Frank Sullivan Smith (James McMitchell, of counsel), for Mining Co.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The plaintiff below obtained a verdict of $5,000, which he regarded as inadequate, and moved to set aside for that reason. The motion was elaborately argued, carefully considered, and denied. The motion was addressed to the discretion of the court, and its denial is not the subject of review in an appellate court. This rule has been so long established and so uniformly adhered to by this court that discussion as to its wisdom and propriety is unnecessary. Clement v. Wilson, 135 Fed. 749, 68 C. C. A. 387; United Engineering, etc., Co. v. Broadnax, 136 Fed. 351, 69 C. C. A. 177; Central Vt. R. Co. v. Bateman, 75 Fed. 1021, 20 C. C. A. 679.

As the verdict was in the plaintiff's favor on the merits, it is not easy to see how he can take advantage of alleged errors in the admission and exclusion of testimony or in the charge. On every question at issue the jury found in favor of the plaintiff, even on the question of damages. His only grievance is that they assessed his damages at too low a figure. We think the plaintiff has failed to assign any error which entitles him to a new trial.

The defendant has also sued out a writ of error presenting the question of law that the contract in suit is not valid and enforceable. We are of the opinion that defendant's position in this regard is not well taken. We agree with the trial judge in thinking that "the contract is not void for want of mutuality; it is based upon a good and sufficient consideration, and its effect was to cancel an existing contract and make a new arrangement * * * which was * * * binding upon the defendant to sell the output of the mine and upon the plaintiff to take the output under those provisions."

Both writs of error are dismissed, and the judgment is affirmed.

As the writ of the plaintiff below was allowed in August, 1905, and that of the defendant below not until February 2, 1906, six months afterwards, and as the greater part of the record was necessary for the presentation of the plaintiff's assignments of error, we think the costs of this review should be borne by him.

UNITED STATES v. HAMBURG AMERICAN LINE.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 19.

ALIENS—DEPORTATION — EXPENSES — INLAND "TRANSPORTATION" — "COST OF TRANSPORTATION."

Immigration Act March 3, 1903, c. 1012, § 20, 32 Stat. 1218, provides that any alien who shall be found a public charge in the United States from causes existing prior to landing shall be deported at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing the alien into the United States. *Held*, that the term "transportation," as so used, should be given its ordinary meaning, viz., carriage from one place to another, and that the phrase "cost of inland transportation" therefore only included the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States any part of the traveling expenses of an officer sent to bring the alien to the port of deportation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7075, 7076.]

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

Henry L. Stimson, U. S. Atty., and Winfred Denison, Asst. U. S. Atty.

W. G. Choate (Lucius H. Beers, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This action is based upon section 20 of the immigration act of 1903 (Act March 3, 1903, c. 1012, 32 Stat. 1218), which provides as follows:

"That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country from whence he came at any time within two years after arrival at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that cannot be done, then at the expense of the immigrant fund referred to in section one of this act."

It appears from the agreed statement of facts that one Suerpenas, an alien, was brought to the port of New York in one of the defendant's ships, and was admitted by the immigration authorities; that within a year thereafter, at Syracuse, N. Y., he became a public charge from causes existing prior to his landing, and that he was thereupon brought from Syracuse to New York, and thence deported to the country whence he came. The defendant is clearly liable under the act. The only question is, what items of the expense connected with bringing the alien from Syracuse to New York are embraced by the use of the phrase "one-half of the cost of inland transportation"? The government claims to recover one-half of the entire expenses going and coming of the immigration officer who went from

New York to Syracuse for the alien, as well as of the actual cost of carriage of the alien, including car fare and livery hire. The defendant, on the other hand, claims that it is liable only for the last item—the actual cost of carriage. The District Court practically sustained the defendant's contention.

The alien having been admitted by the immigration authorities, there is no element of fault upon the part of the defendant. The defendant is liable for the expenses of deportation only because the government has imposed such liability as a condition of bringing aliens into the country. Moreover, in addition to the strictly deportation expenses, the government might have required the payment of such other expenses connected with the removal of the alien to the port of deportation as it deemed proper. Thus, in the immigration act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 904 [U. S. Comp. St. Supp. 1907, p. 401]), the section (section 20) which takes the place of the section of the act of 1903, which we are considering, provides that "one-half of the *entire cost of removal to the port of deportation* shall be at the expense of the contractor, procurer or other person by whom the alien was unlawfully induced to enter the United States." (Italics ours.)

The act of 1903, however, is more limited in scope than the act of 1907. Whatever may be the actual expense of removing the alien to the port of deportation, it provides that only a particular portion of such expense, viz., "one-half the cost of inland transportation," shall be collectible. We think that the word "transportation" as so used should be given its ordinary meaning—carriage from one place to another. The phrase "cost of inland transportation" means the cost of carrying the alien from the inland place where he is found to the port of deportation. It does not include the cost of carrying some one else; much less the expenses of an officer traveling away from the port of deportation. If Congress desired to include such items, it should have used broader language, as it did in the later act.

There is no error in the judgment of the District Court, and it is affirmed.

G. W. SHELDON & CO. v. UNITED STATES.

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

No. 52 (4,162).

1. CUSTOMS DUTIES—CLASSIFICATION—"SCRAP IRON"—OLD CHAINS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], which provides for "scrap iron," and defines it as "waste or refuse iron * * *, fit only to be remanufactured," refers not only to pieces or scraps thrown off or discarded in the course of manufacture, but to completed articles worn out by use, such as old chains, in small pieces, fit only for remanufacture.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6358.]

2. SAME—SPECIFIC DESIGNATION—"SCRAP IRON"—"JUNK."

The provision for "scrap iron" in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], is more specific than that for "junk, old," in section 2, Free List, par. 588, 30 Stat.

198 [U. S. Comp. St. 1901, p. 1684], as the latter includes an infinite variety of things, of which one kind is "scrap iron."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6358; vol. 4, p. 3874.]

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

This is an appeal by the importers from the Circuit Court, Southern District of New York, affirming a decision of the Board of General Appraisers, G. A. 6,281 (T. D. 26,917), which sustained the action of the collector. For decision below, see 152 Fed. 318.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The merchandise in question is old iron chains, in small pieces, fit only for remanufacture. The government contends that this merchandise is subject to duty under paragraph 122 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]):

"Iron in pigs, iron kentledge, spiegeleisen, ferro-manganese, ferro-silicon, wrought and cast scrap iron, and scrap steel, four dollars per ton; but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured."

The importers claim that the merchandise is entitled to free entry under paragraph 588:

"Junk, old."

It may be conceded at the outset that these chains are old junk. But it does not necessarily follow that they are entitled to free entry. If they are more specifically described in the "iron" paragraph than in the "junk" paragraph, they fall within its provisions. Thus, while old bottles are old junk, it was held in Carberry v. United States (C. C.) 116 Fed. 773, that they came within the provision specially describing bottles. So, if these old chains were fit for use, they might still be junk, but would be better described in the special chain paragraph.

In our opinion old, broken, iron chains, fit only for remanufacture, are more specifically designated as "scrap iron" in the "iron" schedule than as "old junk." There is evidence that in the trade they are called both "scrap iron" and "junk"—the terms being used interchangeably. But the latter term is of much wider application than the former. It includes an infinite variety of things. Articles of iron are only one kind of junk. All scrap iron may be junk, but all junk is not scrap iron. But notwithstanding the testimony that in the trade both terms "scrap iron" and "junk" are applied to secondhand chains, the importers contend that the former term as used in paragraph 122 is inapplicable to old material. In support of this contention they especially call attention to the concluding portion of the paragraph, "but nothing shall be deemed scrap iron or scrap steel except waste or

refuse iron or steel fit only to be remanufactured." And they contend "that the terms 'waste' or 'refuse iron' refer to iron pieces or scraps which have been thrown off or discarded in the course of manufacture, and do not apply to completed articles which have been in use in trade and commerce for a specified purpose."

We cannot approve this contention. The "iron" schedule in the act apparently embraces all kinds of iron and iron products. The evident purpose of the proviso in the present paragraph is to limit the operation of the low rate of duty to iron products of low value—to compel other products to pay higher rates, not force them out of the "iron" schedule altogether. The construction contended for would contravene this purpose, and admit a large variety of iron articles free of duty. There is nothing in the phrase "waste or refuse iron or steel" which compels such construction. In the ordinary use of words this phrase well applies to old broken up chains, good only for remanufacture. Moreover, the Supreme Court has negatived the claim of the importers that the term "waste iron" is inapplicable to old iron by its decision in Schlesinger v. Beard, 120 U. S. 264, 7 Sup. Ct. 546, 30 L. Ed. 656. The history of the statute also supports this view. Prior to 1890 the proviso in the paragraph of the tariff act, which corresponded to paragraph 122, read as follows:

"Nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel that has been in actual use and is fit only to be remanufactured."

Here the term "scrap iron" expressly covered old iron, and could not cover anything else. New iron was excluded. The scraps or pieces left over in the process of manufacture, which the importers say are the only things which come under the present statute, could not have come within the original act at all. To sustain the importers' contention is to hold that the provision as amended is now inapplicable to the only articles which it formerly covered, and that Congress narrowed the scope of the statute by striking out words of limitation.

The decision of the Circuit Court is affirmed.

BUEHNE STEEL WOOL CO. v. UNITED STATES.
UNITED STATES v. BUEHNE STEEL WOOL CO.

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

Nos. 86, 87 (4,389, 4,415).

1. CUSTOMS DUTIES—CLASSIFICATION—"STEEL WOOL"—"ARTICLES MANUFACTURED FROM WIRE."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], the provision for "articles manufactured from * * * wire," cannot be restricted to manufactured articles which contain the round wire in its integrity; and "steel wool," consisting of filaments shaved from steel wire, and constituting a finished commercial article, is embraced in said provision.

2. SAME—DOUBT—IMPOSITION OF HIGHEST RATE.

Where merchandise is dutiable at rates varying according to certain prescribed conditions, and such conditions are not determinable by the customs officers on inspection of the goods, the collector may assess duty

at the highest rate which the circumstances will warrant, leaving it to the importer to inform the collector of the true conditions by satisfactory evidence.

Cross-Appeals from the Circuit Court of the United States for the Southern District of New York.

These causes come here upon appeals by the importer and the government, neither of whom appear to be satisfied with the classification of the articles imported which has been approved by the Board of General Appraisers and the Circuit Court.

For decision below, see 154 Fed. 93, affirming a decision of the Board of United States General Appraisers, G. A. 6,406 (T. D. 27,536).

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty., and W. Wickham Smith, for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The importations were under the tariff act of 1897. The relevant paragraphs are as follows:

"Par. 135. Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act, all of the above valued at one cent a pound or less, three-fourths of a cent a pound; valued above one cent and not above one and four-tenths cents per pound, four-tenths of one cent a pound * * *; valued above sixteen cents per pound, four and seven-tenths cents per pound." Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638].

"Par. 137. Round iron or steel wire not smaller than number thirteen wire gauge, one and one-fourth cents per pound; smaller than number thirteen and not smaller than number sixteen wire gauge, one and one-half cents per pound; smaller than number sixteen wire gauge, two cents per pound: Provided, that all the foregoing valued at more than four cents per pound shall pay forty per centum ad valorem. Iron or steel or other wire not specially provided for in this act, including such as is commonly known as hat wire, or bonnet wire, crinoline wire, corset wire, needle wire, piano wire, clock wire, and watch wire, whether flat or otherwise, and corset clasps, corset steels, and dress steels, and sheet steel in strips, twenty-five one-thousandths of an inch thick or thinner, any of the foregoing, whether uncovered or covered with cotton, silk, metal, or other material, valued at more than four cents per pound, forty-five per centum ad valorem: Provided, that articles manufactured from iron, steel, brass or copper wire, shall pay the rate of duty imposed upon the wire used in the manufacture of such articles, and in addition thereto one and one-fourth cents per pound, except that wire rope and wire strand shall pay the maximum rate of duty which would be imposed upon any wire used in the manufacture thereof, and in addition thereto one cent per pound; and on iron or steel wire coated with zinc, tin, or any other metal, two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made." 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639].

"Par. 193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured forty-five per centum ad valorem." 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

The collector classified the merchandise under paragraph 193. The Circuit Court held that its proper classification was under paragraph 135. It being contended by the importer that it was covered more specifically by paragraph 137, the Circuit Court followed a decision of Judge Townsend in Buehne v. U. S. (C. C.) 140 Fed. 772, and overruled the contention. The merchandise is known as "steel wool," which is manufactured from steel wire by a patented process whereby, by means of a toothed knife, the steel is shaved into filaments of varying degrees of fineness, which constituted in that form a finished commercial article used chiefly for polishing hardwood floors and furniture. There is evidence to the effect that sometimes—though apparently rarely—the article is made from steel wire rods or steel bars; but as to the importations now before us all parties concede that they are manufactured from steel wire.

The phrase "articles manufactured from steel wire" seems to be more specific than the phrase "steel in all forms and shapes not specially provided for in this act." We are clearly of the opinion that it cannot be restricted to manufactured articles which contain the round wire in its integrity; the use of the words "manufactured from wire" precludes so narrow a construction. The paragraph is apparently framed to protect the wire-drawing industry. It lays a duty not only on the wire while it remains wire, but on articles into whose manufacture wire has entered as the raw material. It is suggested that the plain language of paragraph 137 should not be held to cover this particular article manufactured from wire because, the identity of the wire being destroyed, it is impossible from mere inspection to determine accurately either its gauge or value. But this circumstance presents no really serious difficulty. In the case of each importation the collector would, of course, assess duty on the basis of the highest value of wire which the appearance of the article will warrant, and upon the assumption that the gauge was the one usually taken for the manufacture of such articles. If the value were less or the gauge larger, it would be for the importer to inform the collector of those facts by satisfactory proofs. In our opinion, therefore, this steel wool should be assessed for duty under paragraph 137.

The protest claims, inter alia, that the merchandise imported is covered by paragraph 137 as articles manufactured from round steel wire worth less than four cents a pound, but gives no information as to what was the gauge of the wire, and we do not find evidence in this record showing either the value or the gauge of the wire from which this particular lot of steel wool was manufactured. Nevertheless the protest was sufficiently specific to inform the collector as to what was the classification which the importer asked for; upon reliquidation the amount of duty could have been determined at such sum as would have secured to the government the full amount of duty.

The decision of the Circuit Court and of the Board of General Appraisers is reversed, and causes remanded for reliquidation of the entries in accordance with the views above expressed.

JACKSON FIBRE CO. v. MEADOWS.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1908.)

No. 1,732.

1. MASTER AND SERVANT—INJURIES TO SERVANT—TELEPHONE LINES—DUTY OF MASTER.

Where defendant maintained a telephone line as a part of its factory equipment, it was bound to keep the poles in a reasonably safe condition so as not to be dangerous to an employé required to ascend the same to repair the wires.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

2. SAME—QUESTION FOR JURY.

In an action for injuries to a servant by the fall of a telephone pole on which he was required to work, whether plaintiff in the exercise of ordinary care knew or should have known that the pole was rotten, and therefore assumed the risk of injury in ascending the same, *held* for the jury.

[Ed. Note.—For case in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068–1088.

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

3. TRIAL—REQUEST TO CHARGE—REFUSAL.

It was not error for the court to refuse requests to charge which were covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

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

R. R. Sneed, for plaintiff in error.
T. A. Lancaster, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

RICHARDS, Circuit Judge. The defendant below, the Jackson Fibre Company, owned and operated a cotton factory in Tennessee, and, in connection with it, a private telephone and signal system running, by poles and wires, from its office to its barn. The plaintiff below, Meadows, did the general electrical work upon this system, keeping it in repair. He was not a lineman, nor had he ever worked for a telephone company. He states he was assistant electrician, the master mechanic, Mr. Wadleigh, being the chief electrician. He says he had nothing to do with the erection and inspection of the poles, the yard foreman, Mr. Nichols, having that duty. On December 19, 1905, the wires between the office and the barn became entangled, and Wadleigh sent word to Meadows to come out and straighten the wires right away. Meadows first tried to unentangle them with a pole, but, failing in this, put a ladder up against the pole and climbed up to the cross-arm. Here he unloosened one of the wires and threw it to his assistant below. Then he told the latter to pull; he did, and the pole fell, severely injuring Meadows. It appears from the testimony that

this was a cypress pole which had been in use for about four years, and below the ground it was "doty" or affected with dry rot. It was the only old pole left, the others having been replaced that year. Nichols, the yard foreman, did this. Nichols also had a coal bin constructed around the pole. It does not appear there was any employé of the company whose duty it was made to inspect poles. The case went to the jury and there was a verdict for Meadows. The effort is to reverse, principally upon the ground that a verdict should have been directed for the defendant.

The duty of a telephone company to its employés, respecting poles, was before the court in Cumberland Tel. & Tel. Co. v. Bills, 128 Fed. 272, 62 C. C. A. 620, and in Britton v. Central Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598. In the first case, the situation was somewhat akin to the present one. The plaintiff was not an experienced lineman. The company therefore owed him the duty of inspection and instruction. Whether it performed these duties, so as to warn him against the possible dangers of his employment, was a matter left to the jury. So, also, was the question of contributory negligence. 128 Fed. 274, 275, 62 C. C. A. 620. In the second—the Britton Case—the employé who was injured by the fall of a rotten pole was a lineman. His experience was not so extended as to warrant the court below in taking the case from the jury, his competency as to poles being left in some doubt by the testimony. It did not appear he was fully advised as to the proper method of inspecting poles, and we thought the question ought to have been left to the jury whether, under all the circumstances, the telephone company was not under the duty of cautioning and instructing such a lineman before putting him at the work of transferring wires from old and dangerous poles.

In the case at bar, the primary and positive duty undoubtedly rested upon the defendant below to use ordinary care to keep the pole which fell and broke in a reasonably safe condition. It was an appliance in use as a part of the telephone and electric system. It had to be used to keep that system in repair, and therefore the primary duty rested upon the defendant to keep it in a reasonably safe condition. Along with this duty it was necessary, of course, to inspect the pole from time to time to ascertain whether it was in a reasonably safe condition for use. It seems to have been conceded by the defendant that the pole was not reasonably safe—it was rotten—and it was made no employé's duty to inspect it and ascertain its condition. But obviously the primary duty could not be avoided in that way. The defense is made, however, that Meadows had charge of these electrical appliances, the poles and wires and instruments; that it was his duty to keep them in repair, and that being his duty he should have known and must have known that this pole was rotten. If, in the use of ordinary care, he must have known that it was rotten, then he assumed the risk of climbing it, and cannot recover because it fell and hurt him. Williams v. Ry. Co., 149 Fed. 104, 79 C. C. A. 146. But here comes in the question which we think was properly submitted to the jury, and upon which the verdict may rest. Did Meadows, in the exercise of ordinary care, know, or was he obliged to know, that the pole was rotten? It seems to us this was

a question peculiarly for the jury. Meadows was not a lineman; he apparently knew nothing about the poles except as supports for wires. He had not put up any of the poles; the record does not show that he knew how to inspect a pole and tell whether it was safe or not. He had been there for several years. He knew that Nichols, the yard foreman, had replaced all the poles except this one, and, so long as it remained, Meadows had a right to think it was safe. It was the duty of the company to keep it safe, and, if it did not intend to do that, then instruct him how to find out whether it was safe or not. Instead of doing this, its representative, Yard Foreman Nichols, put a coal bin around it, indicating it was safe by hindering inspection.

There was a large number of special requests made, which were refused. The exception to this refusal was so worded that it may be regarded as a general exception to the refusal to charge all the requests in a lump. Bean-Chamberlain Co. v. Standard Spoke, etc., Co., 131 Fed. 215, 218, 65 C. C. A. 201. But these requests, when examined, all rest upon, or are different ways of stating, the fundamental request, to direct a verdict for the defendant. So far as they were based on that, they were properly refused; so far as they stated general principles of law, they were covered by the general charge.

Judgment affirmed.

SHUMAKER v. SECURITY LIFE & ANNUITY CO. OF AMERICA.

(Circuit Court of Appeals, Third Circuit. February 4, 1908.)

No. 60.

1. COURTS—UNITED STATES CIRCUIT COURT OF APPEALS—REVIEW OF INTERLOCUTORY ORDERS.

Under Act Cong. March 3, 1891, § 6, c. 517, 26 Stat. 828, vesting in the United States Circuit Court of Appeals jurisdiction to review, by appeal or by writ of error, final decisions, and under section 7, authorizing an appeal to such court from an interlocutory order or decree granting or continuing an injunction or appointing a receiver, it has no jurisdiction to review an interlocutory order refusing judgment for want of a sufficient affidavit of defense.

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

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. SAME—CONFORMITY TO STATE PRACTICE.

Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], provides that the practice, pleadings, and forms and modes of proceeding in civil causes in the Circuit and District Courts shall conform as near as may be to the existing practice, etc., in like causes in the courts of the state within which such Circuit or District Courts are held. Act Pa. April 18, 1874 (P. L. 64), provides that, where plaintiff is entitled to and is refused judgment for want of a sufficient affidavit of defense, he may take a writ of error to the state Supreme Court. *Held*, that these provisions do not give the Circuit Court of Appeals for the Third Circuit jurisdiction to review an interlocutory order refusing judgment for want of a sufficient affidavit of defense. Section 914 is inapplicable to a subsequently created appellate court for a circuit composing several states, and requires conformity to the state law and practice only in matters of practice, pleading, and forms and modes of proceeding, and not even in such matters where Congress

has prescribed a rule, and not in matters of jurisdiction, as to which Congress has prescribed the rule.

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

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

For opinion below, see 153 Fed. 332.

W. Clarke Mason, for plaintiff in error.

Theodore W. Reath, Sydney Young, and Joseph I. Doran, for defendant in error.

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

DALLAS, Circuit Judge. Section 6 of the act of Congress of March 3, 1891, by which this court was established, vested in it "jurisdiction to review, by appeal or by writ of error, final decisions"; but neither that statute nor any other has given it jurisdiction to review an interlocutory order refusing judgment for want of a sufficient affidavit of defense. Morris v. Dunbar, 149 Fed. 406, 79 C. C. A. 226; McLish v. Roff, 141 U. S. 665, 12 Sup. Ct. 118, 35 L. Ed. 893; Railway Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123, 35 L. Ed. 902; Webster Coal & C. Co. v. Cassatt (decided December 2, 1907) 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. ——. The provision in section 7 of the same act for an appeal from an interlocutory order or decree granting or continuing an injunction, or appointing a receiver is manifestly exceptional in character, and makes it perfectly clear that, except as expressly excepted, the settled rule as declared in section 6 is to be adhered to.

We cannot assent to the suggestion of counsel that section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684] would justify the assumption by this tribunal of the jurisdiction which the Pennsylvania act of April 18, 1874 (P. L. 64), imposed upon the Supreme Court of that state. That section refers in terms to Circuit and District Courts, and to the state within which such courts are held. It is inapplicable to a subsequently created appellate court for a circuit comprising several states. Moreover, it requires conformity with state law and practice only in whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, and not even in such matters where Congress itself has legislated upon the subject and prescribed a rule. A question of jurisdiction is not within the categories mentioned; and upon the subject of reviewable judgments Congress, as we have seen, has legislated and prescribed the rule. Amy v. Watertown, 130 U. S. 305, 9 Sup. Ct. 530, 32 L. Ed. 946.

We may be permitted to add that this particular statute has not proved to be satisfactory to the courts of the state by which it was enacted, and were we at liberty to adopt it the experience of those courts would deter us from doing so. Radcliffe v. Herbst, 135 Pa. 574, 19 Atl. 1029, was an appeal to the Supreme Court of Pennsylvania from the refusal of the court below to enter judgment against the defendants

for want of a sufficient affidavit of defense, and in deciding it the reviewing court said:

"The language of this court in Griffith v. Sitgreaves, *81 Pa. 378, is so applicable to this class of cases that I quote it here: 'The act of assembly authorizing writs of error to be taken when a court of common pleas refuses to enter judgment on the ground of the sufficiency of an affidavit of defense was intended to reach only clear cases of error in law, and thus to prevent the delay of a trial. Its effect is often to produce two writs of error in the same cause, instead of one, and is not to be encouraged. Such writs should be confined to plain errors of law. In doubtful cases, and especially in those requiring broad inquiry into facts, where the court refuses judgment, the matter in controversy should go to the jury, as the proper tribunal to decide the cause, under proper instructions from the court.'

"Our further experience with the act referred to confirms us in the wisdom of these remarks. The practice is growing to bring up cases upon the refusal of the court to enter judgment; nor are such writs, as a general practice, confined to plain errors of law, as they should be. The instances are rare where any benefit results therefrom. Frequently the cases could have been tried below in less time than is required to bring them here upon appeal. The practical effect of such a mode of practice is to delay, instead of speeding, causes, and to add materially to the expenses of the litigants."

See, also, Murphy v. Cappeau, 147 Pa. 48, 23 Atl. 438; Ætna Ins. Co. v. Confer, 158 Pa. 604, 28 Atl. 153; Paine v. Kindred, 163 Pa. 642, 30 Atl. 273; Security S. & L. Ass'n v. Anderson, 172 Pa. 307, 34 Atl. 44; Land & Improvement Co. v. Mendinhall, 4 Pa. Super. Ct. 407; Holland v. Iron Works, 9 Pa. Super. Ct. 264.

From what has been said, it results that we cannot take jurisdiction of this case as now presented, and consequently, at the cost of the plaintiff in error, but without prejudice, it will be remanded to the Circuit Court for further proceedings according to law.

McCORMACK et al. v. ILLINOIS COMMERCIAL MEN'S ASS'N.

(Circuit Court of Appeals, Seventh Circuit. November 5, 1907.)

No. 1,366.

INSURANCE—ACCIDENT INSURANCE—CAUSE OF DEATH—QUESTION FOR JURY.

In an action on an accident policy, whether insured's death resulted from his being thrown from a buggy, and was therefore within the terms of the policy, or whether death resulted wholly or partially from disease or bodily or mental infirmity, within an exception in the policy, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1745.

Risks and causes of loss under accident insurance policies, see note to National Accident Society of City of New York v. Dolph, 38 C. C. A. 3.]

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

This is a common-law action brought by the plaintiffs in error against the defendant in error upon a policy of accident insurance issued to the late Patrick E. Murphy in his lifetime. By the law of the association, which became practically embodied into the policy, it was provided that when a member in good standing should, through external violence and accidental means, receive bodily injuries which would, independently of all other causes, result in the death of such member, there should be paid an indemnity of $5,000, and there should be no liability when death occurred wholly or partially, directly or indirectly, as a result of or while the member was afflicted

with disease, bodily or mental infirmity, etc. At the close of the proofs the court directed a verdict in favor of the defendant. Such direction of the court is the error chiefly relied upon for the reversal of the judgment, and the only one necessary to be considered.

The evidence tended to show that on the 5th day of October, 1904, the assured was driving in a single buggy near the intersection of Dale street and Como avenue in the city of St. Paul, Minn.; that while his horse was on a walk, and while he was putting on his gloves, he reached forward, apparently to gather up the reins which lay across the dashboard of the buggy. At that instant, while the assured was so leaning forward, the buggy struck some obstruction in the street, which caused the hind wheels to rise up with a "jerk" or "bounce," and thereupon said assured fell from the buggy, striking the forward wheel, and then striking on his head upon the cobblestone pavement; that he was picked up and carried to an adjacent building, where he died in about ten minutes. He had a contusion on his face and on the right side of his head immediately back of the ear. The evidence leaves it uncertain as to what the obstruction was which the wheels of the buggy struck. It appears that the assured was a man about 50 years of age, that he was about 5 feet 8 inches in height, weighed about 225 pounds, wore a No. 18 collar, and was a heavy eater, although it appears that he was in good general health, and did not appear to be suffering from any bodily ailment on the day of the alleged accident. Plaintiff in error also offered evidence, which was not seriously controverted, that the injuries incident to the fall were sufficient to produce death in the case of a healthy person. There was no post mortem examination, and the body of assured was examined only by one medical man, Dr. Miller, who was then the coroner of Ramsey county. In the first instance he filed a certificate that death occurred as the result of apoplexy, but after further examination into the circumstances of the case, a second certificate was filed attributing the death to cerebral hemorrhage, occasioned by the fall from the buggy. Some expert evidence was offered by medical men who were acquainted with assured in his lifetime, to the effect that the assured, as to age, habit of life, and general appearance, belonged to a class from whom apoplexy selects its victims. Expert testimony, predicated upon hypothetical questions, was received as to the probable cause of the death of assured, and such testimony was conflicting.

There is no dispute that the deceased was a member of the association in good standing; that proper proof of death was duly presented; nor as to the fact of the death of the assured at the time and place alleged. The contention of the defense is that the assured was stricken with apoplexy or heart failure before he fell from the buggy, and that death did not therefore result from accident so as to bring the case within the terms of the policy.

Curtis H. Remy (Christopher O'Brien, on the brief), for plaintiffs in error.

James Maher, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

QUARLES, District Judge (after stating the facts as above). The issue in this case is narrow and simple. Evidence was offered at the trial tending to prove an injury from external, accidental causes, sufficient to produce death in the case of a healthy person. On the other hand, evidence was received which tended to show that the assured was by his condition and habit of life predisposed to an attack of apoplexy, although no affirmative showing was made that he was actually suffering from any bodily ailment. It is claimed that certain facts appearing in evidence are consistent with and calculated to sustain the theory of the defense, as for instance, the failure of the assured to make any outcry or any effort to save himself, or break the force of his fall.

There were, therefore, two possible inferences to be drawn from the facts disclosed. Was the death the result of the fall, or was the fall the result of death? To determine which inference should prevail was peculiarly the province of the jury.

No inference which the learned trial judge may have been inclined to entertain ought to foreclose the question of fact, while there remained a different theory of the evidence which the jury might reasonably have adopted. If the jury found that the testimony of the two eyewitnesses was credible, they might have inferred therefrom that the assured while leaning forward to gather up his reins, was thrown out by the jolt or jerk occasioned by the obstruction which suddenly lifted the hind wheels of the buggy, and if they found that the fall was purely accidental, the evidence might have justified the further finding that death resulted from injuries occasioned by the fall. In short, we are satisfied that the case was one where the plaintiffs were entitled to go to the jury.

For these reasons, the judgment is reversed, and the cause remanded to the Circuit Court with instructions to grant a new trial

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BUTLER v. WESTERN GERMAN BANK.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1908.)

No. 1,689.

BANKS AND BANKING—COLLECTION OF DRAFT WHEN INSOLVENT—RECOVERY OF PROCEEDS—INTEREST.

Where a bank known by its officers to be insolvent collected money for a customer and mingled the same with its own funds which, to an amount larger than the sum received, passed to the bank's receiver in insolvency, the customer, though unable to trace the identical money into the receiver's hands, was entitled to recover from the receiver an amount equal to that collected but without interest, the general creditors of the bank not being responsible for the receiver's error of judgment in refusing to pay the claim on demand.

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

Duncan Upshaw Fletcher, for appellant.

J. C. Cooper and C. M. Cooper, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit in equity brought by the Western German Bank against the receiver of the First National Bank of Florida to recover money collected by the latter bank for the complainant. This is the second appeal in this case. A statement of the case made by the bill and our opinion as to the law which should govern its decision appear in the report of the case on the first appeal. Western German Bank v. Norvell, 134 Fed. 724, 69 C. C. A. 330. The suit is for the recovery of $3,995, which the complainant alleges was collected for it by the First National Bank of Florida shortly before the latter bank went into the hands of a receiver, and

when it was insolvent and known to its officers to be insolvent. The complainant claimed the right to recover the entire collection notwithstanding the insolvency of the bank. The court below entered a decree for the complainant for the sum sued for, "with interest from March 14, 1903," and this appeal is from that decree.

On the merits of the case, it is sufficient for us to say that we concur in the conclusion of the learned trial judge who decreed that the complainant was entitled to relief. Concurring in the conclusion that the complainant, on the facts proved, is entitled to recover its money collected for it by the First National Bank of Florida, the only question to be decided is whether or not the circuit court erred in allowing the complainant to recover interest.

An examination of the cases showing the development of the doctrine of tracing funds or property throws light on this question. At first the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability to identify it; the right attached only to the very property misapplied. This right was then extended to the proceeds of the property; that is, to that which was procured in place of it by exchange, purchase or sale. But the earlier cases held that if it became mixed with other property of the same kind so as not to be distinguishable, without fault on the part of the possessor, the equity was lost. But this view has been abandoned, and the doctrine now established is that confusion or the mixing of money or property with other money or property of the same kind does not destroy the equity, but converts it into a charge upon the entire mass, thereby giving to the party injured by the unlawful diversion a priority of right over the creditors of the possessor. This doctrine is now indisputably established. Richardson v. N. O. Deb. Red. Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67, and cases there cited. What the courts set out to do from the first was to take the money—the identical money or property—from the wrongdoer, and give it to the true owner. When it could be identified, there was no hesitation; and, finally, when the identical coins or property could not be selected from the mass, the courts took out for the owner a like amount. We find no indication in the cases that the right extended beyond the amount of the property wrongfully converted or withheld.

The claim is for the funds or property converted or wrongfully withheld. It is not founded on the idea that the defendant owes to the complainant a debt; on the contrary, it is based on the fact that the conduct of the defendant has been such that the relation of debtor and creditor has not been created, as ordinarily occurs when a client makes a deposit with his banker. The equity, springing as it does from the right to trace the funds or property, does not extend to a right to take other funds or property by way of damages or interest. Especially is this true where it does not appear that the fund withheld has earned interest or profit, and where the defendant holds, also, as trustee the other funds or property with which the funds claimed were mixed. To allow interest in such case would be to permit the wrongful withholding of the fund by the defendant to create

a charge on other funds held by him in trust for the creditors of the bank. This would be inequitable. The investigation and decision of this case has, it is true, established the fact that the receiver should have surrendered this fund to the complainant, but an error of judgment by the receiver on this question should not make the creditors of the bank chargeable with interest on the fund withheld. Merchants' National Bank v. School District, 94 Fed. 705, 36 C. C. A. 432; Guignon v. National Bank, 22 Mont. 140, 55 Pac. 1051, 1097.

The decree will be amended here by striking out the words thereof which allow interest on the amount of the complainant's claim, and, as so amended, it is affirmed.

The appellee will be taxed with the costs of the appeal.

BENSON v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1907.)

No. 1,371 (1,725).

1. CUSTOMS DUTIES—CLASSIFICATION—APPETIT-SILD—HERRING IN TINS.
   Herring called appetit-sild or appetit-herring, in tins, but not "known or labeled as anchovies, sardines, sprats, brislings, sardels or sardellen, packed in * * * tin boxes or cans," are not dutiable under such enumeration in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], but are within the provision in the same paragraph for "all other fish * * * in tin packages."

2. SAME—"FISH IN TINS"—FISH SKINNED—HERRINGS.
   Herring in tins, which have been pickled, salted, skinned, or boned, are dutiable as "fish * * * in tin packages," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], rather than as "herrings, pickled or salted," or as "fish, skinned or boned," under paragraphs 260, 261, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]. The fact of importation in tins controls over the other conditions set forth in the two latter paragraphs.

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

There was no opinion below. The Circuit Court affirmed 21 decisions by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Chicago on importations by C. L. Benson.

Hatch & Clute (J. Stuart Tompkins, of counsel), for the importer.

Francis G. Hanchett (Edwin W. Sims, U. S. Atty., on the brief), Asst. U. S. Atty.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The importer, Benson, appeals from a decree of the Circuit Court affirming the classification of several varieties of fish for payment of duties under the tariff act of 1897, as fixed by the collector and affirmed by the Board of General Appraisers. The importations in question are of three general classes, as designated in the record and briefs, namely (1) appetit-sild and appetit-herring; (2) fresh mackerel; and (3) curled fillets, gaffelbitar, marinated herrings, kryd-

sild, etc. And the provisions of the tariff act involving the inquiry are paragraphs 258, 260, and 261, Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, pp. 1650, 1651], reading as follows:

"258. Fish known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, box or can; if in other packages, forty per centum ad valorem. All other fish (except shellfish), in tin packages, thirty per centum ad valorem; fish in packages containing less than one-half barrel, and not specially provided for in this act, thirty per centum ad valorem."

"260. Herrings, pickled or salted, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound.

"261. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut or salmon, pickled or salted, one cent per pound."

Hearing arose upon review of the return of the Board of Appraisers, with the protests, reports, and evidence before them, together with additional testimony reported to the court below upon reference.

1. Appetit-sild. The importations called appetit-sild and appetit-herring were classified for duty by the rulings and decree, under the initial classification of paragraph 258, as "fish known or labeled as anchovies, sprats, brislings, sardels, or sardellen, packed," etc., at the rates specified for such varieties according to the size of tins. It was claimed in the protest and is contended here on behalf of the importers that they were entitled to be assessed under the subsequent provisions—either under the concluding general terms of paragraph 258 as "other fish (except shellfish), in tin packages, thirty per centum ad valorem," or under paragraph 260 or 261. The evidence is undisputed that these importations were from Norway; that they were put up in tin packages and labeled appetit-sild; that "sild" in the Norwegian language is synonymous with "herring"; that appetit-sild is and was prior to the enactment in question known to the trade and labeled under that name, in the form of the importation, and neither known nor labeled under either of the names designated in the first-mentioned classification of paragraph 258; that the packages so named consist of small herring, skinned and boned, pickled and spiced, and so prepared have been known and marketed exclusively as appetit-sild or appetit-herring.

Under the facts thus appearing the present case is clearly distinguishable from Reiss v. United States (C. C.) 113 Fed. 1001, in reference to an importation of "appetit-sild," as the opinion there expressly rests its adoption of a classification upon the appraiser's finding that "the contents of the boxes is 'fish known as anchovies,'" with "no evidence in the case one way or the other to contradict this finding"; and neither that authority, nor others adopting its view, cited in support of

the rulings below, are applicable here as precedents. It is the settled rule of construction, in fixing the classification of goods for the payment of tariff duties, not only that the intent must be found in the language used in the statute, but that the name or designation applied "is to be understood in its commercial sense," and the denomination of the goods "in the market when the law was passed will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied." American Net & Twine Company v. Worthington, 141 U. S. 468, 471, 12 Sup. Ct. 55, 35 L. Ed. 821; Hedden v. Richard, 149 U. S. 346, 348, 13 Sup. Ct. 891, 37 L. Ed. 763; United States v. Goldenberg, 168 U. S. 95, 102, 18 Sup. Ct. 3, 42 L. Ed. 394. The terms of the first-mentioned provision of paragraph 258 are limited to "fish known or labeled," either as anchovies or as one of the other varieties specified, with no mention of appetit-sild or appetit-herring. So the evidence of their special name and label in the market, and that they were known under such designation and not under either of the statutory terms, clearly excludes them, as we believe, from classification thereunder, in view of the subsequent provisions for other varieties. We are of opinion that the importation in question is within the intent and description of the concluding provision of paragraph 258, as "other fish (except shellfish), in tin packages," and not within paragraphs 260 and 261 under the rule above stated, and that the decree must be modified accordingly.

2. Fresh mackerel. The objections to the assessment of "fresh mackerel in tin packages," as included in the last clause of paragraph 258, above referred to, were withdrawn on behalf of the appellant, upon submission of his appeal, and thus require no further consideration.

3. Curled fillets, gaffelbitar, etc. In the classification complained of for importations of this third variety—all composed of herring—the last above-mentioned terms of paragraphs 258 were likewise applied for assessing duties, for the reason that each was "in tin packages," while the importer claims that they are dutiable either under paragraph 260 as "herrings, pickled or salted," or paragraph 261 as "fish, skinned or boned," being within the letter of both descriptions. The fact, however, that each is imported in tin packages is the controlling element, as we believe, and authorizes the interpretation adopted by the decree. The ad valorem duty imposed by paragraph 258 for "other fish" extends only to goods "in tin packages," while the fish subject to the specific duties of paragraphs 260 and 261 are not so limited, implying other forms of packages. Thus the legislative intent appears to require the ad valorem and higher duty when imported in tin, as well defined in Kauffmann Brothers v. United States (C. C.) 99 Fed. 430, approving the cognate ruling in Re Johnson (C. C.) 56 Fed. 822.

The decree is affirmed as to the two last-mentioned importations, and reversed as to the first, with direction to modify in conformity with the opinion.

THE HUSTLER.

THE W. E. STREET.

(Circuit Court of Appeals, Second Circuit. January 22, 1908.)

No. 122.

COLLISION—TUG AND MEETING TOW—FAILURE TO ALLOW SUFFICIENT ROOM.

A collision in East river between a descending flotilla in tow and a meeting tug, in which some of the boats in the flotilla were injured by being crowded together, *held* due to the fault of the up-bound tug in failing to allow sufficient room in passing, and not to the crowding of another tug and tow bound down on the opposite side of the flotilla.

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

James J. Macklin and La Roy S. Gove, for appellants.
A. F. Cushman, for The Hustler.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. January 11, 1905, about 8 p. m., on the last of the ebb tide, just below the Brooklyn Bridge, in about the center of the East river, three tows got into the following situation, viz.: The derrick Century, on the port side of the tug Hustler bound down the river, came alongside the first or first and second tiers of a flotilla of four tiers of light canal boats, four boats in each tier, also bound down the river in tow of the tugs Robinson and Bully, towing tandem; and the port bow of the tug Street, bound up the river with a loaded canal boat on her starboard side, struck a glancing blow against the port side of the port hawser boat of the flotilla. No damage was done to the sides of the boats on the starboard side of the flotilla, or to the port hawser boat, or to the tug Street. The libel is for bow and stern damage to the boat Frank, outside boat in the second tier on the starboard side, and the Wild West, outside boat in the third tier on the port side, evidently resulting from the tiers running together.

The Robinson and Street and the Robinson and Hustler exchanged signals of one whistle, whereby it was agreed that the Hustler, going down, and the Street, going up, should pass the flotilla port to port. The Hustler explains the situation by saying that the Robinson and Bully pulled the tow right across her course, while the Street (corroborated by the Robinson and Bully) says that the Hustler and her tow shoved the flotilla out of line with its tugs across the course of the Street. The district judge thought that this latter explanation was incredible, and we quite agree with him. If the Hustler and tow were going down the stream with and alongside of the flotilla, we do not see how she could shove these light boats diagonally out of line with their tugs, especially without doing them some injury. The account of the Hustler is not improbable. There is at the Brooklyn Bridge a bend in the East river of several points to the south and east. If the Robinson and Bully, instead of starboarding to conform to this bend, held the course they were following above the bridge, they would be heading to the Battery, and would bring their flotilla across the course of the

Hustler; and the Street, wrongly supposing that the tugs had starboarded, might naturally think that the flotilla was being shoved over by the Hustler and her tow. We think that the Street misapprehended the situation, and that the district judge was right in holding that the collision was due solely to her fault in not porting sufficiently to keep out of the way.

The decree is affirmed, with costs.

G. W. THURNAUER & BRO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 51 (4,016).

CUSTOMS DUTIES—CLASSIFICATION—"UNDECORATED CHINA"—"DECORATED."

Construing the provisions for china decorated and china not decorated, in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 95, 96, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], *held*, that merely adding a color to white china for utilitarian purposes does not make decorated china, and that china and cooking serving dishes of which the sloping undersides are irregularly colored brown in order to conceal smoke and finger marks, and without decorative effect, are dutiable as undecorated china under the latter paragraph.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1904–1905.]

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

For opinion below, see 152 Fed. 660.

D. Frank Lloyd, Asst. U. S. Atty.

Walden & Webster (Henry J. Webster, of counsel), for importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The merchandise in question consists of small round china cooking and serving dishes. Eggs, macaroni, and cheese are cooked in these dishes over the fire or in the oven, and are then served in them upon the table. The dishes are white, with the exception that they are irregularly colored brown upon their sloping undersides. The testimony shows that this coloring is put on to conceal smoke and finger marks. The Circuit Court held these dishes to be decorated china ware and subject to a duty of 60 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 95, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633].

The importers claim that the dishes are dutiable at 55 per cent. ad valorem only, under paragraph 96 of said act, as being china "not ornamented or decorated." There is some evidence that these articles are known in the trade as "decorated china." But the gist of most of this testimony is that they are called so only because they are not white china. We are not satisfied that the term "decorated china" has any commercial meaning which would include these articles, contrary to the fact. In our opinion these dishes in fact are not ornamented or decorated. The testimony shows that the brown color is put on solely

to add to their usefulness. It certainly does not add to their beauty. Merely adding a color to white china for utilitarian purposes does not make decorated china. The merchandise should be assessed under paragraph 96, in accordance with the importers' claims.

The decision of the Circuit Court is reversed.

NEWMAN v. UNITED STATES.

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

No. 66 (4,130).

1. CUSTOMS DUTIES—CLASSIFICATION — STEEL "PLATES" — "DRAW-PLATES" — "WORTLES."

"Wortles" and "draw-plates," so called, consisting respectively of bars and blocks with holes for wire drawing, are not dutiable as steel "plates" under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638]; that term being, in the absence of evidence of a contrary commercial usage, limited to articles in the form of sheets.

2. SAME—DESIGNATION—MISNOMER—"PLATES."

Misnomer alone cannot make a tariff provision applicable; and the appellation of "draw-plates" cannot bring articles within the enumeration of "plates," which are not plates in form, nor commercially known as plates, and to which such name has clung inappropriately because plates were formerly used for the same purpose.

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

The Circuit Court reversed a decision of the Board of General Appraisers, G. A. 6,157 (T. D. 26,731), which sustained the protest of the present appellant, an importer.

For decision below, see 152 Fed. 488.

Everit Brown, for importer.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The merchandise consists of steel articles used for drawing wire called "draw-plates" and "wortles." These articles were classified for duty under the so-called "catch-all" paragraph of the metal schedule of the tariff act of 1897 as articles manufactured of steel not specially provided for. The importer protested, claiming that they should be assessed under paragraph 135 of the act (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638]) as "plates and steel in all forms and shapes not specially provided for." The Board of Appraisers sustained this alternative protest. On appeal from this decision the importer waived his contention under the clause "steel in all forms and shapes," and confined himself to the single claim that the articles are "plates," and thus within said paragraph.

In so limiting his claim, we think the importer deprived it of all merit. The articles may be embraced within the phrase "steel in all

forms and shapes not specially provided for." We do not determine that question. They are not steel plates.

The dictionaries generally define the term "plate"—in accordance with common usage—as a sheet of metal. There is nothing of the nature of a sheet of metal about these "draw-plates" or "wortles." The "wortle" is a steel bar with several holes of diminishing diameters, through which the wire is drawn. The "draw-plate" is a steel block with an elongated end and with holes similar to those of the "wortle." The "draw-plate" is a plate in name only. Undoubtedly steel plates were formerly used to draw wire through, and, as is not uncommon, the earlier name clings inappropriately to the later development. But misnomer alone cannot make the provisions of paragraph 135 applicable. Nor is there anything in the testimony of commercial usage to make them applicable. The articles may be called, but not described, by the name "draw-plates." They are not known as "plates."

Holding, therefore, that the articles in question are not steel plates within the meaning of paragraph 135, we are not called upon to determine to what extent that paragraph embraces manufactured articles.

The decision of the Circuit Court is affirmed.

W. G. MOREL & CO. et al. v. LEHMAN.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,700.

1. SHIPPING—LIABILITY OF VESSEL—INJURY TO LONGSHOREMAN—ASSUMED RISK.

A longshoreman was injured, while assisting in loading heavy logs on a vessel, by the insufficiency of certain of the tackle. There was no evidence that he knew that the strap securing the tackle block at the lower end was defective, and if this had been sufficient would have prevented the accident. *Held*, that he did not assume the risk, though he did know that the rope ends securing the upper end of the rope used to support the guy on which the tackle was suspended had not been moused, which defect was the immediate cause of the accident.

2. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.

Where libelant, a longshoreman, who had previously been well and able to do heavy and continuous work, was so injured by the defective tackle appliances of a vessel that he was immediately afterwards and from thence on continuously crippled and incapacitated, a decree in an admiralty proceeding allowing him $3,500 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372–396.]

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

Wm. C. Dufour and H. Generes Dufour, for appellants.

John D. Grace, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The libelant alleged and proved in the court below that he was injured, while working as longshoreman on board the

steamship Bertholey, by the negligence of the ship and her officers in furnishing the libelant and his colaborers defective tackle and appliances to take in and handle the heavy logs which they were engaged in loading; that the particular negligence was in failing to have properly secured the upper end of the preventer, a heavy rope used to support the guy on which the tackle was suspended, and in using to secure the lower block of the tackle a strap or rope of insufficient strength and quality. The claimants contend that, as the libelant knew that the rope ends securing the upper end of the preventer were not moused—that is, secured with rope yarn—and as the loosing of this rope was the cause of the accident, the libelant cannot recover, because, knowing of this dangerous appliance, he assumed the risk.

Under the evidence in the case we do not think that this contention of the claimant can be allowed, even as to the preventer rope; but it is unnecessary to go into the matter, because there is no evidence whatever to show that the libelant knew of the defective strap securing the block at the lower end, and, however defective the tying of the preventer may have been, the libelant would not have been injured if the strap securing the block had been sufficient.

As to the amount of recovery,[1] we agree in the main with the judge a quo and see no reason to disturb his judgment in that respect. The libelant was apparently well, and able to do heavy and continuous work. He was injured, and immediately afterward and from then on he was crippled and incapacitated. In any aspect of the case, the award of damages is not excessive.

The decree of the District Court is affirmed.

LEO LUNG ON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1908.)

No. 2,466.

ALIENS—CHINESE EXCLUSION—JUDGMENT OF DISTRICT COURT—MODE OF REVIEW.

The judgment of a district court rendered on an appeal from an order of a commissioner directing the deportation of a Chinese is not subject to review on a writ of error, but only on an appeal.

[Ed. Note.—Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Nebraska.

S. A. Searle (Edson Rich and Charles E. Clapp, on the brief), for plaintiff in error.

Edwin W. Sims, U. S. Atty., and A. W. Lane, Asst. U. S. Atty. (Charles A. Goss, U. S. Atty., on the brief), for defendant in error.

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

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[1] The award made to libelant by the judge a quo was $3,500 and costs.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment of the District Court affirming an order of a commissioner directing that the plaintiff in error be deported from the United States as a Chinese not entitled to remain therein; and counsel have assumed, in the discussion of the questions sought to be presented for decision, that the case is properly here upon a writ of error, and also that such a writ brings up for review both the law and the facts. The settled practice, however, is otherwise. A writ of error brings up questions of law, and nothing more, while an appeal when it is the proper mode of obtaining a review, usually brings up both the law and the facts. Rev. St. § 1011 [U. S. Comp. St. 1901, p. 715]; Hall v. Houghton & Upp Mercantile Co., 8 C. C. A. 661, 60 Fed. 350; Mason City, etc., Co. v. Boynton (C. C. A.) 158 Fed. 599; In re Neagle, 135 U. S. 1, 42, 10 Sup. Ct. 658, 34 L. Ed. 55; Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200; Taylor on Jurisdiction and Procedure of U. S. Supreme Court, §§ 119, 120. And an appeal is the proper mode of obtaining a review in cases like this. Such was the holding of the Circuit Court of Appeals of the Sixth Circuit in United States v. Hung Chang, 67 C. C. A. 93, 134 Fed. 19, and it has the sanction of a long-continued practice. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Ah How v. United States, 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619; Tom Hong v. United States, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772; The United States, Petitioner, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931; Ark Foo v. United States, 63 C. C. A. 249, 128 Fed. 697; Toy Tong v. United States, 76 C. C. A. 621, 146 Fed. 343; Moy Suey v. United States, 78 C. C. A. 85, 147 Fed. 697; Lee Joe Yen v. United States, 78 C. C. A. 427, 148 Fed. 682; Jung Yuen v. United States, 79 C. C. A. 534, 149 Fed. 1023. Moreover, the distinction between a writ of error and an appeal is jurisdictional, and cannot be waived by the parties or disregarded by the court. Taylor on Jurisdiction, etc., § 119.

It follows that, although we are satisfied from an examination of the record that the proceedings in the District Court were free from prejudicial error, we cannot affirm the judgment, because it cannot be reviewed upon a writ of error.

The writ is accordingly dismissed.

THOMASSON et al. v. GUARANTY TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Seventh Circuit. November 18, 1908. Rehearing Denied January 15, 1908.)

No. 1,403.

CORPORATIONS—SUIT AGAINST CORPORATION—RIGHT OF STOCKHOLDER TO INTERVENE.

Where a corporation defendant in a suit in equity is represented by counsel employed by its directors, and also by a committee of stockholders appointed for the purpose under leave of court for intervention, an individual stockholder cannot intervene as matter of right, at least without showing bad faith on the part of those by whom his interests are represented, or a demand and refusal to take such action as he desires.

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

Charles H. Aldrich, for appellants.

Wm. J. Calhoun and W. W. Gurley, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The appellants were petitioners before the Circuit Court, for leave to intervene, as stockholders of West Chicago Street Railroad Company and on behalf of other stockholders thereof, in the long-pending litigation entitled Guaranty Trust Company of New York v. West Chicago Street Railroad Company et al., 158 Fed. 913, 923, 1015, and this appeal is from an order which overrules their motion and denies the leave sought. Conceding the well-settled general rule that such applications are addressed to the discretion of the court, and denial of leave to intervene is not such final order or decree as required by statute for review upon appeal, the appellants contend that the averments of their petition clearly state a case within the recognized exceptions from this rule. The propositions relied upon to authorize review are substantially these: (1) That the interests of the stockholders are unrepresented in the proceedings, although threatened with destruction or loss, and can only be defended and preserved through this intervention; (2) that the petition shows a fund in court, derived from net earnings, wherein the stockholders have a direct interest, as creditors of the fund, and an absolute right to intervene. The correctness of either proposition must be tested by the facts averred and appearing of record, in the light of the presumptions which must be overborne to establish the case within the exceptions referred to.

1. Upon the first contention, the record discloses and the petition recognizes, not only the presence of the stockholders' corporation as a party defendant, and proceedings on its behalf by the directors and their counsel, but active proceedings on behalf of the stockholders and for their protection, through a so-called "protective committee" appointed by the stockholders, under leave of the court for intervention. With such facts appearing, other individual stockholders cannot intervene, as of right under the well-settled rules of equity, without at least requesting action by such representatives, together with clear averments of fact which tend to impeach their conduct. It is true that the petition states that the appellants applied to the president of the corporation to ascertain what steps were intended "to resist the allowance of a decree," and that he replied that the "amended and supplementary bill was a friendly litigation" and no opposition was intended, but states no request to proceed otherwise. There are no averments, however, either explaining the proceedings on behalf of the stockholders by the "protective committee" and special counsel employed by them, or tending to show that such committee were neglecting the interests of stockholders. No presumption arises in favor of the pleader thereupon, and we are of opinion that the petition fails to support the contention.

2. The proposition of a fund in court applicable for payment to stockholders, as creditors of the fund, is not raised by the averments

of the petition, under the terms of the alleged amendatory lease. Laying aside the controversy upon the argument whether an accumulation of net earnings appeared, under the facts of record, the petition fails to aver, in express and distinct terms, the occurrence of the condition of fact upon which such accumulation was made payable to the stockholders under the terms of the amended lease; and the administrative orders of court mentioned as adjudication of such right are, as we believe, neither applicable to the amended lease, nor to the claim here asserted.

The appeal must be dismissed for want of reviewable subject-matter, and it is so dismissed.

FORET et al. v. MATHES et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,681.

SHIPPING—CHARTERS—LOSS OF VESSEL—NEGLIGENCE OF CHARTERERS.

Where a gasoline launch was chartered at a specified rent, the charterers to return the launch in good order or satisfactorily account for her loss, and she was destroyed by fire during the term because of the negligence of the charterers' servants in handling a gasoline stove provided for culinary purposes, the charterers were liable therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 219, 220.]

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

Robt. J. Perkins and William E. Howell, for appellants.

John D. Grace, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The contract sued on in this case is one of letting and hiring under Louisiana law of the gasoline launch Robert Bruce for a specified term at a specified rent, and the burden is on the lessees to return the launch in good order or satisfactorily account for her loss. See Nicholls v. Roland, 11 Mart. (O. S. La.) 190; Ford v. Simmons, 13 La. Ann. 397; and Civ. Code La. arts. 2721, 2723.

During the term of the lease the boat was destroyed by fire, originating from the gasoline stove which was attached to the boat for culinary purposes. The libelants contend that this fire was caused by the negligent, careless, and inefficient handling on the part of the lessees' employés of the said gasoline stove, while the respondents claim that the fire was caused from the defects in the construction of the stove and its insecure fastening in the proper position, and that on account thereof the leased launch was not in all respects seaworthy. The case shows that the stove had been operated for over a month under the lease before the accident occurred, and it then occurred from insufficient cleaning and attention, and from careless and ignorant treatment and handling on the part of the respondents' employés.

This is the view taken of the case by the judge below, accompanied

with the finding that after the fire started the respondents' employés were negligent in not taking proper and sufficient means to extinguish the same. The evidence shows that there was a large supply of gasoline stored in the launch, and the employés were more or less afraid of an explosion, and all but the engineer promptly got away.

On the whole case, the decree of the District Court accords with the law and the evidence, and it is affirmed.

ST. LOUIS & S. F. R. CO. v. ROSE.

(Circuit Court of Appeals, Sixth Circuit. February 29, 1908.)

No. 1,748.

TRIAL—IMPROPER ARGUMENT—ERROR CURED.

The withdrawal of counsel's improper argument and an instruction that the jury must ignore it cured counsel's error in making the argument and the court's error in overruling an objection thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 315, 316.]

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

C. H. Trimble, for plaintiff in error.

W. A. Percy and T. F. Kelly, for defendant in error.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

PER CURIAM. The observations of the attorney for the plaintiff to the jury, made the subject of exception below and assigned as error here, were reprehensible, and the trial judge should have sustained the objection made at the time. Later the plaintiff's counsel withdrew the objectionable argument, and the court instructed the jury that they must ignore the argument. This cured the matter. Dunlop v. U. S., 165 U. S. 487, 17 Sup. Ct. 375, 41 L. Ed. 799.

The other errors assigned are overruled, and the judgment affirmed.

BEECHAM v. JACOBS.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 105.

1. TRADE-MARKS—INFRINGEMENT—RIGHT TO RELIEF—DECEPTION—"PATENT."

Where complainant sold pills that were not patented under the name "Beecham's Patent Pills," the word "patent" was employed in a mere proprietary sense, to indicate that the pills were made according to Beecham's secret formula, and not necessarily that they were manufactured under letters patent, and hence did not constitute such a misrepresentation as to preclude plaintiff from relief in equity against the infringement of plaintiff's trade-mark, "Beecham's Pills."

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

2. SAME—PLACE OF MANUFACTURE.

False statements as to the place where complainant's goods are manufactured may preclude him from relief in a suit to restrain infringement of his trade-mark.

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

3. SAME.

Where complainant in a suit to restrain infringement of a trade-mark, "Beecham's Pills," only represented in connection with the sale of the pills that they were prepared and sold by complainant in St. Helens, England, and in New York, a statement that "the pills accompanying this pamphlet are specially packed for U. S. America" was insufficient to show a misrepresentation that the pills were made in England, so as to preclude complainant from equitable relief.

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

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

Arthur von Briesen, for appellant.

Gould & Wilkie (Learned Hand, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The bill charges the infringement of the trade-mark "Beecham's Pills." The proof shows that the defendant has deliberately appropriated the name "Beecham's Pills." If the complainant is entitled to enforce his rights in a court of equity, the defendant should be restrained.

But it is urged that the complainant cannot be heard to complain of the defendant's misconduct because his own hands are not clean—that his packages bear such misstatements of important facts as to bar him from relief in equity. The defendant claims: (1) That the complainant falsely states that his pills are patented. (2) That the complainant falsely states that his pills are made in England.

It is admitted that the complainant's pills are not patented. Whether they were ever patented does not appear. On some of his packages the complainant uses the word "patent" as a part of the name of his pills —"Beecham's Patent Pills." It thus appears that the complainant employs the word "patent" in connection with pills which are not patented. If such use of the term amounts to a representation that the pills are manufactured under letters patent, the complainant, by such false assertion, is precluded from relief in equity. Holzapfel's Co. v. Rahtjen's Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49; Oliphant v. Salem Flouring Mills, 5 Sawy. 128, Fed. Cas. No. 10,486; Consolidated Fruit Jar Co. v. Dorflinger, Fed. Cas. No. 3,129; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523.

But it is only in cases where such use is deceptive that the owner of a trade-mark is deprived of a remedy. Where the use of the word in connection with an article does not amount to a representation that the article is patented, it is innocent. The best illustration of this innocent use is in the case of proprietary preparations, which are universally called "patent medicines." So certain enameled leather is always spoken of as "patent leather." Undoubtedly in these and similar cases

the word "patent" was originally attached to the article because it was the subject of a patent. But it has lost that significance and by usage has become merely a part of the name of the article. The complainant's preparation is a patent medicine. In view of the general use of the word "patent" in this connection, we think there was nothing deceptive in incorporating it in the name—"Beecham's Patent Pills." It is employed in the proprietary sense. The natural inference is that the pills are made according to Beecham's secret formula, not that they are manufactured under letters patent.

False statements as to the place where a complainant's goods are manufactured may preclude him from equitable relief. Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706. The defendant claims that these principles apply here. But none of the complainant's packages or circulars in use at the time of the commencement of the suit, or years before, contains any false statement as to the place of manufacture. Fairly considered, they state what is true —that the pills are prepared and sold by the complainant in St. Helens, England, and in New York. The statement that "the pills accompanying this pamphlet are specially packed for U. S. America," may possibly suggest their manufacture outside the country, but falls far short of being a false representation.

We find nothing in the case to justify the defendant's contention that the complainant, by misrepresentations, is precluded from relief against the defendant's willful misappropriation of his trade-mark.

The decree of the Circuit Court is affirmed, with costs.

ROBINSON v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1907. Rehearing Denied January 15, 1908.)

No. 1,408.

JUDGMENT—MATTERS CONCLUDED—JUDGMENT AS BAR.

A decree dismissing a bill in equity for infringement of a patent on the merits is a bar to a subsequent action at law between the same parties for infringement of the same patent by the same device.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1032, 1165, 1297.]

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

See 150 Fed. 331, 80 C. C. A. 127.

J. Gray Lucas, for plaintiff in error.

Thomas A. Banning, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The judgment of the Circuit Court, brought for review upon this writ of error, dismisses the suit at law of the plaintiff in error, as against the defendant in error (impleaded with another defendant), charging infringement of letters patent No. 594,-

286, on hearing upon the pleadings. As it is the fourth adjudication against the plaintiff in error, upon like allegations of infringement of the patent in controversy, brought to this court for review, it would seem desirable to have the litigation terminated, and the present record affords ample tenders of the issues of law, as we believe, upon which that result may be reached. If the plaintiff in error suffers loss of any benefit of his patent, he has surely had sufficient days in court and patient hearings upon the merits for determination of any rights which were involved in the several actions.

The first two adjudications were upon bills filed in equity for alleged infringements of the patent, and the issues tried and decided in each are sufficiently stated, for present purposes, in the opinions, respectively, of this court, on appeal from each decree, reported as (1) Robinson v. Chicago City Ry. Co. et al., 118 Fed. 438, 55 C. C. A. 254, and (2) Robinson v. American Car & Foundry Co., 135 Fed. 693, 68 C. C. A. 331. After affirmance of the last-mentioned decree, dismissing the bill against this defendant in error for want of equity, the present suit at law was commenced against the defendant in error, impleaded with Chicago City Railway Company, resulting in a judgment below, upon the pleadings, in favor of the defendant in error. On writ of error to this court the judgment was reversed, for insufficiency of the pleas, with direction to the trial court to grant leave to amend, if desired. Robinson v. American Car & Foundry Co., 150 Fed. 333, 80 C. C. A. 127. The trial court granted leave to the defendant in error to file additional pleas, which were filed accordingly, by way of plea of res judicata, setting up in various forms of averment the issues which were tried and determined (as averred) under the above-mentioned second suit in equity, in favor of this defendant in error. General demurrers to these pleas were filed by the plaintiff in error, upon hearing were overruled, and on his election to stand by the demurrers the present judgment was entered.

The single question arising upon this record, therefore, is the sufficiency of the facts averred in one or the other plea, confessed by the demurrer, to establish the defense or bar of res judicata; and none of the various propositions urged in the brief and oral argument submitted on behalf of the plaintiff in error impress us as standing in the way of its solution. Each plea states with abundant particularity the issues raised, heard, and decided in the prior equity suit referred to between these parties, and specifies their identity with the subject-matter in controversy here—the same patent to be construed and the same device and acts alleged as infringement thereof—together with identity of parties. Each plea states—as the above-mentioned opinion upon the appeal from the decree shows—that the issues were there determined upon the merits. So the prior adjudication thus averred was clearly brought within the elementary rule which bars a second action upon the same claim or demand. In the language of the opinion in Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195:

"It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

See 9 Notes U. S. Rep. 93, for exemplifications of the rule.

The power of the trial court to allow the pleas to be filed is challenged on behalf of plaintiff in error; but the propositions and citations thereupon are inapplicable, and both power and rightful allowance are unquestionable. The elaborate brief of counsel for the plaintiff in error travels widely afield in discussion and citations not involved in this review, and the assignment of errors likewise departs from reviewable questions. No further consideration, however, is deemed needful or useful, as the foregoing view is decisive of the only reviewable matter.

The judgment of the Circuit Court is affirmed.

JAMES E. TOMPKINS CO. v. NEW YORK WOVEN WIRE MATTRESS CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

No. 116.

1. PATENTS—INFRINGEMENT—DESIGN FOR BED SPRING.
   The Tompkins design patent, No. 37,649, for a design for bed-springs, *held* either void for lack of patentability or not infringed on uncontradicted testimony that defendant made and sold springs in all essentials like those alleged to infringe before the application for the patent was filed.

2. SAME—DESIGNS—SUFFICIENCY OF DESCRIPTION.
   A design patent like a mechanical patent must describe the article in such full, clear, concise, and exact terms as to enable persons skilled in the art to make and use the invention.

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

On appeal from a decree of the Circuit Court for the Southern District of New York holding valid and infringed letters patent No. 37,649 granted to Daniel I. Tompkins, November 7, 1905, for a design for bed-springs and assigned to the complainant. The application for the patent was filed May 3, 1905. The opinion below is reported in 154 Fed. 669.

Charles C. Gill, for appellant.

J. E. Hindon Hyde, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The description of the bed-spring found in the specification is as follows:

"A new, original and ornamental design for a bed-spring, as shown in the accompanying drawing, which represents a transverse section of my design."

This is all. The claim is for "the ornamental design for a bed-spring as shown." We are thus relegated to the drawing as the sole source of information.

The drawing is about seven inches long and two inches wide and shows alternate sections of close and open weaving about three-quarters of an inch wide, separated by longitudinal strands, those on the

outside being of greater width than the others. The outside sections have the open weave, are a little over an inch in width and are subdivided by two longitudinal strands about five-sixteenths of an inch apart. The central section shows three bands of close weaving and two of open weaving. No one contends that the design as shown in the drawing could be applied, without change, to a bed-spring intended for actual use.

It is insisted by the defendant that when the bed-spring of the patent, which is seven inches wide, is made for use on an ordinary bed, the precise pattern shown must be correspondingly enlarged. In other words, the number of stripes shown in the drawing must be preserved and proportionately broadened, so that for a four foot bed the five central stripes will approximate six inches in width and the outside stripes (subdivided as before stated) about nine inches.

The complainant contends, on the contrary, that so to enlarge the drawing would destroy the identity of the design and present a different impression upon the eye. It is contended by complainant that any one skilled in the art would know that to make a spring for actual use the stripes must be widened sufficiently to give the necessary effect and the number of stripes increased to make up the desired width. There is no scale attached to the drawing of the patent.

The statute requires that the inventor shall describe what he has done in such full, clear, concise and exact terms as to enable persons skilled in the art to make and use the invention. As the parties differ radically as to what the design in question is, it may be doubted whether Tompkins has complied with the requirements of the statute in this regard. Both parties present equally plausible arguments in support of the design which, they respectively contend, is an embodiment of the drawing. It would seem that neither of these designs, tested from the view point applicable to design patents, infringes the other; the appearance to the eye being quite dissimilar. It is also to be noted that the complainant's expert contends that it makes no difference whether the individual elements are enlarged proportionately or the number of stripes increased, so long as the general appearance produced upon the eye is retained. But it is apparent that the design, if proportionately enlarged to fit a large double bed would present a totally different impression upon the eye. In other words, a manufacturer enlarging the design proportionately might infringe when making a spring for a single bed and might not infringe when making a spring for a double bed. There is nothing in the patent to show where the line of demarcation is to be drawn.

A design patent for which such an elastic construction is asserted can hardly be said to deal fairly with the public. The public is entitled to know what it may and may not do and the patent in hand fails to give this information as explicitly as it should. But, irrespective of these considerations, we think the suit cannot be maintained. Aaron Prince the vice president and general manager of the defendant testified that they commenced making beds similar to the complainant's exhibit, "Defendant's spring-bed," but without roll edges either in the latter part of 1904 or very early in 1905, and first sold them in

February, 1905, under the name of the "Regis Spring." This continued until April 16, 1906, when they commenced the manufacture of a bed known as the "1906 Bed Spring," which the complainant does not, in this suit, contend is an infringement. He testifies further that about the same time that they made the springs without roll edges they made them with roll edges, both varieties being made in February, 1905.

A photograph of the spring without the roll edges was taken during that month and is in the record. Assuming the Regis spring to have been on sale prior to the application of the Tompkins patent, one of two results must inevitably follow, either the claim must be so limited that defendant does not infringe, or, if a construction broad enough to cover the defendant's structure is placed upon the claim, it must be held void for want of patentability. This is true whether the roll edges were added prior or subsequent to the date of the application. The addition of the edges would not make an old fabric patentable as a design. The roll had been known to the trade for at least five years prior to the patent and it will hardly be contended that, if the body of the Tompkins spring were old, a distinctly new, ornamental and patentable feature would be imparted to it by placing the enlarged coils at the edges.

Is Mr. Prince's statement true? Having in mind the fact that he is an interested witness and that his statements must be established beyond a reasonable doubt, we see no way to avoid the effect of his testimony, unless we are prepared to say that he has committed willful perjury. This we cannot do. Mr. Prince appears on the record to be an intelligent, straightforward, conservative, business man. He was not testifying about events happening so long ago that the memory might well be confused and clouded by the lapse of time and a multitude of intervening events. His testimony was given in 1906 and related to transactions in 1904–5, and it was not contradicted. Though he did not produce a Regis spring he gave the names of a number of dealers to whom the spring had been sold, so that if his statements were untrue it could easily have been discovered by an examination of these persons and the defendant's books. There is nothing astonishing or inherently improbable in Prince's testimony and we cannot disregard it.

The decree is reversed with costs and the cause remanded to the Circuit Court with instructions to dismiss the bill with costs.

J. L. MOTT IRON WORKS v. STANDARD SANITARY MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

No. 53.

1. PATENTS—INVENTION—DREDGER FOR ENAMELING.

The Arrott patent, No. 633,941, for a dredger for pulverulent material used in enameling bath tubs, etc., was not anticipated, and discloses invention, the device being one of a high order of merit and usefulness. Also *held* infringed.

2. SAME.

The contribution to an important industry of a device that is labor-saving and effective, and relieves to a degree work under fierce heat conditions, is meritorious in the patent system, and rises to the plane of the humane.

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

For opinion below, see 152 Fed. 635.

W. P. Preble, Jr., for appellant.

Marshall A. Christy and George H. Christy, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Standard Sanitary Manufacturing Company, owner of patent No. 633,941, granted September 26, 1899, to James W. Arrott, Jr., for a dredger for pulverulent material, brought suit against the J. L. Mott Iron Works for the infringement thereof. That court adjudged the patent valid and its three claims infringed. From such decree the latter appealed.

The process involved is the enameling of bath tubs and like wares, which consists in evenly distributing powered glass through a sieve on cast-iron tubs raised to a high heat. This sprinkling process is repeated several times and after each the tub is reheated. The glass fluxes and makes the thick glassy coating or enamel of the modern tub. To properly enamel requires that exactly the right amount of powdered glass be sprinkled through the sieve; that it be distributed uniformly over the tub; and fall at right angles to the tub surface being treated. Failure to do so makes a lumpy or wavy surface and an imperfect tub.

In the practice both prior and subsequent to the patent, the heated tub was placed in a cradle and its position so shifted that an enameler could let the glass fall at right angles to its surface. In the old system he held the sieve with one hand and with the other struck its handle with a pronged tool, and thus dropped the powder through the sieve. It will be noted this work was done under great strain. The tubs were heated to some ten or eleven hundred degrees Fahrenheit and the sieve handle was short to enable the workmen with one hand to counterbalance the glass in the sieve. With the hand thus strained to support, he must at the same time horizontally move the sieve to secure uniform lateral distribution, and meanwhile the force and frequency of the blows given by the other hand must be such as to discharge the precise amount of glass. Moreover, as the powder came through in distinct puffs or waves after each blow, the sieve must, to avoid the injurious wave effect, be moving when the blow was struck. The heat was such as to compel the use of asbestos clothes, apron, gloves, and face screens. These difficulties are stated by different witnesses:

"With the hand dredge it was very difficult to distribute the enamel evenly on the surface of the work on account of irregular rapping. When a man started in on a tub he could rap pretty fast, but toward the end of the operation he would get tired and rap more slowly. This made it enamel uneven. Sometimes on very large tubs, during the process of enameling, my arm would

give out, and I would have to rest for a second or so on account of my arm being seized with cramps, which most of the enamelers experienced the same. Some enamelers that I worked with wore out their arms and had to stop work; * * * it was very hard to operate the hand dredge * * * on account of the difficulty to learn the right rap. That is the most difficult proposition in the hand dredge, is the rap. * * * The operation of handling a hand-tapping dredge was not only difficult, but laborious, and before a man could become expert in his work, he was compelled to master the knack of depositing the enamel evenly upon the surface of the casting. It was always necessary to not only have a man of good judgment, but a man of physical strength. The constant tapping, and standing in front of a hot casting at the same time, was very exhausting. During the summer months, it was almost an impossibility to keep the furnaces fully manned, by reason of the men becoming exhausted at their work, largely on account of the labor connected with the applying of the enamel to the casting."

By this method a skilled workman could enamel one tub an hour. Now the improvement made by Arrott was simple but effective. It converted an ordinary sieve, by using a pneumatic hammer in connection therewith, into an automatic sprinkling machine. What the patentee did is thus described in the specification:

"The object of this invention is to provide an automatic tapper or agitator which will deliver a succession of rapid blows against the side or end of the dredger and while relieving the workman of a great deal of labor causes the pulverulent material or powder to be evenly distributed and to be uniformly discharged. The device which I employ for this purpose is preferably a pneumatic hammer, the piston or plunger of which is elongated and fitted to the hollow handle of the dredger so as to reciprocate within the latter and strike the end or side of the dredger with every forward stroke."

The proofs show that with Arrott's dredge a man can by touching a valve button secure a rapping action which is rapid, continuous, and uniform. At the same time his hands are each free both to sustain the load and to move the sieve over the surface and get a uniform lateral powder distribution. The blows are so rapid and regular that the powder, instead of jetting through the sieve in a puff or distinct wave with each hand-struck blow, flows in a practically continuous, regular sheet. This device subjects an enameler to a much less strain in the face of terrific heat, while it enables him to enamel three tubs an hour, and such work can be done by less skilled and easier taught men. While there were other improvements which enabled a factory to handle more tubs, and to that extent may be said to have helped produce this substantial increase of output, yet it is manifest that, save for Arrott's device, these other mechanical improvements would be of no avail owing to the limitations of human strength and endurance, which confined the old enameling process to impassable product bounds.

The prior art disclosed no such device as Arrott's, and we are of opinion it was his individual work, and involved patentability. It is easy now to minimize its importance and say it consisted simply in applying a pneumatic hammer to a sieve, but the fact remains that, with the difficulty of enameling keenly recognized in the art, no one made such combination. Indeed its inventive character is evidenced by the alleged anticipatory uses in the respondent's works. The combined use of a pneumatic hammer with a sieve was some years before there tried and abandoned. The evidence of exact practice is not such as to establish an anticipatory use, for it is contradictory as to how

the hammer was applied, but the highly significant fact is that, even with the thought of a possible combination of pneumatic hammer and sieve suggested to men skilled in that art, they were not able to mechanically place the two in successful operative relation. But Arrott did just what they failed to do. He contributed to an important industry a device, labor-saving, effective, and which, in relieving to a degree labor under fierce heat conditions, rose to the plane of the humane. It was these results which the respondent failed to secure that make Arrott's work invention, and theirs a fruitless and abandoned experiment. Their work began and ended in groping trial. The varying positions, at different times, of the pneumatic hammer with relation to both handle and sieve evidence those tentative, uncertain steps of experiment, which neither forestall the work of, or withhold the reward from, the real inventor. So holding, we are of opinion the court below committed no error in adjudging the patent valid, and respondent's dredge, which is a mere duplication of complainant's device, an infringement. The appeal is therefore dismissed.

GRAY v. GRINBERG et al.

(Circuit Court of Appeals, Third Circuit. February 5, 1908.)

No. 31.

1. PATENTS—SUIT FOR INFRINGEMENT—ISSUES MADE BY PLEADINGS.
   Where a bill for infringement of a patent against a nonresident defendant alleged infringement in the district where the suit was brought, which allegation was denied in the answer, the issue as to infringement is limited to infringement within such district.

2. SAME—INFRINGEMENT—EVIDENCE.
   Evidence considered in a suit for infringement, and *held* insufficient to establish a prima facie case of infringement by defendants by a sale of any infringing article.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 549.]

3. PLEADING—EXHIBITS—DESIGN PATENTS.
   When the question involved is the infringement of a design patent, the court is especially entitled to have put before it exhibits to which the testimony of experts may be referred, and by means of which it may make its own comparisons and deductions.

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

For opinion below, see 147 Fed. 732.

Mark W. Collet, for appellant.

Horace Pettit, for appellees.

Before DALLAS and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The bill of complaint states that the complainant is a citizen and inhabitant of the state of Massachusetts, and that the defendants are citizens and inhabitants of the state of New York, in the Southern district of New York, but have a regular and established place of business in the city of Philadelphia, in the East-

ern district of Pennsylvania, where they committed acts of infringement upon complainant's design patent for a lamp, No. 37,301. The only question argued and presented for decision at this time is that of infringement.

The learned judge who heard the cause in the court below dismissed the bill of complaint because the evidence was insufficient to show that infringing lamps had been actually sold in the Eastern district of Pennsylvania. Complainant's counsel contends before this court, however, that the defendants, by filing a general appearance in the cause without objection to the jurisdiction of the court, waived their right to object to being sued in the Eastern district of Pennsylvania, and hence that, as the action is within the general jurisdiction of the Circuit Court, the complainant, because of such waiver, may show in support of his bill acts of infringement committed outside of such district. If that be admitted, however, as a general proposition, it does not relieve the complainant in this case of the burden of proving that the defendants have committed infringing acts within said district, since that was substantially the issue tendered by the bill, denied by the answer, and to the maintenance of which the proofs were directed. It should be noted in passing, however, that the only evidence of sales outside of the Eastern district of Pennsylvania is that of the complainant who says:

"They [the defendants] made a copy of our lamps, had them manufactured outside, and sold them to the trade under the name 'Majestic.'"

Manufactured outside and sold, but whether within or without the United States, does not appear, and the proofs upon the point are therefore fatally defective, even if relevant. Furthermore, the issue would seem to be limited in this court by the assignments of error to infringement committed within the Eastern district of Pennsylvania. The first assignment is as follows:

"The learned judge of the Circuit Court erred in holding that complainant had not proved that the defendants had committed acts of infringement within the Eastern district of Pennsylvania."

There is no assignment, however, which specifically raises the point now urged. The question for consideration, therefore, may be properly limited here, as it was below, to whether or not the proofs show that infringing acts were committed within that district. The burden of proof rested upon the complainant to show a completed act of infringement. The defendant's alleged threatened infringement was insufficient. Westinghouse Electric Company v. Stanley Electric Company (C. C.) 116 Fed. 641. The complainant produced two witnesses who testified that they went to the complainant's place of business in Philadelphia, and were there shown by salesmen certain lamps, of which they said many had been sold in that city. No lamp or lamps were bought by either of the witnesses, however, and consequently none were produced to the court for inspection. One of the witnesses testified that the lamps shown him at the defendant's place of business were "substantially identical" with the picture of a lamp advertised by the defendants in a magazine, and the other that the lamps shown were a "good representation" of those so advertised;

but they did not say that the lamps offered to them for sale were marked "Majestic," or were so called by the salesmen. This proof was supplemented by the production of a lamp of the complainant's design, between which and the advertising cuts a comparison was made. It appears, however, that the defendants were, not long before, customers of the complainant's firm, and had bought lamps from them designed after the patent in suit, and had also been furnished by the complainant's firm with a cut or electrotype, by means of which they could advertise the complainant's lamp. It may well be, in view of the general and uncertain character of the evidence, that the lamps which the salesmen in the defendants' store showed to the witness were lamps of the complainant's genuine design, which had been bought from his firm, and that the advertisements referred to, if they were representations of the complainant's design, were legitimately displayed through a cut furnished for that purpose.

It is unnecessary, however, to discuss the evidence at length. The learned judge who heard the case below has done it fully and carefully, and we are satisfied with his reasoning and conclusions. The evidence would undoubtedly have been greatly clarified, and perhaps rendered conclusive, by the purchase and exhibition in court of one of the lamps shown in Philadelphia. In that event the court would at least have been in a position to compare and determine for itself its likeness or unlikeness to the genuine. When a question involving the infringement of a design patent is presented, the court is especially entitled to have put before it exhibits to which the testimony of experts may be referred, and by means of which it may make its own comparison and deductions. The complainant's testimony does not make out, to our satisfaction, a prima facie case of infringement by the defendants.

The decree below is affirmed, with costs.

AMERICAN GRASS TWINE CO. v. CHOATE et al.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1907

No. 1,332.

1. PATENTS—INVENTION—GRASS TWINE.

The Lowry patent, No. 412,963, for a grass twine for use in harvesters to bind grain, consisting of a twine made of grass, hay, or straw twisted together and wrapped with a thread made of cotton or other suitable material, in view of the prior art, which disclosed both grass rope and the use of a wrapping of thread for twine made of coarse and brittle fibers, is void for lack of patentable invention.

2. SAME—GRASS FABRICS.

The Koeck patent, No. 646,123, for a fabric consisting of a main body portion formed of parallel layers or strands of twisted grass, each wrapped with a thread and having transverse binding threads passing alternately over and under such grass strands to bind them together, is merely for the result of the application of the old method of weaving rag carpets to a different material, and is void for lack of invention.

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

Appellant failed in its suit for alleged infringement of patent No. 412,963, issued on October 15, 1889, to Lowry for a twine for binding grain, and of patent No. 646,123, issued March 27, 1900, to Koeck for a woven fabric.

Lowry's patent describes and claims the twine as follows:

"My object is to utilize common farm products—such as grass, hay and straw—for binding grain; and my invention consists in the construction of a twine, as hereinafter described, that is adapted to be wound upon a ball or spool and used in a grain binder on a harvester for automatically binding sheaves as the machine is advanced in a field to cut and bind grain in a common way."

"In the manufacture of my twine I place stems and blades of grass, hay or straw into parallel position with each other and twist them together, and then wrap a thread of cotton or other suitable material around the outside to prevent any ends from projecting, and to produce and maintain a uniform thickness and smooth surface, as required to adapt the twine to slip through the eye of a needle in a binder."

"I claim as my invention—

"As an improved article of manufacture, a twine made of grass, hay, or straw, twisted together and wrapped with a thread made of cotton or other suitable material, substantially as shown and described, for the purposes stated."

The Koeck fabric is composed of ordinary twine as warp and the Lowry twine as woof. The claims relied on are these:

"2. As a new article of manufacture, a fabric the body of which is composed of stalks of grass twisted together and spirally wrapped to form a continuous strand, said strand bent or doubled back and forth upon itself and having interspersed throughout transverse binding stays or strands interwoven therewith, such binding strands or stays being duplicated along the edges of the fabric, as and for the purpose set forth."

"4. As a new article of manufacture, a fabric consisting of a main body portion formed of parallel layers or strands of twisted grass, each strand being encircled spirally by a thread in combination with transverse binding threads traversing the entire body but alternately under and over adjacent parallel grass strands, as and for the purpose set forth."

Frank T. Brown, for appellant.

Robert H. Parkinson (C. T. Benedict, on the brief), for appellees.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Long before Lowry's time, as the record shows, various sorts of vegetable fibers and stalks had been twisted into twine. It was old, also, "to wrap a thread of cotton or other suitable material around the outside" of twine made from coarse and brittle fibers. The new thing that Lowry did was to make twine by wrapping thread around twisted grass, hay, or straw. But the fact that a thing is new does not prove that invention was present any more than it establishes the other element of patentability—usefulness. In our judgment, no invention was involved in applying to the known grass, hay, or straw rope the wrapping of thread that had been applied to other coarse and brittle fibers. This patent comes fully, we believe, within the line of cases illustrated by Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702, and Underwood v. Gerber, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710. Against this view appellant lays stress on the asserted fact that a great industry has been built upon the patent. The industry of manufacturing mats and the like out of wild marsh grass or sedge is due, we think, rather to the commercial ability and financial resources at the command of appellant than to Lowry's conception of making binder twine

from common farm products. But, if appellant's assertion were to be taken as true, it would only be influential in resolving a doubt. It would not also serve to inject a doubt into an otherwise clear case.

Koeck was a weaver of rag carpets on a hand loom. The woven fabric of his patent is the result of applying to the Lowry twine as woof the warp and the methods of weaving which he had been applying to strips of rags as woof. He exercised, we find, only the ordinary skill of his trade.

The decree is affirmed.

MERRELL-SOULE CO. v. STAR CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1908.)

No. 100.

PATENTS—INVENTION—MASK.

The Merrell patent, No. 727,173, for a mask made from a flat blank having interlocking devices of well-known forms at the top and bottom to hold it in place, is void for lack of invention.

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

For opinion below, see 153 Fed. 762.

H. P. Denison, for appellant.

H. A. West, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action for infringement of letters patent, No. 727,173, to Gaius L. Merrell, assignor to complainant, for improvements in masks, the claims relied upon being the first and fifth.

"1. A mask having ears and provided on inner and outer sides of each ear with interlocking flaps, whereby the top portion of the mask is held down substantially as set forth."

"5. A mask provided at the top with ears and with interlocking top flaps holding the top portion down and having at its lower end interlocking muzzle flaps substantially as set forth."

These claims are specifically for a mask with interlocking devices at top and bottom by which it is made to conform to the human head. The specifications state:

"This invention has for its object to produce in a simple and inexpensive way from a flat blank a shaped mask which is suitable for the amusement of children. This improved mask is formed of a flat blank of pasteboard or similar flexible material provided in suitable places with interlocking flaps, which draw the blank together at these points and impart the desired shape to the same."

Masks have been used from time immemorial, and a flat mask of flexible material is covered by letters patent No. 211,675 to Antone Weidmann. Patents too numerous to mention have been put in evidence covering interlocking devices to make various forms such as boxes, dishes and caps out of flat flexible material. Conceding that the plaintiff was the first to apply these old interlocking systems to an

old flat mask of flexible material, we discover no invention in his doing so, but only the capacity of a skilled mechanic addressing himself to the particular problem in question. The decree is affirmed, with costs.

CHICAGO PNEUMATIC TOOL CO. v. CLEVELAND PNEUMATIC TOOL CO.

(Circuit Court of Appeals, Third Circuit. February 5, 1908.)

No. 62.

PATENTS—INFRINGEMENT—PNEUMATIC TOOL.

The Boyer patent, No. 537,629, for a pneumatic tool, as construed and limited by prior adjudication, *held* not infringed.

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

For opinion below, see 154 Fed. 953.

Edward Rector and Frank P. Prichard, for appellant.

E. Hayward Fairbanks and Hector T. Fenton, for appellee.

Before GRAY, Circuit Judge, and HOLLAND and CROSS, District Judges.

CROSS, District Judge. The patent in suit, No. 537,629, has been before this court upon two prior occasions. In Boyer v. Keller Tool Company, 127 Fed. 130, 62 C. C. A. 244, its validity was sustained, but necessarily, in view of the prior art, upon very narrow grounds. It was distinguished from the prior British patent to Low, in but one respect, and that was in the location of the valve. This court then said, speaking of the position of the valve in the Low patent:

"It is not located, in our judgment, in the grasping portion of the handle, as is required by the claims in suit, but beyond it in a distinct recess or chamber of the tool body specially fashioned to receive and hold it."

The patent was again before this court in this suit upon appeal from an order of the Circuit Court granting a preliminary writ of injunction against the defendants. The case will be found reported in 135 Fed. 784, 68 C. C. A. 485. The order of the court below allowing the writ was reversed, and Judge Dallas, speaking for this court, after quoting from the earlier opinion the extract hereinabove quoted says, at page 784 of 135 Fed., at page 486 of 68 C. C. A.:

"This distinction is quite as apparent in the tools of the appellants (now appellees) as in that of Low. Their valve is not, it is true, located at the same point as his, but it is placed, nevertheless, in a chamber specially fashioned in a projection which, though connected with the grasping portion of handle, is no more a part of it than is Low's recess portion of the tool body; and the fact that the valve chamber in the one case is at the upper, while in the other it is at the lower, end of the handle, is immaterial."

It is obvious that since the location of the valve in a distinct recess or chamber alone prevented the Low patent from completely anticipating the complainant's, as was held in the case against the Keller Tool Company, that any device in which the valve is located in a distinct recess

or chamber, as in Low, cannot infringe the complainant's patent; accordingly this court, after finding that the valve in the defendant's tool was located to all intents and purposes in a distinct recess or chamber as it was in Low's, held that the defendant's device did not infringe the complainant's patent, and consequently reversed the order of the Circuit Court awarding a preliminary injunction. The case as now presented is substantially the same as that then presented, and we see no reason, therefore, to modify or change the conclusion reached upon the preliminary appeal.

The decisions of this court, above referred to, cover the entire case, and leave no ground upon which the appellant can stand.

The decree of the court below dismissing the bill of complaint is affirmed, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CONDIT ELECTRICAL MFG. CO.

(Circuit Court, S. D. New York. January 7, 1908.)

No. 1.

1. PATENTS—SUIT FOR INFRINGMENT—PREVIOUS DECISIONS—EFFECT.
Upon the question of the validity or construction of a patent, the judge of a Circuit Court is not bound by a decision of a Circuit Court of Appeals of another circuit, but it is his duty to exercise an independent judgment, giving to such decision the weight to which, in his opinion, its reasoning entitles it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 481–488.]

2. SAME—INFRINGEMENT—CIRCUIT BREAKER.
The Wright and Aalborg patent, No. 633,772, for an automatic circuit breaker, while an improvement patent in which none of the elements of the device are broadly new, covers a new combination which produces better results and discloses invention, claims 2 and 5, construed, and *held* infringed.

3. SAME—IMPROVEMENT PATENTS.
In the field of improvement each patentee must stand on the specific improvement disclosed in and covered by his claims, and improvements subsequently made by another, though in the same field of improvement, do not infringe unless the changes are colorable merely, and consist of the substitution of well-known equivalents, or mere changes of form or interchange of parts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 379.]

4. SAME—EQUIVALENTS—SUBSTITUTION OF SPRING FOR PIVOT.
A spring substituted for a pivot in a patented combination where it permits the same movement and does the same work is an equivalent, and the substitution does not avoid infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 374, 375.]

In Equity. Bill of complaint alleging infringement by defendant of claims 2 and 5 of U. S. letters patent to Gilbert Wright and Christian Aalborg, for "Automatic Circuit Breaker," No. 633,772, dated September 26, 1899, application filed March 23, 1899.

Kerr, Page & Cooper (Thomas B. Kerr, of counsel), for complainant.

Clifton V. Edwards (Edward P. Payson, of counsel), for defendant.

RAY, District Judge. The patentees in the specifications of the patent say:

"Our invention relates to devices employed for automatically opening electric circuits upon the passage therethrough of a current materially in excess of that which the circuit is intended to carry. The object of our invention is to provide a circuit-breaker that shall have a large current-carrying capacity in proportion to the mechanical dimensions of the device, which shall be easily brought into operative position and locked therein, which shall be certainly and quickly opened whenever the current in the circuit exceeds that for which the locking mechanism is set, and which shall serve to interrupt the circuit without danger of injury to the main contact-terminals. The means for accomplishing these results are disclosed in the accompanying drawings, and will now be described."

Claims 2 and 5, in suit, read as follows:

"In an automatic electric-circuit breaker, the combination with a base and stationary main and shunt contact-terminals located in approximately vertical alignment thereon, of a movable laminated contact member pivoted to said base, a movable shunt-contact member pivoted to said laminated contact member, toggle-levers for operating said movable members, means for locking the breaker in closed position, and a tripping device projecting into a magnetic circuit."

"(5) In a circuit-breaker, the combination with main stationary contact-terminals and a stationary shunt-terminal located above the same, of a pivoted main contact member, a shunt-contact member pivoted to said main member at a distance from its axis of movement, means for yieldingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position, toggle-lever mechanism for closing the breaker, a latch and electromagnetically-actuated means for tripping the latch, said toggle-lever, latching and tripping mechanism being located below both the main and the shunt separable terminals."

The complainant alleges infringement by defendant in the use, etc., of a circuit breaker illustrated in complainant's record on the sheets opposite page 25. Defendant denies infringement, and avers in his answer that the patent in suit is invalid by reason of prior use and lack of invention in view of the prior art, or, if valid, it is to be so narrowly construed as not to cover defendant's device.

Claim 2 has, in combination in a circuit breaker, the following elements: (1) A base and stationary main and shunt contact-terminals located in approximately vertical alignment thereon; (2) a movable laminated contact member pivoted to said base; (3) a movable shunt-contact member pivoted to said laminated contact member; (4) toggle-levers for operating said movable members; (5) means for locking the breaker in closed position; and (6) a tripping device projecting into a magnetic circuit.

Claim 5 has, in combination in a circuit breaker, the following elements: (1) (a) Main stationary contact terminals and (b) a stationary shunt-terminal located above the same; (2) a pivoted main contact member; (3) a shunt-contact member pivoted to said main member at a distance from its axis of movement; (4) means for yield-

ingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position; (5) toggle-lever mechanism for closing the breaker; (6) (a) a latch and electromagnetically-actuated means for tripping the latch and (b) said toggle-lever, latching and tripping mechanism being located below both the main and the shunt separable terminals.

In closing their description of their invention the patentees say, "We desire it to be understood that one invention is not limited to any specific form or arrangement of parts except in so far as such limitations are specified in the claims." Hence it is not otherwise limited, except by specific language or by the prior art.

This patent has been the subject of litigation in the Third Circuit. Westinghouse Electric & Mfg. Co. v. Cutter Electrical & Mfg. Co., 143 Fed. 966, 75 C. C. A. 152, reversing the Circuit Court (Holland, D. J.) in 136 Fed. 217. On a full hearing as to the validity of the claims of the patent here in suit Judge Holland held, in substance, that:

"The Wright and Aalborg patent, No. 633,772, for an automatic electric breaker, is limited by the prior art to a single new element in the combination shown. As so construed, held not infringed."

Judge Holland said:

"In the second claim it will be noticed 'a movable shunt contact member' is 'pivoted to the laminated contact member' and in the fifth claim 'a shunt contact member' is 'pivoted to a main contact member' and this is the only new matter the patent contains."

He meant, I take it, that this was the only new matter distinguishing it from the prior art. He refers to the file wrapper in the Patent Office, and says:

"The complainant is therefore estopped from asserting any broader claim than that to which he agreed with the Patent Office."

He asserts that the original claims were rejected on Packard, Larson, and Potter, and then amended by the insertion of the new matter above quoted from Judge Holland's opinion, and, as amended, allowed. He also states:

"The defendant's device contains the same nine old elements found in the Potter, the Larson, and the Packard patents, and the patent in suit, but it is different in arrangement from any of them, in that the early contact and delayed break is effected by two movable shunt terminals, which, when brought together in closing, tilt on their respective pivots so that the faces can adjust themselves in a close fit, the one sliding on the other for some distance, each one of them having a resilient mounting, so that when they are opened they both spring in somewhat different positions from those which they occupy when closed."

He then concludes that as defendant's device secures the early closing and delayed break "by a shifting movement of both the shunt terminal and piece," while the complainant accomplishes the same result "through a stationary shunt terminal and a moving shunt piece actuated by a long arm pivoted to the main contact member near the toggle joint," there was no infringement. He did not deny the validity of the claims in suit, but simply held that in view of the

limited or narrow construction which must be placed upon the claims the defendant did not infringe. The Circuit Court of Appeals, Third Circuit, Acheson and Dallas concurring, Gray dissenting, held the patent valid and infringed. The Circuit Court of Appeals, among other things, said:

"We are not able to give to the claims 2 and 5 the limited meaning contended for by the defendant. Certainly nothing is expressed to restrict these claims to a pivoting at the point B. The language used is satisfied by the pivoting of the shunt-contact member at a point, A, and the shunt-contact member cannot be said any more truly to be pivoted to the laminated contact member or main member by a pivotal connection at B, than by a pivotal connection at A. Moreover, we think it clearly appears that the pivotal connection at A is essential to the practical operation of the patented apparatus, and therefore the construction of the claims 2 and 5 should be such as to include this indispensable feature. The function of the movable carbon block is not simply the adjustment of contact between the carbons 17 and 5, but also to permit the main contact to close after the carbon contacts are closed, and to open before the carbon contacts are opened. Furthermore, the interpretation on which the defendant insists brings into claims 2 and 5 as an element the pivoted arm, 20, which is expressly made an element of claims 1 and 3, but which was omitted from claims 2 and 5, and presumably was intentionally so omitted.

"Turning to the defendant's circuit-breaker, we find that the movable carbon block (15) is pivoted directly to an arm forming an upward extension of the main movable laminated contact member. The defendant, however, insists that it has wholly dispensed with the pivoted connection of the long arm, 20, of the patent in suit with the laminated contact member, and thus has eliminated from its structure the loose and yielding connection at point B. Is this so? As we have seen, the movable laminated contact member of the defendant's apparatus is pivoted to the base, and the pivot, 6, it is shown, moves in a slot, 7, thereby affording loose motion to the laminated contact member independent of the motion of the carbon shunts. Now, in answer to the question, 'Will you please state the functions of the slot marked "7" in your cut A of the defendant's circuit-breaker?' the defendant's expert replied: 'The function of the slot marked "7" in the cut A is to permit a motion of translation of the pivot, 6. This permits a motion of translation of the laminated member, 4, before its simple motion of rotation about pivot, 6, during the opening of the switch.' And the witness further states that: 'In closing defendant's circuit-breaker the carbons come first into engagement, and then, by a motion of translation, permitted by the slot, 7, the main laminated member and the movable carbon move together toward their respective complementary contacts; after the carbons have once touched in the closing movement they continue in engagement.' Obviously the two devices for securing loose motion to the laminated contact member independent of the motion of the carbon shunts are equivalent mechanical arrangements."

That court also said:

"Upon the whole case we are of opinion that there is substantial identity of operation between the complainant's and the defendant's devices, accomplished by substantially the same means, and securing the same results. We think, therefore, that the court below should have entered a decree in favor of the complainant upon the second and fifth claims of the patent in suit. We have not overlooked the argument based upon the contents of the file wrapper. We are not able, however, to find anything therein inconsistent with the interpretation which we have given to claims 2 and 5 of the patent in suit. Claim 2 stands as originally formulated, save by the insertion of the word 'located' after 'terminals,' and the word 'approximately' before 'vertical alignment.' Claim 5 was not amended so as to include the long arm, 20, or with reference to it at all. The changes made in that claim do not touch the controlling questions before the court."

It is contended by the complainant that as this was the decision of a Circuit Court of Appeals, even though in another circuit, that the Circuit Court of the Second Circuit should deem itself bound by it, and cites decisions and the rules of comity. I do not regard this court as bound at all except as it is convinced by the reasoning of the opinions in the two cases. Circuit Judge Gray and District Judge Holland hold the one way, while Circuit Judges Acheson and Dallas hold the other. I think this court should look to the record, the reasoning, and the law rather than to the high degree of that court for guidance. The judge at circuit is bound by the decisions of the Circuit Court of Appeals in his own circuit so far as such decision relates to the questions before that court for decision and decided by it. He is not bound by the obiter holdings of his own Circuit Court of Appeals. When he comes to the decisions of the Circuit Courts of Appeals in other circuits he is not bound at all. Should he so regard himself he would find himself in a predicament, for such courts quite frequently decide the same question on the same facts in direct opposition to each other. What is his duty in such a case? Shall he, for comity sake, "hedge?" Shall he be bound by the one Circuit Court of Appeals and thereby run the risk of offending the other when they differ, as frequently they do, or shall he exercise his own best judgment and simply follow the one whose reasoning and judgment is most convincing? It seems to me very clear that the judge at circuit, as an independent judicial officer, is bound to think and act for himself, exercising his best judgment, giving to the holdings of Circuit Courts of Appeal, outside his own circuit, all the weight their reasoning is entitled to. When he does this he does his duty, when he fails he becomes a mere machine. In all cases the judge at circuit must follow the Supreme Court of the United States as it is the final arbiter, and its decisions are the law of the land binding on all. Hence I have carefully examined the opinions in the cases referred to and the record in the case now before this court. In the record here I find no file wrapper. A large number of prior patents are in evidence, and show the prior art as explained by defendant's witness Louis Bell. He states that Wright and Aalborg, in the patent in suit, have designed an automatic circuit breaker along the same general lines as their switch of patent No. 633,771, "with the addition of a shunt contact arm pivoted to the main contact member and reaching above it make contact with a fixed carbon block in such wise that the carbon shunt contact would be the last to break as this circuit breaker was opened and the first to close when it was closed." He divides complainant's claims into eight elements, and then says:

"These elements are all individually old in the art, and they are collectively old in at least three patents prior to the patent in suit."

He specifies these as Larson, No. 522,527; Potter, No. 533,083; and Packard, No. 577,447. He also says:

"The only element of claims 2 and 5 of the patent in suit which distinguishes them from these prior combinations is the pivoting of the shunt contact-piece to the main contact member in such wise as to close the shunt before the main contact and open it after the main contact."

William Main, a witness for the complainant, takes up Bell's analysis of the claims in suit and demonstrates, I think, that Bell has omitted important and vital words, as, for instance, Bell describes element 1 of claim 2 as "a base carrying two main terminals" and "a fixed shunt terminal," dividing it into two elements. The patent calls for "a base and stationary main and shunt contact terminals located in approximately vertical alignment thereon." His third element is thus stated by him, "a movable bridge piece to close the main circuit." The patent calls for "a movable laminated contact member pivoted to said base." His fourth element is "a movable shunt member to close the shunt circuit." The patent calls for "a movable shunt contact member pivoted to said laminated contact member." Now, going to claim 5 Bell gives as the fifth element, for he combines the claims, "Means for opening and closing the shunt circuit so that it should open after and close before the main circuit," whereas the fifth claim calls for "Means for yieldingly holding the movable shunt contact in a position in advance of the plane of the faces of the main movable member when in open position." I will not go further, but it seems to me that these omissions and changes are very important. We are dealing with a device which has to do with electricity, the power of which is so tremendous as to be appalling, and one purpose of which is to prevent accidents and destruction. It is unnecessary to go into details of its purpose. In such a device as a "circuit breaker" of which many have been devised, as the art shows, every element of the claims as there particularly described becomes important. While the patentees were not pioneers in this art, they were improvers in an art which demanded improvement, and in which every real improvement was hailed with satisfaction. The control of the electric current and devices therefor is an art as yet in its infancy, probably. It seems to me that the force of the evidence of defendant's expert is broken by the ease with which he seems to have passed over some important matters and differences. However, probably he had no intention to slight the consideration of any question he thought important, or to evade the discussion of any element he deemed important. The complainant does not claim that any element of either combination is broadly new. He does claim a new and an improved combination producing far better results. He has the presumption of patentable invention in view of the prior art. Considering the importance of the art and the great interest therein it is improbable that anything was overlooked in the Patent Office. I am convinced that patentable invention is disclosed, and in that agree with the Circuit Court of Appeals in the Third Circuit.

When an invention has been extensively introduced and has met with success and large sales we have, sometimes, from this fact alone, persuasive evidence of patentable invention. It is sufficient to turn the scale as the courts have frequently decided. Here, we have evidence of this character of a most substantial nature. When a device of this kind has been made and covered broadly by a patent or patents, and no new element is introduced, and no old element is discarded in the new combination alleged to be an improvement, in other words, when we have but a new combination of old elements, a substantial advance in the art must be shown, and we must have in the new combination ei-

ther a new or a better result as well as a new mode of operation, or we must have a mode of operation answering in obedience to another law of mechanical movement. This field of improvement is open to all comers, and each comer must stand on the specific improvement disclosed in and covered by his claims. He cannot claim anything he has not specified in the claims of his patent. And the improvements subsequently made by another, which he has not described and claimed, even in the same field of improvement, do not infringe unless they are colorable merely, and consist of the substitution of well-known equivalents or a mere change of form or interchange of parts. If they operate in the same way and produce the same results and contain the same elements then such alleged improvements would not be patentable, and the devices would of course infringe. The mere change of position of the several elements, if they still operate on the same principle and in obedience to the same law of mechanical movement, would not constitute a new, a patentable, or a noninfringing improvement, or a noninfringing device. In determining whether or not there is infringement it is always important and necessary to ascertain the scope of the patent sued upon and alleged to be infringed. To do this intelligently we must consult the prior art as well as the terms of the patent itself. If the claims of the patent sued upon differ from the prior art, then we ascertain what this new combination does, and how it does it, to what extent is it an advance in the art, etc. Next, what are the elements of the alleged infringing device, what does it do, and how does it do its work? If the alleged infringing device has the same elements in substantially the same combination, doing substantially the same work in substantially the same way and producing the same results, we find infringement of course, assuming it was not made prior to the patented combination. It would not matter that each element was changed in form, or that some material had been substituted unless such substitution itself could be dignified as showing patentable invention. In applying the law of equivalents we are to act with caution, as in the field of mere improvement the rules are very strict. Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Kokomo F. M. Co. v. Kitselman, 189 U. S. 8, 24, 23 Sup. Ct. 521, 47 L. Ed. 689; Cimiotti U. Co. v. American F. R. Co., 198 U. S. 399, 414, 25 Sup. Ct. 697, 49 L. Ed. 1100; Computing Scale Co., etc., v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645.

We will inquire, then, whether there are differences in means and operation between complainant's "automatic circuit breaker" and the one used by defendant. And, first, what does defendant's breaker do, how does it do its work, and what are the means employed? It is not necessary to go all through in detail, but only to call attention to the differences claimed by defendant. Defendant says in its brief:

"Broadly, no doubt, defendant's device is the equivalent, broadly, of Wright and Aalborg's—if that patent were a pioneer or the first for circuit breakers. But it is only for a late and specific form of breaker, and here the law is that an equivalent must not only accomplish the same purpose, but must accomplish it in the same way."

I understand the law to be that where a party is entitled to the benefit of the doctrine of equivalents it is not essential that the equiva-

lent do the same work in precisely the same way. It is only necessary that it accomplish the same result in substantially the same way. As, for instance, a pivot is something on which another thing may turn, or move up and down, or sidewise. If a spring, which permits the same movement, be substituted, and it does the same work, permits the same movement, is it not the equivalent of the pivot? Is not the one the well-known equivalent of the other? Can noninfringement be predicated on the use of a spring, used to do the same work in the same place with the same instrumentalities, in place of a pivot? In Imhaeuser v. Buerk, 101 U. S. 647, at pages 655, 656, 25 L. Ed. 945, the court, per Clifford, J., said:

"Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts composing the invention is new, and will produce a new and useful result. Such a patentee may doubtless invoke the doctrine of equivalents as against an infringer of the patent; but the term 'equivalent,' as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine. Pressure in a machine may be produced by a spring or by a weight; and, where that is so, the one is a mechanical equivalent of the other. Cases arise, also, where a rod and an endless chain will produce the same effect in a machine; and, where that is so, the constructor in operating under the patent may substitute the one for the other, and still claim the protection which the patent confers. Exactly the same function in certain cases may be accomplished by a lever or by a screw; and, where that is so, the substitution of the one for the other cannot be regarded as invention. Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. Gill v. Wells, 22 Wall. 1, 28, 22 L. Ed. 699."

I think it clear that a spring is as much of an equivalent for a pivot as is a rod for an endless chain, or a spring for a weight. The question is, do they produce the same effect, perform the same function? See language quoted. Here Prof. Main testifies to the equivalency of the pivot and spring, and gives references.

The defendant describes the complainant's device thus:

"Arms 20 are themselves pivoted to a bifurcated frame, 11, which again is pivoted to base-brackets, 8 at 12, and carries 'rigidly fastened' to itself the laminated main movable terminal 9; and arms 20 also project downward and are attached to spring 23, which is pulled taut, in the operation of closing the main contacts, by lugs, 24, on casting 16 (connecting with a toggle-lever) so as to keep the carbon shunt block 17 at the end of arm 20 pushed forward into operative relation with the fixed carbon."

Defendant then says:

"In defendant's apparatus we find substantially the bifurcated frame 11 and the laminated main terminal mounted, but flexibly, thereon. But pivoted arm 20, carbon holder 18 pivoted to pivoted arm 20, spring 21 with its stop and spring 23 acting on one end of arm 20 from lug 24 on handle are all absent.

In place thereof defendant has a flat, angled spring rigidly attached to bifurcated frame 11, and carrying rigidly attached to itself a carbon block. This flat spring is constructed with two angles to insure the carbon making contact before and leaving contact after the main laminated terminal. That is the protective purpose of all movable shunt contacts in circuit breakers."

Comparing the two devices we find that this amounts to an admission that defendant has substituted a spring or spring arrangement, not novel, for pivots to do the same work, in the same way, at the same place, and to accomplish the same result. I think the question resolves itself into the inquiry whether the complainant's claims, read with the specifications, and in view of the prior art, are so specific and limited as to preclude the application of the doctrine of equivalents, as to allow this substitution by defendant of this equivalent without infringing. Of course, in substituting an equivalent there must be changes of construction and form, more or less, in unimportant details. Hence, in describing the two devices, the words used may indicate much greater differences than really exist. In reading specifications as well as in reading claims we are to get at the essence of the matter. If the complainant is to be strictly held to a "movable contact member" actually "pivoted to said base" by a pin "a movable shunt-contact member" actually "pivoted to said laminated contact member," by a pin or "a pivoted contact member, a shunt-contact member" actually "pivoted to said main member at a distance from its axis of movement," and the words "means for yieldingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position" are limited to the precise means shown and described, so that the complainant is not entitled to any range of equivalents whatever, notwithstanding the statement of the patent, "we desire it to be understood that our invention is not limited to any specific form or arrangement of parts except in so far as such limitations are specified in the claims," then defendant may not infringe. But, having in mind the state of the prior art and the words used, I do not so understand the rights of the parties. I fail to find anything in the prior art that precludes complainant from invoking the doctrine of equivalents in the respects just noted. Defendant's circuit breaker answers literally the terms of the claims in suit, except that the movable shunt carbon is mounted on a spring arm which extends upward from the laminated contact member instead of being actually pivoted to a rigid arm extending up from the laminated contact member. The function of the movable carbon in complainant's breaker is to adjust the contact between the stationary and the movable carbons, and to allow the main contact to close after and open before the carbon contacts are opened. This is clear and beyond all question. This is the sole function of defendant's spring mounted carbon. In defendant's device, the axis of motion of the movable carbon 15 is not confined to the line of the pin of the pivot, as in complainant's device, but is distributed along the spring arm. This, however, is immaterial, for, as stated, the function is the same, and the mode of operation of this part of the device is substantially the same. This, the proofs show, was the mechanical equivalent of complainant's pivot and known to be such at the date of the patent. Re-

ferring to defendant's device and claim 2 of the patent in suit Mr. Bean, complainant's witness, says:

"Regarding the mounting of the movable shunt carbon upon the spring in defendant's circuit breaker, as a mechanical as well as a functional equivalent of the construction set forth in claim 2 of the patent in suit, and therefore the same as far as this claim is concerned, I find in defendant's circuit breaker the combination with the base and stationary main and shunt contact terminals located in approximately vertical alignment thereon, of a movable laminated contact member pivoted to said base, a movable shunt contact member pivoted to said laminated contact member, toggle-levers for operating said movable members, means for locking the breaker in a closed position and a tripping device projecting into the magnetic circuit, substantially as described in claim 2."

And referring to claim 5 the same witness says:

"Regarding the mounting of the movable shunt carbon upon a spring, and the holding of the stationary shunt member forward of the plane of the main contact surfaces to compensate for the mounting of the movable shunt contact member back of the plane of the faces of the laminated members, as a mechanical as well as a functional equivalent of the construction set forth in claim 5, I find in this circuit breaker the combination with main stationary contact terminals and a stationary shunt terminal located above the same, of a pivoted main contact member, a shunt contact member pivoted to said member at a distance from its axis of movement, means for yieldingly holding the movable shunt contact in a position in advance of the plane of the faces of the main movable member when in open position, toggle-lever mechanism for closing the breaker, a latch and electromagnetically-actuated means for tripping the latch, said toggle-lever, latching and tripping mechanism being located below both the main and the shunt separable terminals, substantially as described in claim 5 of the patent."

Prof. Main, another expert, says:

"In the apparatus of the patent in suit, the shunt contact is described as pivotally-mounted and spring-pressed, so as to throw the movable shunt contact angularly in advance of the main movable contact, so far certainly as its function was concerned, so that in closing the breaker the shunt contacts would engage first and the main contacts later while the reverse would take place in the opening of the circuit. This involved a slight swinging of the movable shunt contact in reference to any radius which might be considered as connecting the main movable contact with its axis or pivot, while at the same time there was a bending of a spring or equivalent yielding means of holding the movable shunt contact to an advanced position so as to make the earlier and later engagements described during the closing and opening movements. It is obvious that the spring-mounting of the carbon shunt block to be found in defendant's apparatus effects precisely the same result. In many forms of mechanism a spring-mounting pure and simple is frequently adopted in place of the spring-pressed pivotal mounting or vice versa, the selection of one or the other form of mounting being a matter of judgment with the artisan."

In Winans v. Denmead, 15 How. 343, 14 L. Ed. 717, we find the following:

"When form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement, and it is not a defense that it is embodied in a form not described and in terms claimed by the patentee."

Authorities are numerous to the same effect. I think they apply here, and are decisive of this case. The opinion of Judge Holland admits, in the language quoted, that defendant's device differs from the prior art both in arrangement of elements and in operation. The complainant's patent does this same thing, and was one of the advances made and patented to Wright and Aalborg. Then defendant came in and by substituting an equivalent did the same thing Wright and Aalborg had done, and were protected in doing by their patent. Defendant cannot escape the charge of infringement on this ground as we have seen. Defendant's device is not differentiated from complainant's by the mere substitution of a well-known equivalent. The result is that the patent, as to claims 2 and 5, is valid and infringed by defendant, and there will be a decree accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CONDIT ELECTRICAL MFG. CO.

(Circuit Court, S. D. New York. February 17, 1908.)

1. PATENTS—SUIT FOR INFRINGEMENT — CONSTRUCTION OF STATUTE — "DAMAGES."

   In Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], which provides that, where a patentee has failed to mark the patented articles as therein required in any suit for infringement, "no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement" and continued to infringe after such notice, the word "damages" is used as meaning all sums which the complainant would be entitled to recover and includes profits.

   [Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

2. SAME—FAILURE TO MARK PATENTED ARTICLES—NOTICE OF INFRINGEMENT.

   In a suit for infringement of a patent, where the bill does not show that the patented article was marked as required by Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], it must clearly allege that explicit notice of infringement was given to defendant, otherwise damages are not recoverable except for infringement after the suit was commenced. An allegation that defendant was informed or had knowledge of the infringement is insufficient.

In Equity. This court being about to sign a decree in favor of the complainant—having found the validity of the patent and infringement by defendant—defendant objects to the insertion of any provision for an accounting by defendant, on the ground that there was no allegation in the bill and proof of a compliance with section 4900, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3388], as to notice, etc., to defendant of the patent and of infringement.

Kerr, Page & Cooper, for complainant.

Clifton V. Edwards, for defendant.

RAY, District Judge. No proof was given by the complainant that any notice was given to the public that the device held to be infringed was patented either by fixing thereon the word "Patented," or by fixing to it a label containing such notice.

Section 4900 of the Revised Statutes [U. S. Comp. St. 1901, p. 3388] reads as follows:

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "Patented," together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

Two questions arise: (1) Does the bill of complaint allege notice of the infringement and does the answer admit such notice; and (2) does the word "damages," used in the section quoted, include profits? In other words, if it be admitted that the bill of complaint sufficiently charges notice at the time suit was brought that the device was patented and the answer admits such allegation, is the complainant entitled to an accounting for damages from the date suit was brought and to profits from the commencement of the acts of infringement?

The bill of complaint in the third subdivision charges that this complainant brought suit against Cutter Electrical Manufacturing Company for infringement of this patent, and that recovery was had, all to defendant's knowledge. The bill of complaint in paragraph 4 then charges:

"That your orator is informed and believes, and therefore avers, that the said defendant has been informed of your orator's said letters patent and of its rights thereunder, but nevertheless has made, sold, and used, and now continues to make, sell, and use, against your orator's will and in violation of its rights, * * * circuit breakers substantially as set forth in the said letters patent, and claimed * * * to make, use, and sell, which is by law vested in your orator, * * * which acts are in violation of the rights vested in your orator by said letters patent. * * *"

The answer of the defendant admits the allegations of paragraph 3, and then says:

"And further answering said bill, paragraph 4, defendant admits that it has been informed of said letters patent and in general, as already admitted, of the matters set forth in paragraph 3 of said bill; but denies," etc.

The section of the statute quoted says that unless notice is given "no damages shall be recovered by the plaintiff," etc. While in patent suits we frequently speak of damages and also of profits, and thus distinguish the one from the other, still I think that the word "damages" in section 4900 includes, and was intended to include, profits, in short, all damages—all sums that the complainant is entitled to recover by way of damages for the infringement alleged and proved. I do not think that Congress intended to allow the complainant to recover profits in the absence of the notice required. This view seems to be sustained in Lorain Steel Company v. N. Y. Switch & Crossing Company (C. C.) 153 Fed. 205. We recur then to the question, does the bill of complaint sufficiently allege compliance with section 4900, and does the answer admit the allegation?

The bill says that the defendant has been informed of the complainant's letters patent and of its rights thereunder. The bill gives no time when this information was given, and it fails to suggest that the defendant was notified of any infringement by it prior to the commencement of the action. Of course, bringing the suit—filing the bill of complaint—was notice to the defendant, not only of the patent, but of complainant's alleged rights and of the infringement. I do not think that the bill alleges, or that the answer admits notice of, infringement by defendant prior to the bringing of the suit.

In Dunlap v. Schofield, 152 U. S. 244, 247, 248, 14 Sup. Ct. 576, 577, 38 L. Ed. 426, Mr. Justice Gray, in giving the opinion of the court, said:

"The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article "Patented," or to the particular defendants by informing them of his patent and of their infringement of it."

If the court meant what it said, then notice of the alleged infringement was required. Such notice should be clear and explicit, and the language of the bill of complaint averring it should be clear so that the defendant may not be misled in his pleading. There is no allegation that the word "Patented" was on the patented article or on the package containing it. Defendant may have been informed in some other way of the patent and of complainant's rights thereunder, but this should not be held a compliance with the statute. In case of failure to so mark, the defendant must have been notified not of the patent and of complainant's rights simply, but of the infringement.

It appears, however, in the case that the defendant continued its acts of infringement after suit brought. For these reasons, I think that the decree should contain a provision for an accounting, but that the accounting should be limited to the time subsequent to the filing of the bill of complaint.

NATIONAL CARBON CO. v. NUNGESSER ELECTRIC BATTERY CO.

(Circuit Court, N. D. Ohio, E. D. August 2, 1907.)

No. 6,940.

PATENTS—INFRINGEMENT—BATTERY FILLER.

The Richmond and Zeller patent, No. 641,546, for a battery filler, *held* not anticipated, valid, and infringed.

In Equity. On final hearing.

Thurston & Woodward, for complainant.
Weed, Miller & Nason, for defendant.

TAYLER, District Judge. This is an action based upon the alleged infringement of patent No. 641,546 for a battery filler issued January 16, 1900, to Richmond and Zeller, assignors, to the complainant. The defendant denies infringement, and also the validity of the patent. Proof is made of patent No. 809,526 issued to the defendant for a machine for filling dry batteries, which substantially illustrates the alleged infringing device. I am satisfied that the complainant's patent was not anticipated, and that it is valid. The difficult and serious question is as to its infringement by defendant's device.

Both devices exhibit an interesting, ingenious, and effective method of economically filling dry batteries, of which many millions are annually made in this country. The ordinary dry battery is a deep cylindrical zinc cup with a suitable absorbent lining, a central carbon electrode around which, in the zinc cup, is tightly packed a mixture of finely divided carbon and manganese dioxide, moistened by a solution of zinc chloride. The carbon electrode, which is hard and rigid, projects slightly above the top of the zinc cup. The evaporization of the moisture in the packed filling is prevented by a seal of pitch or similar substance. The purpose of both complainant's and defendant's device is to put the carbon electrode centrally in the zinc cup, and to pack the battery filling material around the electrode. A result especially desired and manifestly accomplished by the devices is uniformity in the density of the packing. Generally described, the machine consists of a downwardly yielding table or support upheld by a measured resistance which determines the density of the packing. The packing is tamped in the cylinder by rotating tamping bars operated perpendicularly by a vertically reciprocating member and rotated by a suitable device unimportant so far as this proceeding is concerned. The upper or exposed end of the electrode is held by spring fingers which disengage when the jar is filled. It is plain that a machine which will perform all of the functions necessary to produce these results must represent an ingenious combination of many well-known mechanical devices. To accurately and fully describe the machine would acquire much detail unnecessary in this opinion.

The following are the claims of the patent which the complainant insists are infringed:

"1. The combination of a yielding support for the article to be filled, with a vertically reciprocating cross-head, a vertical member rotatably mounted in said cross-head, tamping bars secured to said member, and means for turning said member on its axis, substantially as described.

"2. The combination of a yielding support for the article to be filled, and a stationary vertical bar having on its lower end means for holding a core, with a vertically-reciprocating cross-head, a vertical sleeve which embraces the said vertical bar and is rotatably mounted in the cross-head, tamping bars secured to said sleeve, and means for turning said sleeve upon its axis, substantially as described."

"4. The combination of a yielding support for the article to be filled, an immovable vertical bar, and spring fingers on the lower end of said bar, with a vertically-reciprocating cross-head which embraces said bar, a vertical sleeve which also embraces the bar and is rotatably mounted in the cross-head, tamping bars secured to said sleeve, and mechanism for turning said sleeve upon its axis, substantially as specified."

"6. The combination of a movable support for the article to be filled, means for yieldingly upholding the same support, and a clutching device which acts automatically to permit said support to move downward and to prevent it from moving upward, with a vertically-reciprocating cross-head, a member rotatably mounted therein, tamping bars secured to said member, and means for turning said member upon its axis, substantially as specified.

"7. The combination of a vertically movable cross-head adapted to support the article to be filled, a pivoted lever having a weight upon one arm, a link connecting the other arm with said cross-head, and a clutching device which acts automatically to permit the downward movement of said cross-head, and to prevent its upward movement, with a vertically-reciprocating cross-head, a member rotatably mounted in said cross-head, tamping bars secured to said member, and means for turning said member upon its axis, substantially as specified."

The chief contentions of the defendant are these:

"(1) The patent in suit is not a pioneer, and is therefore not entitled to invoke the doctrine of mechanical equivalents.

"(2) The disclaimers of the applicant during the progress of his application in the Patent Office limit the claims to precisely the construction shown and described.

"(3) The prior art discloses all the elements of the claims in suit performing the same functions, operating in the same way, and for the same purpose as in complainant's patent.

"(4) A subsequent patent has been issued covering defendant's structure, and the presumption arises that it does not infringe.

"(5) The defendant's structure, though performing the same functions and organized for the same purpose, does not contain the combination of elements called for by complainant's claims here in suit, and therefore does not infringe said claims."

Let us now examine the two devices with a view of discovering whether, and if so, how, the defendant's machine differs in principle or in patentability from complainant's. This question we must answer by an examination of the vertically reciprocating members of each. Both devices are designed for the one purpose, to wit, the filling of dry batteries. In such a device both patentees found it necessary that the following conditions be present: (1) The central carbon electrode held rigid, but so that it can be easily detached. (2) The battery cup, while being filled, to be yieldingly supported by a measured resistance controlling the density of the packing. (3) Rotatable tamping bars or rammers. (4) A vertically reciprocating member operating in unison the tamping bars. It was such a machine as this that the complainant's assignors invented and patented. It is substantially the same machine that the defendant uses. In complainant's patent the vertically reciprocating member is called a "cross-head," as shown in the accompanying figure 1, from which are omitted the

Fig. 1

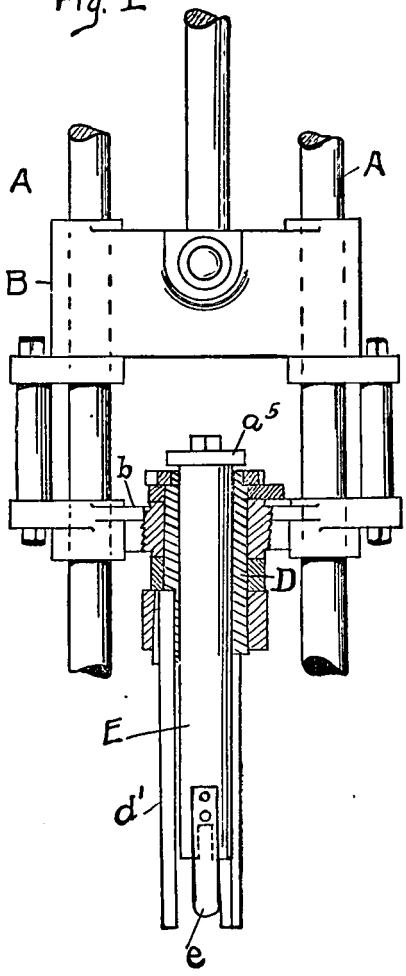
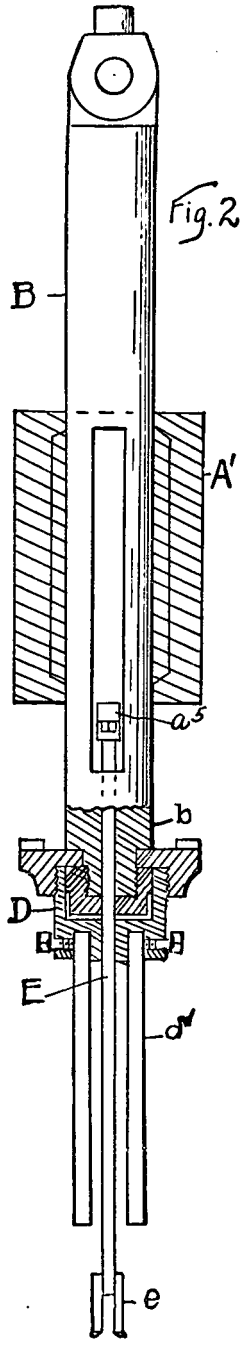


Fig. 2



remaining parts of the machine. In defendant's machine the vertically reciprocating member is called a "shaft," and is shown in figure 2. The lower part of the member and the rotatable sleeves which carry the tamping bars are sectioned.

In both of these figures B represents the "vertically reciprocating member." In complainant's machine, as shown in figure 1, this member is guided by fixed vertical rods A, which pass through the member. In defendant's machine the corresponding member passes through a fixed guideway A'. In each of the members B there is an opening between the top and bottom portions thereof. A bracket arm, a5, is fixed to the framework of the machine, and extends into this opening in the vertically reciprocating member. The core or electrode-holding rod, E, is fixed to this bracket arm, and extends therefrom downward through a hole in the lower part, "b," of the vertically reciprocating member, and this core-holding rod has on its lower end the spring fingers, "e." In each a rotatable sleeve, D, is supported by the lower part of the vertically reciprocating member. The tamping bars, d', are secured to this sleeve; and suitable mechanism, which has not been reproduced in these figures, is provided for turning this sleeve slowly as the member, B, moves up and down, carrying with it the sleeve and tamping bars. It is necessary that the opening in the vertically reciprocating member shall be so long, measured from top to bottom, that the brackets, a5, will not be struck by either the upper or lower part of said member as it moves up and down. Complainant's patent was for a combination of coacting parts of which one was a vertically reciprocating member called a "cross-head," and of a form as shown in the figure. The term "cross-head" was doubtless unhappily applied. It was the form of mechanism occurring to the patentees, whereby vertically reciprocating motion could be transmitted to the tamping bars, but I cannot think that there was any other thought in the mind of the inventor than that such a well-known thing as vertically reciprocating motion was to be used in combination with the other elements, and that the most obvious form of applying that motion, to wit, by something in the nature or substance of a cross-head, would naturally be used. I do not think that the form of applying the vertically reciprocating motion was important, or that it is the essence of the patented invention. If so, it was easy to differentiate it as the defendant has done by what is called a "shaft." This required no inventive skill. The term "shaft" describes defendant's vertically reciprocating member even more loosely than "cross-head" describes complainant's. The latter has a visible, if not a functional, resemblance to a "cross-head." It required a vivid imagination to describe the former as a "shaft."

The two devices in all of their essential parts are the same. Being of that opinion, I think a discussion of the occurrences pending the application for complainant's patent unnecessary. If my theory of the invention and of the identity of the two machines is correct, there is nothing in the disclaimers referred to which affects the patentee's rights in this case.

A decree may be entered for an injunction and accounting.

BENBOW-BRAMMER MFG. CO. v. RICHMOND CEDAR WORKS et al.

(Circuit Court, N. D. Illinois, E. D. February 6, 1908.)

No. 28,245.

PATENTS—INFRINGEMENT—MEANS FOR OPERATING WASHING MACHINES.

The Schroeder patent, No. 535,465, for means for operating washing machines, has for the essential element in the combination shown a sliding cylinder on the operating shaft, through which cylinder alone motion is communicated to such shaft, and is not infringed by a machine having no such cylinder, but in which the teeth or cogs are mounted directly on the shaft.

In Equity.

See 149 Fed. 430.

Poole & Brown (Taylor E. Brown, of counsel), for complainant.

Bulkley & Durand, Charles C. Bulkley, and C. D. Davis, for defendants.

KOHLSAAT, Circuit Judge. This cause is now on final hearing on bill to restrain infringement of claim 1 of patent No. 535,465, granted to John Schroeder, March 12, 1895, for "new and useful improvements in means for operating washing machines." The claim reads as follows, viz.:

"1. An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

Heretofore a motion for a preliminary injunction was denied upon the ground that infringement was not shown. The claim in suit is for a mechanical movement. The drawings and specifications associate it with a washing machine. There seems to be no indefiniteness in the claim, however, and therefore no necessity for looking to the drawings and specifications for elucidation. The device is capable of adaptation to any use calling for reciprocating rotary motion. There does not appear to be any basis for the statement of complainant's expert that the characteristic feature of the device consists in its application to the stirrer shaft of a rotary washing machine. In Brammer v. Schroeder, 106 Fed. 918, 46 C. C. A. 41, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the claim in suit says:

"Appellee simply claims to be the inventor of the means employed for effecting this action of the stirrer-shaft, and not the function of washing clothes in a tub by the backward and forward revolution of the stirrer-head, and, in this connection, it will be observed that the claims of the patent in suit are drawn simply to cover said means, and that the language of these claims does not limit the combination of elements embodied therein to washing machines."

It appears that the application for a patent was referred by the Patent Office to division 12, and classified under "Machine Elements,"

and not under washing machines. It also appears that original claims 1 and 2 call for a pronged hook at the lower end of the operating shaft or post. These claims were canceled, as being no part of the invention. The claim in suit calls for (1) a stationary or fixed horizontal driving shaft, having means for revolving same at its outer end; (2) a wheel or cog at or about its inner end for engaging teeth upon cylinder; (3) a cylinder mounted upon an operating post and having a vertical sliding movement thereon, and also having a double row of teeth or cogs meshing with the teeth of the cog at the end of the driving shaft, in such a manner as to secure a reciprocating rotary movement of the cylinder; (4) a vertical operating post made square or angular so as to lock with the reciprocating rotary cylinder, from which it in turn takes its reciprocating rotary motion, itself remaining vertically stationary.

The alleged infringing device comprises (1) a horizontal floating driving arm, having means for revolving it at its outer end; (2) a wheel or cog at its inner end for engaging teeth upon an operating post; (3) a vertically stationary operating post provided with teeth or a cog integrally therewith for engagement with the teeth or cog at the inner end of the floating driving shaft in such a manner as to secure a reciprocating rotary motion of the operating post.

In both devices the driving shaft is always moved in a straightforward direction. Means for securing a reciprocating rotary movement from a straightforward actuation of a driving shaft is very old. It is plainly set out as mechanical movement No. 371 in the book entitled "507 Mechanical Movements," in evidence. It also is shown in English patent to Morris of August 20, 1875, for washing machines and churns, and in the patent to Charles Danforth, February 18, 1841, for improvement in making cotton roping, and in the patent to F. L. Palmer for a mechanical movement, granted September 2, 1884. It is also found in many other patents cited. The idea is no longer novel. Only the means for accomplishing this is here involved. In the book "507 Mechanical Movements," No. 371 aforesaid is thus described:

"The large wheel is toothed on both faces, and an alternating circular motion is produced by the uniform revolution of the pinion, which passes from one side of the wheel to the other through an opening on the left of the figure."

This is substantially defendant's device. Some modification of the movement is required to adapt it to the production of reciprocating rotary motion in an upright, vertically stationary operating post, such as the upward extension of the post, adjustment of guides, enlargement of teeth, etc., but, as said in Brammer v. Schroeder, supra:

"These are mere details of construction; mere means of union. * * * They are not substantive constituent elements of the combination described and claimed by the appellee. They are not essential elements of that combination."

Given said movement No. 371 and the Morris & Danforth patents above referred to, and it would require only ordinary mechanical skill to adapt said movement No. 371 to produce the reciprocal rotary motion of defendant's device upon an upright operating post.

Complainant's mechanical movement is not shown in said book of movements, and, so far as shown, is new in the art. As said in claim 1 in suit, this cylinder alone imparts motion to the operating shaft. It is an element of the claim in suit which intervenes the driving cog and the driven post. There is no serious contention as to the validity of the patent in suit. It has been sustained by the Circuit Court of Appeals for the Eighth Circuit in Brammer v. Schroeder, supra, by Judge Shiras in the same case (C. C.) 98 Fed. 880–886, by Judge Seaman in Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. (C. C.) 132 Fed. 614, by Judge Ray in Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co. (C. C.) 144 Fed. 429, and by Judges Finkelnburg and Dyer of the Eastern District of Missouri in Benbow-Brammer Mfg. Co. v. Wayne Mfg. Co. (C. C.) 157 Fed. 559. That fact may be conceded for the purposes of this hearing. An examination of these cases discloses the fact that each of the parties found to be infringers in the first three cases named was using complainant's sliding cylinder. With regard to the two opinions last named, it should be said that the character of the infringement is not set out, but, inasmuch as the decisions rest entirely upon the said opinion of the Eighth Circuit Court of Appeals, the fact is deemed fairly deduced. This last-named case (106 Fed. 918, 46 C. C. A. 41) is cited with approval by Judge Seaman. That court sets out at considerable length in a number of places in its opinion the features of the patent in suit which are deemed by the court to constitute patentable novelty. At page 924 of 106 Fed., at page 47 of 46 C. C. A., it is said:

"The only real question is whether or not the spool-shaped gear-bearing cylinder of Brammer is the mechanical equivalent of the cog-bearing cylinder of Schroeder."

And again, at page 926 of 106 Fed., at page 49 of 46 C. C. A.:

"Now, what was the principle of Schroeder's invention? What was the advance in the progress of the art which his combination marked? What was the peculiar combination of devices which distinguished his from all prior machines? It was the combination of the sliding cog-bearing cylinder, by which alone the reciprocating rotary motion was imparted to the operating shaft, with the old and familiar elements of his combination. The history of the prior art has been searched in vain for any device or machine in which a sliding actuating cylinder on the operating shaft, provided with cogs or cog wheels adapted to mesh with those of the driving wheel, is disclosed. The use of such a sliding cylinder to impart motion to the shaft, in combination with the other parts of this machine designated in the first claim of this patent, was new in the art."

The appellee (Schroeder) "was not ignorant of the principle or mode of operation he was seeking to secure when he drew his specification and made his claim. They show that that was the peculiar principle or mode of operation which he described and sought to secure"; and at page 927 of 106 Fed., at page 49 of 46 C. C. A.:

"It is plain that the cog-bearing, actuating, sliding cylinder was the element of this combination which embodied its principle and distinguished its mode of operation from those which preceded it. This principle has been appropriated by appellant."

And again on page 927 of 106 Fed., on page 50 of 46 C. C. A.:

"What Schroeder described and claimed here was the cog bearing, actuating, sliding cylinder in combination; not the specific form of that cylinder which he described, nor the identical means he pointed out to hold its cogs in mesh with the pinion, but this tooth-bearing, actuating, sliding cylinder in combination with the driving shaft and pinion and the angular operating shaft of the washing machine. He does not describe the form of his cylinder as a part of his invention. He does not claim it as such. He says in his specification: 'This cylinder will preferably be made in the form here shown;' and this is to say, in effect, that this is one of the forms in which this essential element of the combination, the tooth-bearing, sliding cylinder, may be made."

And again, page 928 of 106 Fed., page 51 of 46 C. C. A.:

"The combination of the appellant contains the very principle of the appellee's invention; the new mode of operation which he conceived, described, and claimed in his patent; the cog-bearing, sliding cylinder, by which alone motion is imparted to the operating shaft, in combination with the angular shaft, the driving shaft, and its pinion. It contains every element of the patented combination, except the sliding cylinder, in the identical form described in the specification of the appellee, and it contains the mechanical equivalent of the sliding cylinder. While the sliding cylinder of Brammer is not in the same form as that of Schroeder, it is the same thing. It performs the same function and attains the same result, the imparting of reciprocating rotary motion to the shaft, by the same mode of operation, and as this principle and mode of operation were new, so far as is disclosed by this record, in the art to which the patent of Schroeder relates, his cylinder falls within the fair meaning of the term 'mechanical equivalent,' and it should be applied to the combination in suit."

Complainant's counsel in the Eighth Circuit case uses the following language, viz.:

"It is therefore urgently insisted and contended for in behalf of appellee that appellant is estopped, by all rules of logic and law, from now denying that said cylinder is absolutely and without question new and original with Schroeder.

"Even, however, if appellant's admission were not available to establish to this court's satisfaction the novelty and originality of this 'cylinder I,' the possession of these qualities is certainly not disproved by the prior art in evidence. In the whole batch of twenty-two patents introduced in evidence by defendant, and antedating the Schroeder patent, No. 535,465, not one shows the 'cylinder I,' and nowhere in the voluminous briefs submitted in appellant's behalf do counsel claim such anticipation."

In the same case complainant's expert says:

"From my examination of the prior art as set out in my direct deposition, it is evident that that part of the combination described as, 'A cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft,' is novel in the sense of the patent law, as none of the prior patents show such a construction."

From the above quotations it seems entirely logical to conclude that the distinguishing feature of the patent in suit is the sliding cylinder. But complainant insists that defendant's device may fairly be claimed by it as an equivalent; that a vertically stationary operating shaft actuated by a vertically moving cylinder, having teeth meshing with and driven by, a horizontal stationary shaft, is the full equivalent of a vertically stationary operating shaft having teeth integral there-

with, meshing with the teeth upon a floating driving shaft, the latter being a mere reversal of the parts of the former; citing Consolidated Fastener Company v. Hays, 100 Fed. 984, 41 C. C. A. 142, and many well-known other cases. But is there a mere reversal of the parts here? If complainant's cog had been made integral with its operating post, the latter would have been alternately raised and lowered, and the result would have been to destroy its efficiency, especially in connection with washing machines, by reason of the lifting and lowering motion of the stirrer head. The essential element of complainant's patent is utterly foreign to defendant's device. If, as contended by complainant, defendant's device is so plainly an equivalent of that in suit, why did it not occur to complainant? That it is just as effective and much simpler than that of the patent in suit, is very evident, for it cuts out the most essential element of the latter. If, in view of the prior art above referred to, complainant has a valid patent, its novelty must be found in the use of the sliding cylinder, as its distinguishing element. This defendant does not employ. The bill must therefore be dismissed for want of equity.

TYSSOWSKI v. THAYER et al.

(Circuit Court, N. D. Illinois, E. D. February 6, 1908.)

No. 26,798.

PATENTS—AGGREGATION OF OLD DEVICES—PYROGRAPHIC TOOL.

The Tyssowski patent, No. 727,034, for a pyrographic tool, "comprising a combined pyrographic point and a scorcher," covers a mere assembling in one implement of two distinct devices of the prior art, not capable of conjoint use, and each of which maintains its autonomy and works independently of the other in its accustomed manner, and having no influence on the other or its operation, and is void as a mere aggregation and for lack of novelty. The scorching device, if conceded validity, must in view of the prior art be limited to a tapering nozzle, and is not infringed by one in which the inner walls are parallel.

In Equity.

Joseph G. Tyssowski and George Kolb, for complainant.
Brown & Williams and Charles A. Brown, for defendant.

KOHLSAAT, Circuit Judge. The bill herein was filed to restrain defendants from infringing claim 3 of patent No. 727,034, granted to Z. N. Tyssowski, May 5, 1903, for a pyrographic tool. The claim reads as follows, viz.:

"3. A tool for pyrographic work, comprising a combined pyrographic point and a scorcher, said pyrographic point consisting of a hollow pointed instrument adapted to be brought into direct contact with the material operated on, and having an interior combustion-chamber by which it may be heated to incandescence, and said scorcher consisting of a nozzle having a passage-way through it of such limited cross-section as to maintain the pressure and temperature of the escaping gases, whereby a hot fine jet of escaping gases, at charring temperature, from the combustion-chamber may be projected with precision, substantially as described."

The sole contention arises with regard to a nozzle or nipple raised at a right angle to the tool, through which a hot jet of escaping gas from the combustion-chamber of the tool may be accurately applied to char or shade any desired object. The patent calls for a combination tool, having a burning or etching point at its end, and this nozzle opening somewhere back of the end. There is no co-operative relation between the etching end and the nozzle. They are both supplied with heat from the same source. They are not capable of use at the same time. They constitute, in fact, a device containing two separate implements of the prior art in one handle, much as in the lead pencil and tack hammer, with the difference that they are both supplied with heat from one heating plant. They still are two distinct tools, having the several prior art functions of each, and made effective in the same way, when used separately. The etching end of the tool of the prior art is identical with that of the patent in suit. In most of the tools of the prior art an opening through the wall of the combustion-chamber without any nozzle serves to provide a vent for the gases and a means for scorching, charring, or shading the object to be manipulated. These still constitute a large percentage of the tools in actual use. The opening is made large for coarse work and small for fine work. There is also to be found in the prior art the combination of the etching end and a nozzle adjusted to the scorching vent.

In the patent granted to Beach December 13, 1898, for a thermo-cauter-lancet, the specification, lines 54 to 65, p. 1, reads:

"The improvements consist, lastly, in the provision, at the exhaust-orifice by which the products of combustion are emitted from the combustion-chamber, of an adjustable jet-nozzle by which the blast products of combustion may be so directed with regard to the work or point of application of the instrument that the fumes arising from the charring of the substance operated on may be carried away by the induced current, and prevented from incommoding the visual or respiratory organs of the operator."

Complainant's nozzle is longer than that of Beach, and calls for what the patentee terms, "a fine issuing channel at its delivery end and is preferably made tapering at its inlet." At lines 45 to 78, p. 2, of the specification in suit, he says:

"In my invention the size of the duct or channel-way in the nozzle must be very small or fine in relation to the outlet from the combustion-chamber or the combustion-chamber itself, so that there shall be maintained up to the point of final issue, and even beyond it, a proper compression and concentration of the hot gases, so as to maintain, conserve, and utilize their scorching temperature, without which no useful effect can be obtained. This effect is perfectly attained in my laterally-projecting concentrating-nozzle, and while I prefer the tapering duct within the same smallest at the outer end I do not confine myself to this tapering form of duct or passageway, it being only important that the issuing-orifice itself should be of such limited cross-section as to maintain the compression of the gases and their scorching temperature and at the same time so concentrate the energy of the fine hot escaping stream as to give it localization for purposes of delineation and with the tool at a distance from the work far enough away to enable the operator to see the work while it is in progress of execution.

"It is to be distinctly understood that while I have described various preferred forms of my invention I do not limit myself thereby in any way, but consider as falling within my invention any structure which may be included within the scope of the appended claims."

Some of the witnesses say they can do any kind of work with the mere orifice in the combustion-chamber wall, by varying the size of the orifice. Some prefer the nozzle because they can thereby better see the article worked on. It is in evidence for defendants that the alleged infringing device does not constitute 1 per cent. of their trade in these tools.

Defendants charge both invalidity and noninfringement upon the grounds (1) that the device of the patent is a mere aggregation; (2) that defendants' nozzle is not the device of the patent in suit. From what has been said before, it is evident that claim 1 describes a mere assembling in one implement of two distinct devices of the prior art, each of which maintains its autonomy and works independently of the other in its accustomed manner, and having no influence upon the other or its operation. It comes fairly within the rule laid down in Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719; Pickering v. McCullough, 104 U. S. 318, 26 L. Ed. 749; National Cash Register Co. v. American Cash Register Co., 53 Fed. 371, 3 C. C. A. 559.

As to infringement, unless complainant's device is limited to a tapering nozzle, it would seem to be fairly covered by the Beach patent. It is admitted that the inner walls of defendants' nozzle are parallel, viz., they do not taper. Whether or not the nozzle is made of so small a cross-section as to restrict the outward flow of hot gas is not made plain. There can hardly be said to be any patentable novelty, in view of the prior art, in lengthening the nozzle of the Beach patent to correspond with that of defendant. As the matter stands, there is nothing in the record deemed sufficient to overcome the judgment of the court on the application for preliminary injunction, and the bill is dismissed for want of equity.

AMERICAN SULPHITE PULP CO. v. GREAT NORTHERN PAPER CO.

(Circuit Court, D. Maine. February 7, 1908.)

No. 616.

PATENTS—SUIT FOR INFRINGEMENT—INJUNCTION.

On application for a preliminary injunction to restrain the use of structures alleged to infringe a patent which had but a few weeks to run denied, and consideration of the claimed right of complainant to a perpetual injunction against such particular structures on the ground that they were built with knowledge of the patent, and that it had been sustained and were piratical, postponed until final hearing, there being no claim that defendant was insolvent, and it appearing that the injunction would subject it to great inconvenience and loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 489-495.]

In Equity. Suit for infringement of patent. On application for preliminary injunction.

Benner & Foster, for complainant.
Bird & Bradley, for respondent.

PUTNAM, Circuit Judge. This is an application for a temporary injunction based on the same patent which was sustained by the Circuit

Court of Appeals for this circuit in American Sulphite Pulp Co. v. Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500, by an opinion passed down on April 16, 1897. The bill was filed on December 2, 1907, and an application for a temporary injunction was filed practically with the bill. The patent expires on January 27, 1908. In connection with the filing of the application for a temporary injunction, the complainant filed a petition for a subpœna to take testimony of certain witnesses before the case was at issue. On hearing that application, the court was strongly impressed to the effect that it was hardly worth while to go into a long investigation for the purpose of obtaining an interlocutory injunction for so short a period as the time between the filing of the bill and the date of the expiration of the patent. The subject-matter was digesters set up in mills for producing chemical pulp; and the complainant urged on the court that the alleged infringing digesters were installed by the respondent corporation with full knowledge that the patent had been sustained, were clearly infringing, and therefore piratical, so that, within certain judicial decisions cited by the complainant, these specific digesters were subject to a perpetual restraint on the ground that they would always be piratical, notwithstanding the complainant would not be entitled to an injunction of a general character extending beyond the 27th of January, 1908. Therefore, in order that the issue might be fully met, at the suggestion of the court, the complainant filed a new application for a temporary injunction, setting out its case in all respects from its point of view; and the respondent excepted to the application, thus raising directly the question whether, on any case the complainant could state, a temporary injunction should be granted.

On the one side, it is plain that it is the duty of this court to hold that the complainant's patent is valid, and to be construed as broadly as stated by the Circuit Court of Appeals for this circuit in the case cited. On the other hand, it is apparent from the complainant's application, and also in the District of Maine it is a matter of common knowledge, that the digesters referred to are of great size, costly, the installation is permanent in its character, and the loss which would arise from a temporary injunction would be so very large that the respondent would be compelled to make with the complainant almost any terms the complainant might demand. In other words, a temporary injunction, if imprudently granted, would unjustly put the respondent at the mercy of the complainant so far as these digesters are concerned.

Under the circumstances, we have now concluded to postpone all consideration of the merits of the claim of the complainant with reference to his right as to the particular digesters in question until final hearing. It is undoubtedly true, as we have said, that even for present purposes the patent must be held to be valid, and must receive a broad construction; but the respondent denies infringement, and that is always to some extent an open question. Also, it is far from certain that the position taken by the complainant with reference to its right as against the existing digesters is sustained, either by the principles of law or by the authorities. Therefore the record is very far from presenting at the present time a case in which the rights of the complainant are fore-

closed against the respondent, as they may be on a final hearing if the positions of the complainant are then sustained.

Under the circumstances, therefore, the court is pressed, as it is ordinarily pressed on matters of temporary injunctions, with a balancing of inconvenience. If the present application is granted, it is plain that the inconvenience to the respondent would be so great as to amount to a very gross injustice if it turns out that the injunction was imprudently issued; while, under the circumstances, it is also plain that there would in no event be any great loss accruing to the complainant pending the time required for a thorough investigation of all of the questions involved. In addition to that, there is no suggestion to the effect that the respondent is not entirely solvent, so there is no reason for supposing that, in any event, the complainant could ultimately be imperiled.

In the particulars to which we refer, the case is not so strong in favor of the complainant as was Westinghouse Air Brake Co. v. Burton Stock Car Co., 70 Fed. 619, 17 C. C. A. 430, decided in this circuit on September 13, 1895, by a judgment which was sustained on appeal. The references there made at page 621, consisting of decisions by Judge John Lowell, fully sustained the conclusion which this court then reached, and demanded the result which we now announce.

The application of the complainant for a temporary injunction, filed on January 27, 1908, is denied.

Note.—Since the announcement of this opinion, we have been enabled to refer to Dun v. Lumberman's Credit Ass'n, 209 U. S. 20, 23, 28 Sup. Ct. 335, 52 L. Ed. —.

CURTIS v. HUMPHREY.

(Circuit Court, N. D. Illinois, E. D. February 15, 1908.)

No. 28,210.

PATENTS—INFRINGEMENT—AUTOMATIC EGG BOILER.

The Curtis patent, No. 557,192, for an automatic egg boiler, construed, and *held* not infringed.

In Equity. On final hearing.

Paul Synnestvedt, for complainant.

Higdon & Longan, for defendant.

KOHLSAAT, Circuit Judge. Complainant seeks to enjoin infringement of claims 1 and 4 of patent No. 557,192, granted to him on March 31, 1896, for an improvement in automatic egg boilers, which read as follows, viz.:

"1. In an apparatus for regulating chronometrically the treatment of substances, the combination of an attachment or holder for an object to be moved or withdrawn; a moving or withdrawing device; a chronometrically-operated detent; and means for engaging the detent with the withdrawing device during a given period of its movement and releasing the same at the termination of such period—substantially as set forth."

"4. The combination of a cord or chain suspending at one end a substance to be treated, and at the other connected to a normally active retracting device, with a shaft in chronometric rotation, and means for engaging the cord or chain with the shaft during any desired number of increments of the shaft rotation and releasing it when said increments are completed, substantially as set forth."

The language of the claims is inaccurate, so much so that the meaning of the reference to the means for securing chronometric movement enters largely into the discussion of the case. Claim 1, it will be seen, calls for a "chronometrically-operated detent"; and claim 4 includes "a shaft in chronometric rotation." In both instances reference is had to the means whereby the desired time for treatment of the object in hand is secured. Strictly speaking, there is no detent. Complainant's clock is an independent device, having its own spring, its own escapement, and the other elements of a common clock. The shaft, said to be in chronometric rotation, is impelled or rotated by weights. For the purpose of regulating the rotation of the shaft, it is connected by a somewhat intricate device with the movement or works of the clock. A cog upon the shaft meshes with the cog upon the post, which brings the two movements—i. e., that of the clock and that of the weight-operated shaft—into combination. The result is a checking or slowing up of the shaft rotation. The clock throws the braking element into action, but not until the speed of the shaft rotation calls its services into play. By an ingenious adaptation of the clock movement to the shaft movement, the latter is then permitted to proceed chronometrically; that is, in a measured speed as to time. This shaft carries upon it as many cogs or pinions as desired—i. e., one for each egg-boiling outfit—which cogs severally mesh with the teeth or ribs upon its respective weighted rack-bar forming a part of the suspending chain. The measured rotation of the shaft permits each ratchet to descend with even steps until its teeth have all passed below its respective cog, when, being then unrestrained, the weight drops and lifts the cooking bucket, located back of a pulley at the other end of the chain, out of the water. The time consumed by the rack-bar in passing by the cog is determined by the length of that portion of the rack-bar extending above the cog or pinion; that is, if the top of the rack-bar or ratchet is only one notch above the shaft pinion, it will be freed in half the time it would take to free it if it were two notches above the pinion, and so on. Three or four, or even more, cooking buckets may be operated from the same shaft; each varying in time from the others. The combination checking device of the shaft and clock automatically adjusts itself with reference to the variation caused by increasing or decreasing the number of weights. The time required in each case to withdraw the bucket from the water is under the control of the operator by manually adjusting the ratchet or rack-bar directly, or by employing a graduated device provided for that purpose.

Defendant's device employs no independent clock movement. It does include gears and escapement similar to clock works. These are operated directly by the weights. The chronometric movement of the rack-bar is secured by means of the escapement which gives a measured action to the gear, which in turn controls the speed of the cog or pinion, which engages with a rack-bar in practically the same way as in the patent in suit. Each gear movement has its separate cooking outfit. There is no allowance made for variation in the weights. The time desired for treating the article to be dealt with

is regulated much as in complainant's device. Thus it will be seen it lacks (1) the independent clock movement of complainant and (2) the elaborate automatic brake appliance thereof, and in their place has (1) the weight-actuated clock-like gear and (2) the escapement-regulated cog or pinion and rack-bar; so that the difference, if any, between the two, rests in their several means for chronometric rotation of their rack-bar engaging cog or pinion.

If complainant were a pioneer in the application of clock-like gear to devices for securing chronometric regulation of withdrawing apparatus, there might be some justification for its claim of equivalency. Such, however, is not the case. It is distinctly shown in the O'Brien patent, No. 284,051, granted August 28, 1883, for an automatic egg boiler. It is there used in a chronometrical charge of a detent in combination with a spring instead of a weight. It is also seen in the Weissenborn patent, No. 125,362, granted April 12, 1872, for a machine for varnishing or coloring lead pencils and other articles. This patent employs a device much like that of defendant; i. e., a weight-operated gear. Indeed, such movements are common in the prior art. Undoubtedly, complainant must be limited to the particular design of its patent. The absence, in defendant's apparatus, of a device corresponding to the brake shown and described in the Curtis patent, and the dissimilarity of the remaining elements, clearly differentiate it from complainant's device. Thus construed, defendant does not infringe.

The bill is therefore dismissed for want of equity.

NEW JERSEY PATENT CO. et al. v. SCHAEFFER.

(Circuit Court, E. D. Pennsylvania. February 24, 1908.)

No. 7.

1. PATENTS—INFRINGEMENT—PERSONS LIABLE.

Where an infringement of a patent is brought about by a concert of action between a licensee and others, all engaged directly and intentionally became joint infringers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 457-459.]

2. SAME—RESTRICTIONS ON LICENSES—VALIDITY.

The owner of a patent may fix a minimum price at which his licensees may sell the patented article at retail to the public, and a violation of the license by the licensee is an infringement.

3. SAME—INFRINGEMENT—VIOLATION OF RESTRICTIONS ON SALE OF PATENTED ARTICLE.

Complainant, as exclusive licensee to manufacture and sell a patented article, sold the same only to jobbers under contracts which bound them to sell only at certain prices and only to licensed retail dealers who were required by contract to sell to the public only at certain prices, the license to be forfeited by the breach of such restrictions. Defendant procured another to become a licensee and to purchase the articles and sell the same to him in violation of the license contract, and defendant resold to the public at less than the price fixed by such contract. *Held*, that such sales were an infringement of the patent.

In Equity. On final hearing.
See 144 Fed. 437.

Delos Holden, Frank L. Dyer, and Charles N. Butler, for complainants.
John H. Fow, for respondent.

HOLLAND, District Judge. This is a suit to restrain the infringement of letters patent, No. 782,375, and for an accounting. The complainants are the New Jersey Patent Company, a corporation of New Jersey, to which the patent was granted as the assignee of the inventor, and which holds the legal title to the patent, and the National Phonograph Company, another New Jersey corporation, which holds the exclusive right to manufacture, use, and sell throughout the United States phonograph records embodying the invention of the patent. The patent covers a composition comprising a metallic soap and a hard wax added thereto, adapted for the manufacture of phonographic records. These records are manufactured and sold to jobbers and retail dealers under the trade-name of "Edison Records," "Edison Standard Records," or "Edison Gold Moulded Records" by the National Phonograph Company through a selling agreement which they have adopted and incorporated in a license which all jobbers and retailers are required to secure from the company. These licenses and agreements are the same for all, requiring every jobber to agree to sell these records at certain prices fixed in the agreement, and only to licensed retail dealers, and the agreement which the company has with the retailer restricts his right to sell at retail for less than 35 cents apiece. The licensee is required to observe other conditions, and both the jobber and the retail dealer stipulate, among other things, that:

"All Edison phonographs, records, and blanks are covered by United States patents, and are sold under the condition that the license to use and vend them, implied from such sale, is dependent on the observance by the vendee of all the foregoing conditions; upon the breach of any of said conditions the license to use or vend said phonographs, records, and blanks immediately ceases, and any vendor or user thereafter becomes an infringer of said patents, and may be proceeded against by suit for injunction or damages, or both."

Each record is encased in a box or carton, upon which is printed, in prominent type, a notice that:

"This record is sold by the National Phonograph Company upon the condition that it shall not be sold to an unauthorized dealer or used for duplication, or that it shall not be sold or offered for sale by the original, or any subsequent purchaser (except by an authorized jobber to an authorized retail dealer) for less than thirty-five cents apiece.

"Upon any breach of said condition, the license to use and vend the record, implied from such sale, immediately terminates."

In his answer he swore that "the records sold by him and offered for sale, about which the complaint is made, were purchased from owners of phonographs who, after having used the same, sold them to him, or exchanged them for others, that he was practically a dealer in secondhand records," and, further, that "he never aided or assisted any other person in the violation of any contract made with the complainants." These statements are untrue, and his testimony at the first

examination was directed to the support of these allegations. It subsequently developed that he had induced Dyer to procure a retail license, for the purpose of enabling him to secure new records at a price less than he could purchase them from jobbers or from the company, and that he did sell new records, obtained in this manner, at less than licensed retailers were permitted by the company to dispose of them to the public. The evidence shows that he purchased secondhand records from the owners of phonographs and disposed of them at such figures as he was able to secure. With this, however, we have no concern. The bill charges the defendant with an infringement of the patent, in that the defendant has sold these records in violation of the restrictions contained in their form of license and the notice upon the box or carton in which the records are encased, and the evidence in the cause fully establishes the truth of these allegations. True, he acted through his representative Dyer, in whose name the license was secured, but he is the responsible party. He disposed of the records of the complainant company to the public in direct violation of the restrictions contained in their retail license. It is true he did not hold a license from the complainants, but his representative did. Dyer was a retail licensee who, in direct violation of the agreement, sold to defendant records at a price which made him an infringer, and the defendant secured his records from Dyer by inducing him to avoid his license and infringe the patent. In so doing, the defendant became the infringer himself. Where an infringement of a patent is brought about by concert of action between a defendant and complainants' licensee, all engaged directly and intentionally become joint infringers. Heaton, etc., Button, etc., Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Wells, etc., Co. v. Abraham (C. C.) 146 Fed. 190, and Id., 149 Fed. 408, 79 C. C. A. 228. If they are empowered, under the patent laws, to place such restrictions upon the sale of the invention, the complainants are entitled to an order restraining the defendant and requiring him to account. These contracts restraining the right of licensees to sell upon certain conditions have been before the courts in a number of instances, and the last to which my attention has been called was upon a jobbers' agreement to sell only at certain prices. The defendant sold the patented article at a price less than those agreed upon and to retail dealers who had not signed the agreement prescribed for retailers. The Circuit Court dismissed the bill on the ground that such agreements could not be upheld even though the article of merchandise was covered by patents. The Circuit Court of Appeals for the Eighth Circuit, in the case of National Phonograph Company v. Schlegel, 128 Fed. 733, 64 C. C. A. 594, reversed the Circuit Court, and held that the restrictions placed upon the jobbers in the sale of their invention was valid and would be upheld by the courts.

The patentee has an exclusive monopoly of the right to manufacture, use, and sell the patented article. These substantive rights to manufacture, use, and sell may be granted together or separately, and subject to such restrictions in each case as the patentee may see fit to impose. He may limit the minimum price at which his licensee may sell at retail to the public, and a violation of the license by the latter

is an infringement. Victor Talking Machine Company v. The Fair, 123 Fed. 424, 61 C. C. A. 58; National Phonograph Co. v. Schlegel, supra; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336.

This record shows that the defendant has been engaged in selling the complainants' records in violation of the restrictions which it placed upon retail dealers, and a perpetual injunction will be awarded restraining him from infringing the complainants' right in this particular.

Let a decree be entered accordingly.

FRANK v. SUTHON.

(Circuit Court, E. D. Louisiana. January 20, 1908.)

No. 13,517.

1. NEGLIGENCE — DEFECTIVE PREMISES—STATUTES—APPLICATION—"NEIGHBORS OR PASSENGERS."

Louisiana Rev. Civ. Code, art. 670, provides that every one is bound to keep his buildings in repair so that neither all nor any part of the material composing them may injure the "neighbors or passengers" under penalty of all losses and damages that may result from the owner's negligence in such respect. *Held* applicable only to persons "outside" the building, such as neighbors or passers-by injured by the fall of the building or some part thereof, and does not apply to persons lawfully in the building as guests, tenants, etc.

2. SAME—ASSUMED RISK.

The owner of a building is not liable for injuries to a person by reason of a defect therein where notwithstanding the person injured was warned of the danger, he voluntarily placed himself in a dangerous position, and thereby sustained the injury complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Neligence, § 86.]

3. SAME—STATUTES—CONSTRUCTION—"RUIN."

Louisiana Rev. Civ. Code, art. 2322, declares that the owner of a building is answerable for the damage occasioned by its "ruin" when this is caused by neglect to repair it, or when it is the result of a vice in its original construction. *Held*, that the term "ruin," as so used, means the collapse, falling, or giving way of the whole or of some part of the building whereby some person is injured.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6271.]

4. SAME—DEFENSES—CONTRIBUTORY NEGLIGENCE.

Contributory negligence of the person injured is a complete defense to the owner of a building sued under Louisiana Rev. Civ. Code, art. 2322, providing that such owner is answerable for the damage occasioned by the ruin of a building caused by his neglect to repair or vice in original construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 83–85.]

5. LANDLORD AND TENANT—DEFECTIVE PREMISES—INJURIES TO ROOMERS—LIABILITY OF LANDLORD.

Defendant rented a building to certain tenants who used it as a rooming house and rented rooms therein to plaintiff's husband. Plaintiff who lived with her husband, on one occasion walked to the back gallery on the second floor to throw out some water, and, as she placed her hand on the

top rail of the balustrade to steady herself, the rail suddenly gave way because of its rotten and defective condition, and plaintiff was precipitated to the pavement below and injured. *Held*, that defendant was liable for such injuries under Rev. Civ. Code La. art. 2322, providing that the owner of a building is answerable for damage occasioned by its ruin when caused by neglect to repair or vice in its original construction, neither the tenant nor plaintiff's husband being under any obligation to make repairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 629-633.]

Frank E. Rainold, for plaintiff.
Zengel, Thomas & Suthon, for defendant.

SAUNDERS, District Judge. The plaintiff herein alleges that the defendant owns a house in this city—2212 Canal street—which he leases to Mr. and Mrs. Wenger, and that they use the house as a boarding and lodging house, and keep a sign posted in a conspicuous place near the entrance, reading, "Furnished Rooms." That Mr. S. O. Frank, the husband of petitioner, engaged rooms on the second floor of this building in March, 1907, and that petitioner and her husband moved into and occupied said rooms. That on April 4, 1907, at or about 4 o'clock p. m., petitioner walked along the back gallery on the second story of said house carrying a basin of dirty water which she intended to throw into the back yard as there was no provision in the house for emptying the slops. That she walked to the end of the gallery and threw the water from the basin, and, as she did so, placed her hand on the top rail of the balustrade of the gallery for the purpose of steadying herself, and thereupon the top rail suddenly and unexpectedly gave way, petitioner falling from said gallery on the second story to the pavement below, a distance of about 16 feet, and was terribly injured by the fall. Further averring the nature and extent of her injuries, petitioner then alleges that the top rail of the said balustrade fell because of its rotten condition, and particularly because of the rotten condition of the ends of the rail, and the rotten and rusty condition of the nails by which this top rail was fastened to the decayed and rotten upright posts, "which decayed and rotten and defective condition of said railing and balustrade and posts made a veritable death trap to any one who might take hold of or lean on or against the same, although said railing and balustrade was constructed to prevent and protect persons using the gallery from falling therefrom, and they would have fulfilled the purpose of their construction, and the accident to petitioner would not have occurred, had said railing and balustrade and posts been in good condition." "Now petitioner avers that said railing and balustrade and posts had never been repaired since its erection, and that the same were old and in need of repairs, and that the owner of the building is answerable for the damages occasioned by their ruin, because the accident was due to his neglect to repair said balustrade and railing and posts, and keep the same in good serviceable condition, and it was through his fault, and his wanton and reckless disregard of the safety and life of any person who might walk upon or use said gallery, that the accident occurred, and said accident was due to his negligence alone." To this petition the defendant interposes the

exception of no cause of action. He insists that if the plaintiff has a cause of action against any one, it is against the lessees, Mr. and Mrs. Wenger.

The Civil Code of Louisiana contains two articles which deal directly with the liability of the owner of a building to persons injured by either its defective condition or its defective construction. The first of these articles reads as follows:

"Art. 670. Every one is bound to keep his buildings in repair, so that neither all, nor any part of the material composing them may injure the neighbors or passengers, under the penalty of all losses and damages which may result from the neglect of the owner in that respect."

This article, it seems to me, was clearly intended to regulate the liability of the owner of a building in damages to his neighbors, or to passers-by, where these are injured by the fall of all or any part of the building; that is, the article deals with a particular case of the liability in damages of the owner of a building, to persons outside the building who are injured by the fall of the building, or of some part thereof.

In the case of McConnell v. Lemley, 48 La. Ann. 1433, 20 South. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319, the Supreme Court of Louisiana held that, under the rule established in article 670, the guests of the tenant had no claim in damages against the owner of a building for injuries they sustained from the fall of part of the building (the front gallery) while they were in the building as guests of the tenant. The facts of the case, however, do not seem to have required any such expression of opinion by the court. A number of persons were calling one evening at the house of a Mr. Burgess. A fire engine passed in front of the house, and some 10 or 12 of the guests rushed out on the gallery to look at the passing engine. The gallery gave way and precipitated the guests to the sidewalk, and in this fall, Miss McConnell's leg was broken. She sued the owner of the house for damages, alleging that the collapse of the gallery was due to its dilapidated and ruinous condition, and to the neglect of the landlord to keep it in proper repair. The court say:

"The cause of the falling of the gallery was fully proved. It was rotten to such an extent that no repairs could have made it safe."

The court then reviews the applicatory authorities and concludes that the owner of the building is liable to only neighbors and passers-by, who may be injured by the fall of the building or any part thereof, and not to persons in the house as guests or licensees of the tenant. And it was intimated that guests or visitors injured by the fall of the building had their recourse against the tenant only. If the decision in the McConnell Case correctly states the law of Louisiana as to the liability of the owner of a building to guests, visitors, or licensees of the tenant, who are injured by the dilapidation of the building while they are therein, the exception of no cause of action interposed by the defendant in this case would have to be sustained. But the dicta in the opinion of the court on this subject were not called for by the facts in that case, and have since been expressly declared by the Supreme Court of Louisiana not to be a correct statement of the law. In the

opinion in the McConnell Case, the court say that the proof at the trial of the case showed:

"That the gallery was not in a condition to stand this unusual strain (the rushing out of ten or twelve guests thereon) is not denied, but on the contrary was generally known among the guests, and that during the course of the evening that the accident happened the visitors were warned and admonished to desist from dancing, as the gallery would not stand the strain it would produce; that, notwithstanding that warning, the guests rushed out on the gallery when the fire bell rang, causing it to give way and fall beneath their accumulated weight, causing the injury complained of to the plaintiff's daughter."

After discussing and stating the law as to the liability of the owner to guests, visitors, or licensees of the tenant, the opinion concludes as follows:

"But in any event the evidence satisfies our minds that the defendant, as owner of the building, has exonerated himself from liability by making all the repairs which he supposed to be necessary to the safety and security of the building; and, if any fault there was on his part, the tenant and his guests contributed, in some degree, to the accident, by not desisting from rushing out upon the gallery as they did after having been warned of the danger of dancing on it."

On the statement of facts made in the opinion of the Supreme Court, the judgment in favor of the defendant (the owner) in the McConnell Case was clearly correct. The plaintiff was a guest or visitor of the tenant of the house, and while in the house was warned not to go on the gallery as it was in a dilapidated condition and might fall. She disregarded this warning and with other visitors went suddenly on the gallery and by her weight and that of her companions, and by the impetus and jarring of their movements caused the very collapse of the danger of which she had been warned. Her own imprudence brought the accident upon her. Conceding that the owner was under an obligation, as to her, to keep the gallery safe, still, when she knew it was unsafe and very likely to fall, and had been expressly told not to go on it, if she chose to go on it and expose herself to the chance of a fall, she had no right to incur this danger at the risk of the owner. The judgment rejecting her demand for damages against the owner was therefore manifestly correct.

Now let us see if the Supreme Court of Louisiana has not repudiated the statement in the opinion in the McConnell Case that the owner of a building is under no liability to visitors, guests, or licensees of the tenant for injuries they sustain by reason of the dilapidation, ruin, and fall of the building or some part thereof. The cases subsequent to McConnell v. Lemley, involving the liability of the owner of a building to persons lawfully in the same and there injured by the fall of the building, or of some part thereof, are Schoppel v. Daly, 112 La. 202, 36 South 322, 104 Am. St. Rep. 452; Brodtman v. Finerty, 116 La. 1103, 41 South. 329; Bianchi v. Del Valle, 117 La. 587, 42 South. 148; and Christadoro v. Van Behren's Heirs, 119 La. 1025, 44 South. 852. The decisions in all of these cases are made to depend chiefly on the application of article 2322, Rev. Civ. Code, to the special facts in each case. That article reads:

"Art. 2322. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

This article deals with the liability of the owner generally, and to all persons whatsoever; its provisions apply both to persons within and to persons without the building. By the term "ruin of a building" is meant the collapse, the fall, or the giving way of the whole or of some part of the building whereby some one is injured. Article 2322 provides, in substance, that any person whatsoever, injured by the "ruin" of a building, may hold the owner of that building liable in damages, if the "ruin" which caused the injury was attributable to neglect to repair or to original defective construction. But, as in most other cases where the law declares that specified conduct of one person, resulting in injury to another, shall be deemed faulty conduct and shall render the person so in fault liable in damages to the person injured, it is always open to the person so made liable to show that, in a particular case, the legal cause of the injury was not the defendant's fault, but the plaintiff's own neglect to take due and reasonable care of himself in a given and known state of facts. Accordingly, the owner will escape liability if he shows that the injured plaintiff knew of the particular danger arising from the neglect to repair or original defect in construction, and yet with full knowledge of such danger, unnecessarily and recklessly exposed himself to the risk of being injured by that danger. The cases above cited all recognize the prima facie liability of the owner, and the inquiry in each case was whether the facts shown constituted a defense to such prima facie liability.

In Schoppel v. Daly, 112 La. 201, 36 South. 322, the facts were as follows: The tenant's wife fell through the floor of the building which gave way on account of its rotten condition. She was badly injured, and sued the owner to recover damages. In her petition she averred that the lessor was bound to keep the house in good order and condition, and to guarantee against all defects and vices. She further alleged that the defects which caused the fall were such as only an architect or builder could have discovered; and that she was ignorant of the rotten and dangerous condition of the floor, and was herself without fault or negligence. Defendant filed the exception of no cause of action, which was finally overruled, and the plaintiff recovered a judgment. This judgment was affirmed by the Supreme Court, though the sum awarded by the lower court was slightly reduced.

In the opinion affirming the judgment in favor of the wife, the Supreme Court, after stating that the action was not brought under article 2695, Rev. Civ. Code, which imposes on the lessor the obligation of guaranteeing the lessee against the vices and defects of the thing leased, goes on to say:

"The action is one ex delicto for personal injuries to the wife. The existence of contractual relations between two parties is no bar to a right for damages for a tort committed pending the contract, though the contract may more or less affect their rights. Torts are often connected with or founded on contracts. Ballew v. Andrus, Ex'r, 10 La. 219. The husband is not suing in the suit for damages for personal injuries to the wife. She is herself the plaintiff suing on that cause of action. She is certainly authorized to do so. * * * The evidence does not fix with certainty whether Mrs. Beecher (the

plaintiff) or her husband was the lessee of the property. As no mention is made of their being separate in property, we presume that her husband was the lessee, and that her occupancy of a portion of the property for a notion store was through his permission. Her right to damages for personal injuries is distinct from his right to recover damages by reason of his contractual relations, as lessee, with Mrs. Daly. The contract of lease evidenced the fact that she was lawfully on the premises. We do not accede to the proposition that the liability of the owner of buildings for injuries resulting from their defective condition is limited to neighbors and passers-by upon the street; that it does not extend to persons who may be lawfully within the same. * * * Whatever may have been the cause, the fact itself remains that the flooring did give way under Mrs. Beecher's (plaintiff's) weight, and should not and could not have done so had the flooring and joists been in proper condition."

I gather from this decision that the tenant's wife was held entitled to recover damages from the owner and lessor of the building, because her demand was based on tort, and not on her husband's contract of lease; and the defect that caused the accident was concealed and the plaintiff knew nothing of it, and she was not therefore chargeable with any contributory negligence which, if it had existed, might have defeated her claim. The court say that under the lease she was lawfully on the premises by reason of her husband's consent. And she was apparently considered to have the same rights against the owner which any one else, lawfully on the premises, would have had. Under the facts of the Schoppel Case the court held that it was not incumbent on the husband, as tenant, to make any repairs. It was, therefore, not necessary for the court in that case to express any opinion on the question whether, if such repairs had been due by the husband, as tenant, that circumstance would have defeated the right of the wife, or of any one else, lawfully on the premises, to recover damages from the owner. Though the court do not refer to the McConnell Case, the doctrine of that case as to the nonliability of the owner to persons lawfully in the house is obviously overruled. The case clearly establishes the right of any one, even the tenant's wife, lawfully in the house, to recover from the owner damages caused by the "ruin" or rotten condition of the house, unless the owner can establish some contractual relation between himself and plaintiff, or some fault in the plaintiff which would defeat his prima facie right of recovery.

The next case in order of time was that of Brodtman v. Finerty, 116 La. 1103, 41 South. 329. This suit, also, was one by the wife of the tenant. She was attempting to close a blind of one of the rooms, when the hinges upholding the blind broke and the blind fell on her right hand and crushed it badly. The petition alleged that the hinges had been broken for a number of months, and that the landlord had been requested to make, and had promised to make, the necessary repairs. The exception of no cause of action was filed by the defendant to this petition and was maintained both in the lower court and in the Supreme Court. The Supreme Court say:

"The repairs required were the most ordinary repairs and did not grow out of the vices and serious defects which are mentioned in article 2695 of the Civil Code."

The repair required in this case (to the blinds) was one of those trifling and ordinary repairs which the law (Rev. Civ. Code, art. 2716) expressly provides shall be made by the tenant and not by the owner. The owner was not therefore in fault or anyways culpable in not making a repair which the law required his tenant to make. But the plaintiff was clearly chargeable with negligence in attempting to move a blind, resting as she knew, on a broken hinge and which was likely to fall at any moment. Under these circumstances it was not possible that the plaintiff could recover. The court, it is true, does seem to put its rejection of the wife's claim partly on the ground that the husband had not made the repair, and that she could not recover for that reason, as he could not have recovered. But as the judgment was correct on the ground of the wife's contributory negligence, the opinion can hardly be cited in support of the view that the contractual relations and duties of the husband, as tenant, will defeat the wife's claim for damages whenever they would, for the same accident, defeat the husband's claim. The opinion also reverts to the doctrine of McConnell v. Lemley, as if it had not been overruled in the Schoppel v. Daly Case.

The next case, Bianchi v. Del Valle, 117 La. 587, 42 South. 148, is also a case in which the tenant's wife sued for damages sustained by her, by reason of the dilapidated condition of the rented building. The floor of the building became rotted to such an extent that there were several holes in it. The plaintiff alleged that her foot slipped through one of these holes in February, and again the same accident occurred to her in July. The resulting injury was trifling. The court say:

"There was nothing permanent about the injury; there was an abrasion of the skin; nothing was broken or seriously affected; it was painful for a short time, but nothing serious came of it. In order to recover an amount for damages, it should be made to appear with reasonable certainty that the party has suffered serious damages; it should not be a slight, temporary hurt. The testimony has not impressed us as presenting a case sufficiently grave to allow damages."

Further on, the court gives the following as the reason why the wife could not recover:

"There was want of care and attention. It amounts to contributory negligence, which prevents recovery. Moreover, the tenant and the tenant's wife should have avoided the danger, which was apparent."

And again they say:

"The defects were apparent, and the wife knew all about them. None the less, she placed her foot on the spot she should have avoided. Both acts which resulted in the accidents were acts of inadvertence."

Clearly the judgment rejecting the wife's demand for damages for an injury which seems to have been utterly trivial, and which was incurred by her own negligence, was inevitable. But the court again gives us an additional reason—that the wife was barred by the negligence of the husband. They say:

"The right of the tenant to make repairs under circumstances of this case is clearly set forth in Scudder v. Paulding, 4 Rob. 430. * * * The hus-

band could have so acted as to have prevented the injury. His act of omission bars the wife from recovering."

The decision of the case, as I have just shown, did not require any expression of opinion on this point, and this statement of the court must be regarded as obiter, especially as the court in other parts of the opinion reaches conclusions which seem inconsistent with holding the wife barred by the husband's failure to make the repairs.

At the trial of the case in the lower court, the husband was offered as a witness to testify in favor of his wife. His testimony was excluded, and in sustaining the judgment on this point, the court refer to the Louisiana statute, which forbids the husband to testify on behalf of his wife except in matters wherein he acted as her agent. And the court held that the husband was not, in any sense, the agent of the wife in making the lease. The court say:

"But a husband who becomes the tenant of a house with a guaranty against the vices and defects, does not act as the agent of the wife, and he is not a competent witness if an accident happens to her while occupying the house with her. The accident is a separate incident from the lease. * * * The husband became the lessor without further stipulation than that he was to be the lessor. His wife or any other member of his family were not mentioned in any way in matter of the lease; there was nothing said about them. There was no agency, and therefore the husband was not brought under the terms of the law which allows the husband when agent to testify regarding the acts of his agency. She (the wife) was not a party to the lease."

On principle, this last statement of the court seems to be correct. The wife could neither sue nor be sued on the contract of lease. She incurred no obligations, and acquired no rights under it. But her husband, as lessee, was entitled to invite her into the leased premises. Whatever may have been the contractual relations between the husband and the lessor, the wife was no party to those relations, and was not, in any manner, bound by them. The wife of a tenant is in the same situation as any other person lawfully on the premises, and has the same rights which any person, lawfully on the premises, would have.

The last of the cases above referred to is the case of Christadoro v. Van Behren's Heirs, 119 La. 1025, 44 South. 852. In that the court, in criticising the decision of McConnell v. Lemley, 48 La. Ann. 1433, 20 South. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319, say:

"We suspect the organ of the court in the Lemley Case understood this to mean that the responsibility imposed by article 1386 (our article 2322) is absolutely restricted to neighbors and passers-by—i. e., to those outside of the house—and does not extend to those inside. But such is not the idea intended to be conveyed. What is meant is simply that the relations of those who have a contract are governed by the contract, and the relations of those who have no contract are governed by the general principles of the law embodied in this and other articles of the Code. In other words, the line of cleavage is between those who have, and those who have not, a contract, and not between those who are outside, and those who are inside, of the house."

And in the syllabus by the court to this case, it is said:

"McConnell v. Lemley, 48 La. Ann. 1433, 20 South. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319, in so far as holding that the responsibility provided for by article 2322, Civ. Code, is restricted to neighbors and passengers, is overruled."

I think it is clearly the law, then, that the landlord and owner of the building is liable in damages to all persons who are lawfully in his building for injuries sustained by them as the result of the dilapidated condition of the building; unless such persons are debarred from recovering by reason of special contractual relations between themselves and the owner, or by reason of contributory negligence on the part of the persons injured, or other lawful defenses.

The wife of the tenant is not debarred from recovering by reason of the fact that her husband is the tenant. His tenancy creates no contractual relations of any kind between her and the owner. The wife, therefore, can recover, unless her claim is defeated by proof of contributory negligence on her part. A fortiori are these conclusions true of the wife of a mere roomer. The roomer has no right to make repairs, either as against the lessee or against the owner of the building. It is, therefore, no negligence of his not to make repairs.

Further, it seems to be the unquestioned law that even the lessee is under no obligation to make repairs, and is not in fault for not making repairs when the defects are concealed or nonapparent, and I cannot infer from the averments of the petition in this case that the defects were apparent or known to the plaintiff in this case, or to anybody else. It is a matter of common observation that boards about a house will rot on the inside while the outside affords no indication of the existence or extent of the decay on the inside.

For the reasons given, the exception of no cause of action must be overruled, and the defendant must file his answer.

LYNCH v. CHEW.

(District Court, E. D. Pennsylvania. January 31, 1908.)

No. 43.

1. TOWAGE—REPAIRS TO TUG—LIABILITY OF HIRER.

Where respondent hired a tug, and agreed to pay the cost of shortening its stack in order that it might pass under a certain bridge, whereupon the tug was taken to a shipyard, where repairs were made on her, for which a charge of $30 was made, including the shortening of the stack, and the evidence did not show the value of the separate items, an allowance of $15 only would be made against respondent for shortening the stack.

2. SALVAGE—PUMPING BARGE—FAULT.

Respondent negligently sent a barge in an unseaworthy condition on a voyage in tow of libelant's tug. The barge was saved from sinking during the voyage with the aid of pumps; but when she reached her dock libelant abandoned her, whereupon she immediately sank, and libelant thereafter pumped her out at respondent's request. *Held* that, since both libelant and respondent were at fault, libelant was only entitled to charge one-half of the reasonable cost of such service.

[Ed. Note.—Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

3. SAME—TOWING.

Where a barge sank because of the negligence of both libelant and respondent, and after libelant had pumped the water from her he towed the barge to a shipyard for repairs, which were needed, before she sank, libelant was entitled to recover the cost of the towing.

4. TOWAGE—REPAIRS TO TUG—DELAY.
Where respondent hired a tug and consented that she be sent to a shipyard to have her stack lowered, respondent was entitled to an allowance for delay, both of the tug and barges, occasioned by other work on the tug, done for the master's individual benefit.

5. SAME—COMPENSATION—IMPROPER NAVIGATION.
The hirer of a tug is entitled to an allowance for delay caused by the tug's running aground because of an error in navigation.

6. SAME—INJURY TO BARGE—EVIDENCE OF DAMAGE.
The hirer of a tug was not entitled to an allowance for damages to a barge by a collision with the bridge while in charge of the tug, where there was no evidence from which the money value of the injury could be estimated.

In Admiralty.

Willard M. Harris, for libelant.
Stanley Williamson, for respondent.

J. B. McPHERSON, District Judge. This action in personam was begun by process of foreign attachment against two persons who were averred to be partners, but it is now conceded that the suit should have been against Stille C. Chew only, and recovery is sought against him alone. The libelant's claim is for a total made up of several items, some of which are admitted, while others are in controversy. As a further defense, the respondent is urging several counterclaims, and upon the whole case asks for a money decree in his favor. It will therefore be necessary to examine the items in dispute, and determine separately how far each should be allowed.

The libelant is the master of the tug Clarksville, and was employed by the respondent in September, 1906, first, to tow by the week at a specified rate, and afterward to tow by the trip upon several occasions. It is agreed that the libelant is entitled to charge $545 on account of these engagements, and also that the respondent is entitled to a credit of $431, so that the inquiry begins with a conceded balance of $114 in favor of the libelant. He asks for a further allowance of three items amounting to $75, all of which are in dispute. The first item is $20, being two-thirds of the sum paid to Neafie & Levy's Shipyard for work done upon the tug. The bill is not produced, but it appears that part of the work was shortening the smokestake so that the tug could go under a certain bridge on the way to Swedesboro. The respondent agreed that the stack should be shortened, and promised to pay the cost. The shipyard's bill was $30 but this included a charge for other work that was done at the same time upon the tug for the libelant's benefit alone. The testimony does not enable me to separate the items precisely, but I think that the libelant should not be allowed upon this account more than one-half the bill, or $15.

The second item is $45, for 9 hours' pumping upon one of the respondent's barges, the Idella, under the following circumstances: The barge had not been in good condition for several weeks at least, and this fact was well known to both parties. She leaked badly and needed constant attention. Nevertheless, she was loaded in Philadelphia while thus unseaworthy, and was sent by her owner, and

taken by the tug, upon a voyage down the Delaware river and up one of its tributary creeks to Swedesboro, where she arrived in safety, but sank at the wharf in half an hour afterward. During the voyage she was only saved from sinking by voluntary aid at the pumps given by the master of another barge that was also in tow of the tug. When Swedesboro was reached, the barge was promptly deserted by her crew, a lad of 17, whom the respondent had put in charge of her before she left Philadelphia, and was deserted also by the libelant, who turned the tug about immediately and returned to the city, without giving the barge such attention as he must have known she badly needed. As already stated, she sank without delay, and had to be pumped out not long afterward. This service was rendered by the libelant at the respondent's request, and the charge of $45—which seems to be at a reasonable rate—would be allowed if the tug had not been obviously at fault in deserting the barge under the circumstances just described. But the respondent was also at fault in sending the barge on a voyage in a leaking condition, and with no one of experience to look after her—for the boy did little or nothing except make the voyage and then run away—and I think, therefore, it would be no more than just to require each of the parties to bear one-half the cost of pumping.

The third item is $10 for towing the barge to Chester, where she was taken to be repaired after having been pumped out, and this I think should be allowed in full. There is no evidence that the repairs were made necessary by the sinking; on the contrary, they were badly needed before she sank, and even before she left Philadelphia the respondent had announced his intention to have the leaks attended to after the voyage should be completed.

Allowing, therefore, $15, $22.50, and $10, making $47.50, for these three items, the libelant's account is increased to $161.50.

Turning now to the respondent's counterclaims, it appears that one of the items, $55.50, is for the delay of the tug and two barges for a day and a half while the smokestack was being cut. This must be reduced. There is no satisfactory proof to justify a full allowance for delay of the barges, but I think there was a partial delay both of the tug and of the barges, due to the work that was done for the libelant's individual benefit. I think this may be fairly estimated at one-half the time (a day and a half) that was taken for the whole job, and that the respondent should have a credit of $18.75, or three-fourths of the charter rate ($25 a day) that was paid for the tug, and a credit of $11 for the delay of the barges.

Another item is for a half day's delay caused by the tug's running aground in Christiana creek. Prima facie, at least, the tug was at fault for this error in navigation, and the presumption of negligence or incapacity has not been satisfactorily rebutted. An allowance of $12.50 should, therefore, be made on this account, and an additional allowance of $9, compensation for delay of the barges.

A third item is $18.50 for a half day's delay of the tug and two barges by running aground on another occasion in Raccoon creek, and for the reason already given this credit should also be allowed.

The fourth item is $100, which is claimed as damages caused by

the sinking of the Idella at Swedesboro; but except for the delay of two days there is nothing beyond the most vague and general testimony upon this point, and for this reason I cannot allow more than $12.

The last item is a second charge of $100, damages claimed to have been done to the Idella by collision with the railroad bridge at Swedesboro, which is said to have been inflicted while she was in charge of the tug. If for present purposes the tug's liability be assumed—and a good deal of reason for assuming it may be found in the libelant's conflicting testimony upon this point—nevertheless I can make no allowance to the respondent, because he has furnished no evidence from which the money value of the injury can be estimated. Nothing was offered except some general statements on page 37 of the respondent's testimony, and the following questions and answers on cross-examination (page 58):

"Q. How do you make up the damage of $100?
"A. By the amount of damage done to her.
"Q. Have you had her repaired?
"A. Broken planks repaired.
"Q. Have you got your bills for repairs? How do you say $100, when you have nothing to prove it?
"A. I built the boat in the first place. I know her exact cost and paid many hundred dollars for repairs on her, as well as on many other barges. I know exactly what it would cost. I consider that $100 is low."

The respondent's credits being $81.75, the balance due the libelant must be reduced to $79.75, for which sum, with interest from the date of bringing the suit, a decree may be entered against Stille C. Chew. It is further ordered that the costs be equally divided between the parties.

UNITED STATES v. KERR.

(District Court, E. D. Pennsylvania. February 7, 1908.)

No. 17.

1. CRIMINAL LAW—PRELIMINARY PROCEEDINGS—FEDERAL COURTS—HEARING.
While criminal proceedings in a federal court are ordinarily before a commissioner, in which a preliminary hearing is afforded the defendant, such proceedings may be instituted by a United States attorney at his discretion by indictment, without previous arrest, binding over, or leave of court; the defendant not being entitled as of right to a preliminary hearing.

2. COURTS—FEDERAL COURTS—RULES OF DECISION—PRACTICE IN STATE COURTS.
The practice in the state courts in criminal cases to accord a person accused of an offense a preliminary hearing as of right is not authority in the federal courts sitting in such state.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 908.]

Indictment. On motions in arrest of judgment and for new trial.

The defendant was tried before Hon. John B. McPherson, at the December sessions of the District Court, upon an indictment containing nine counts, charging him, under Rev. St. §§ 3891, 5467 [U. S. Comp. St. 1901, pp. 2657, 3691], with having unlawfully delayed, embezzled, opened, and rifled three certain registered letters, which had come into his custody in the ordinary

course of his duties as a rural letter carrier attached to the post office at Darby, Pa. As to the first and third letters the indictment charged both delaying (Rev. St. § 3891) and embezzling, etc. (Rev. St. § 5467). As to the second letter the indictment contained but a single count for delaying.

A motion to quash the indictment was based, inter alia, and as to certain counts, upon the contention that as to all except the first three counts of the indictment, relating to the first letter, the defendant had been unlawfully denied a preliminary hearing, and that the indictment had been sent before the grand jury without leave of court and without previous warrant or binding over. This contention was again urged in support of the motion in arrest of judgment. Other questions of law were involved in the case; but, as the same were not discussed in the opinion of the court, they are not set forth in this statement of the facts.

The defendant was arrested at Ft. Slocum, N. Y., upon a warrant of arrest issued by a United States commissioner for the Southern district of New York, upon affidavit made by a postal inspector; the affidavit and the warrant charging the offense of delay and opening with respect to the first letter only. The defendant waived a hearing, and under Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], was committed for trial in the Eastern district of Pennsylvania upon a warrant of removal signed by the District Judge, and based upon the same offense as alleged in the warrant of arrest. The commissioner's return was filed in the District Court on Friday, December 6th, three days prior to the opening of the December sessions of the District Court and the convening of the grand jury.

Subsequently to the commissioner's return the United States attorney became informed of the similar offenses alleged to have been committed during the same month as the first offense with respect to the two other letters, and counts covering these additional offenses were included in the indictment, which was presented to the grand jury on Tuesday, December 7th, and who returned a true bill on the following day.

Defendant was called for trial on Thursday, and on the following Monday the jury rendered a verdict of guilty on all counts, except those covering the embezzlement of the first letter.

On February 15th, in conformity with the opinion here reported, the defendant was sentenced to imprisonment for a period of six months.

J. Whitaker Thompson and Jasper Yeates Brinton, for the United States.

V. Gilpin Robinson, for defendant.

J. B. McPHERSON, District Judge (after stating the facts as above). Whatever may be said concerning the power of a grand jury in the Pennsylvania courts to find an indictment where the accused has not had a previous hearing before a magistrate, it is clear that no such hearing is necessary in the federal courts. No doubt a prosecution before these tribunals is ordinarily begun in much the same way as in the criminal courts of the state. Information is laid before a commissioner, who hears the government's case and thereupon either discharges the accused or holds him to answer; but this preliminary examination is not essential as the federal authorities abundantly show. If the grand jury sees proper to act upon evidence that is brought to their attention, they may bring in a suitable indictment, although the charge is made for the first time by their finding, and although the accused has had no preliminary hearing. Apparently, the argument offered to support the motion in arrest of judgment fails to give due weight to the difference between the practice of the federal and the Pennsylvania courts in this respect, and ceases to be persuasive as soon as the distinction is clearly recognized.

The reasons for a new trial have also received consideration, but I do not see how the verdict upon the McDonald charges, at least, can be properly set aside. The other two offenses are much less important, but the conviction upon the charge growing out of the McDonald letter is a more serious matter. The testimony there was squarely in conflict, but there was sufficient to convict if the jury believed the government's witnesses, and the verdict shows that belief was given to their account, and not to the defendant's. To determine the credibility of witnesses being peculiarly within the province of the jury, and the testimony here being in fair balance (to state the case most favorably for the defendant), there is no legal ground on which the court can interfere with the result.

Both motions must be refused. Sentence will be imposed upon one or more of the counts numbered 5 to 9, inclusive.

UNITED STATES v. WOOD.

(District Court, D. New Jersey. October 21, 1907.)

ALIENS—CHINESE EXCLUSION ACT—INDICTMENT AGAINST MASTER OF VESSEL LANDING CHINESE.

Under the rule that, where a statute in defining a criminal offense states an exception, an indictment for such offense must allege enough to show that the accused is not within the exception, an indictment under Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478 [U. S. Comp. St. 1901, p. 1316], which makes it a misdemeanor for the master of any vessel to knowingly bring within the United States on said vessel and land or attempt to land any Chinese person "in contravention of the provisions of this act," must negative the exceptions stated in section 10 of the act.

On Demurrer to Indictment.

John B. Vreeland, U. S. Atty.

Convers & Kirlin (John M. Woolsey, of counsel), for defendant.

CROSS, District Judge. The indictment in question contains two counts, and is based upon Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1316]. The material portion of the section above referred to is as follows:

"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," etc.

It is clear that the section does not, in and of itself, fully describe a crime. It is not thereby made a crime knowingly to bring into the United States on a vessel, and land or attempt to land, etc., a Chinese laborer or other Chinese person; but the crime is made to consist in knowingly bringing in and landing such Chinese laborer or person in contravention of the provisions of the act. Here, then, we find an exception in the enacting clause of the statute. The crime is not fully defined by that clause; but we are compelled to look elsewhere to determine what constitutes the crime therein referred to. In such cases good pleading requires that the indictment should allege enough

to show that the accused is not within the exception. The rule is different when the crime is clearly defined in the enacting clause. Then an exception, whether found in a proviso or subsequent section of the act, need not be negatived; but such exception may be shown by way of defense. The rule, as I understand it, is laid down in United States v. Cook, 17 Wall. 168, 173, 21 L. Ed. 538, wherein the court says:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but, if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. * * * Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed."

There is much other pertinent matter to be found in this opinion, but to quote it all would make this memorandum unnecessarily prolix. Section 10 contains exceptions which, under the rule just stated, should have been negatived in the indictment. In Ledbetter v. United States, 170 U. S. 606, at the foot of page 610, 18 Sup. Ct. 774, at page 775, 42 L. Ed. 1162, reference is made to an act in a section of which this language was used, "otherwise than as hereinafter provided," concerning which the court says, at the top of page 611 of 170 U. S., page 775 of 18 Sup. Ct. (42 L. Ed. 1162):

"The statute, by the use of the words 'otherwise than as hereinafter provided,' thus introduces an exception into the general words of the definition, and it might be open to doubt whether an indictment which charged only the selling or offering for sale in the language of this section should not also negative the fact that the sale was not within such exception. The general rule is that, while the pleader is not bound to negative a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute." Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 605, 14 Sup. Ct. 458, 464, 38 L. Ed. 279.

It is clear to my mind that both counts of this indictment are fatally defective, in that they do not negative the exceptions contained in section 10. It is unnecessary to consider the other objections urged.

The indictment will be quashed.

LAWRENCE JOHNSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 12, 1907.)

No. 4,615.

CUSTOMS DUTIES—CLASSIFICATION—CABRETTA SKINS—"WOOL."

The growth on cabretta skins is dutiable as "wool," under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 182 [U. S. Comp. St. 1901, p. 1664].

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7515.]

On Application for Review of a Decision by the Board of United States General Appraisers.

This is an appeal by the importers from a decision of the Board of United States General Appraisers which sustained the classification by the collector of the importations in question, viz., the growth on cabretta skins, as wool, under the provisions in Schedule K, Tariff Act of July 24, 1897, c. 11, § 1, 30 Stat. 182 [U. S. Comp. St. 1901, p. 1664]. The importers contend that it should have been admitted free of duty together with the skins under paragraph 664 of said Act, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], relating to skins of all kinds.

Walden & Webster (Henry J. Webster, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

MARTIN, District Judge (orally). I regard this as a different case from the former suit of the same importers (Lawrence Johnson & Co. v. U. S. [C. C.] 140 Fed. 116) in that the growth on the skins in the case at bar is here proven to be commercially known and understood. This did not appear as a matter of proof in the former case. Otherwise, the two cases are exactly alike. The case in the United States Supreme Court (Goat & Sheepskin Import Company v. U. S., 206 U. S. 194, 37 Sup. Ct. 634, 51 L. Ed. 1022), cited by counsel for the importer, seems to hold that the commercial designation should govern; and the comment of one of the General Appraisers herein would seem to bring this case within that rule, but a majority of the Board held the other way, and followed the decision of Lawrence Johnson & Co., supra. I do not regard the facts in the Goat & Sheepskin Import Co. Case, supra, decided in the Supreme Court, such as to be controlling of this case, and therefore I follow the Lawrence Johnson & Co. Case, notwithstanding the additional evidence adduced. The decision of the Board of General Appraisers is affirmed.

WANGE v. PUBLIC SERVICE RY. CO.

(Circuit Court, E. D. New York. January 25, 1908.)

REMOVAL OF CAUSES—JURISDICTION ACQUIRED—SERVICE ON FOREIGN CORPORATION.

A suit against a corporation of another state cannot be maintained in a federal court in the district of the plaintiff's residence, where jurisdiction depends on diversity of citizenship alone, where service was not made within the district of suit and defendant has no place of business therein,

although it may have such place of business and be served in another district in the same state; and where such a suit has been properly removed into a federal court the service will be quashed.

On Motion to Set Aside Service.

Martin T. Manton, for plaintiff.
Page, Crawford & Tuska, for defendant.

CHATFIELD, District Judge. The plaintiff is a resident of Kings county. The defendant is a corporation organized and operating in the state of New Jersey. Its only business in the state of New York is that it maintains a ticket agent in the borough of Manhattan for the purpose of disposing of surface car tickets on the New York side of the Hudson river. The action was begun in the Supreme Court of New York for the county of Kings, and has been removed to the United States Circuit Court in this district by the defendant, appearing specially. The defendant now moves to set aside the service.

Under the authority of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, this application must be granted. It is unnecessary to determine whether the corporation was doing business in the southern district of New York, or not. As was said in the case of Galveston, etc., Railway v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, the provisions of section 740 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 587] and of Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], limit the jurisdiction for the purpose of bringing original suit in the federal court to the district of the residence of the defendant, unless jurisdiction is based upon diversity of citizenship alone, in which case suit may be brought in either the district of the residence of the plaintiff or that of the defendant. In this case suit was brought by a person residing in the county of Kings, and service must have been made upon the defendant within the district where said county is located. By the provisions of Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], removal must be had into the Eastern district of New York, which has and can have no jurisdiction, on the ground of diversity of citizenship alone, over a New Jersey corporation doing business in some other district within the state of New York, unless service can be made within the district and unless business is being done by it therein. Case v. Smith, Lineaweaver & Co. (C. C.) 152 Fed. 730; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

Inasmuch as the court has no jurisdiction, and as the case is properly removable into the United States Circuit Court for this district, the service must be set aside.

THE LLOYD SABAUDO v. CUBICCIOTTI.

(Circuit Court, E. D. Pennsylvania. January 31, 1908.)

No. 14.

INJUNCTION—PRELIMINARY INJUNCTION—GROUNDS.

A preliminary injunction may properly be granted, where all that is sought is to restrain defendant from interfering with complainant's business, pending final hearing, by threatening its agents or attempting to induce them not to act for complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302–309.]

In Equity. On motion for preliminary injunction.

Wm. Draper Lewis and Crawford D. Hening, for complainant.
Charles I. Cronin and Joseph Hill Brinton, for respondent.

J. B. McPHERSON, District Judge. I can see no good objection to the form of interlocutory decree that is asked for by the complainant. It does the defendant no harm, for it only preserves the present status until further hearing of the cause, without putting him to inconvenience or imposing upon him any burdensome obligation. Upon this ground alone, therefore, I think it may properly be granted. Perhaps I might say also that the complainant's evidence was hardly sufficient in some important particulars, but I shall not dwell upon this subject now, as other evidence may be forthcoming hereafter.

The clerk is directed to enter the following decree:

And now, to wit, this 31st day of January, 1908, upon consideration of the bill of complaint, and the evidence of the complainant and the defendant, and after hearing, it is

Ordered and decreed that a preliminary injunction issue, restraining the defendant as an individual from further announcing, either privately or publicly, to any or all of complainant's booking agents in Philadelphia, that if they continue to sell the tickets of complainant they will be deprived of their positions as booking agents of any or all of the transatlantic steamship lines mentioned in the bill of complaint, or of any other transatlantic steamship company, and restraining the defendant as an individual from hereafter employing any threat, argument, or persuasion, based upon a predicted loss of their positions as booking agents of any of the above-mentioned lines, to dissuade complainant's booking agents from continuing in the future to offer for sale, and to sell, the tickets of the complainant.

BRINCKERHOFF v. HOLLAND TRUST CO. et al.

ROOSEVELT et al. v. BRYANT et al.

(Circuit Court, S. D. New York. February 5, 1908.)

1. EQUITY—PARTIES—INTERVENTION.

In a suit by a stockholder against the corporation and another to set aside a transaction between the defendants by which the corporation disposed of property, on the ground of fraud and the gross negligence of its president and directors, such president, although not made a party, may

properly be permitted to intervene and file a cross-bill meeting and controverting the allegations of the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 275–279.]

2. SUBROGATION—NEGLIGENCE OF AGENT—REIMBURSEMENT OF PRINCIPAL FOR LOSS—SUBROGATION OF AGENT.

An agent who is negligent in the management of the property of his principal and who is compelled to reimburse him will nevertheless be subrogated to the rights of the principal against the one primarily causing the loss, unless he was not merely negligent, but his conduct was such that he is not entitled to the consideration of a court of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 4.]

3. JUDGMENT—PERSONS CONCLUDED—CORPORATIONS AND STOCKHOLDERS—JUDGMENT AS BAR.

A building association conveyed certain real estate which constituted all of its property to a trust company, receiving in payment certain notes and securities pledged therefor, but also taking a mortgage on the property sold to guaranty the collection of the notes. This mortgage by agreement was not recorded, and was afterward canceled pursuant to a resolution of the board of directors of the association, not authorized by the stockholders, on the unsecured agreement of the trust company to pay to the stockholders of the association the par value of their stock. The trust company became insolvent, not having complied with such agreement, and, the association failing to realize on the notes and securities which it still held, a stockholder brought suit on behalf of himself and all other stockholders against the president, who was also a director and also president of the trust company, and recovered a decree against him for the consideration agreed to be paid by the trust company for the property, on the ground of the negligence of the defendant and the other directors in canceling the mortgage, which decree the defendant paid. At the time of such decree the securities held by the association were in the hands of receivers appointed in a suit brought by the same stockholder against the trust company in another jurisdiction, and the decree made no provision in respect to the same. *Held*, that such decree was not an adjudication of the right to such securities as between the defendant after payment of the decree and the trust company which was not a party to the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1226.]

4. SUBROGATION—GROUNDS—SUFFICIENCY OF PLEADING.

The defendant in such suit on payment of the decree was properly permitted to intervene in the suit against the trust company, and by cross-bill assert his right to be subrogated to the right of the trust company to the securities, which the latter as against the association was entitled to have returned, and his cross-bill showed a right to such subrogation as against both the trust company and its creditors, who received the benefit of the property received in exchange for the securities, where it alleged that his conduct in the transaction was not fraudulent, but merely negligent, and that neither he nor any other of the officers or directors of either company personally profited thereby.

See 146 Fed. 203.

Hearing on plea of defendants Samuel Bryant and James B. Van Woert, as receivers of Holland Trust Company, to part of a bill of revivor and supplement filed by John E. Roosevelt, Robert B. Roosevelt, and Kenyon Fortescue, as executors, etc., of Robert B. Roosevelt, deceased, and also to a part of the cross-bill filed herein by Robert B. Roosevelt in his lifetime, and also on plea of Holland Building Association to such bills. Also, hearing on motion by Holland Trust Company for withdrawal and vacatur by this court of the permission granted to Robert B. Roosevelt in his lifetime and to his executors, after his death, to intervene in the original cause and answer and file a cross-bill.

Wellman, Gooch & Smyth (Herbert C. Smyth and Frederic C. Scofield, of counsel), for complainants Roosevelt and others.

George M. Van Hoesen, for receiver of Holland Trust Co.

Tunis G. Bergen, for Holland Building Ass'n.

RAY, District Judge. From the papers before me it appears that in September, 1902, one Elbert A. Brinckerhoff, on behalf of himself and all other stockholders of the Holland Building Association, filed his bill in equity in the Circuit Court of the Eastern District of New York against Robert B. Roosevelt and the Holland Building Association, charging the said Roosevelt as an officer of said Holland Building Association with certain wrongful conduct, etc., injurious to such association and its stockholders, and seeking to charge him with certain sums of money as compensation, etc. The particulars will be referred to hereafter.

This action was tried before Hon. Edward B. Thomas, then District Judge of the Eastern District of New York, and, on the facts found by him (see [C. C.] 131 Fed. 955), resulted in a decree in favor of the complainant as follows:

"Ordered, adjudged, and decreed, as follows: That the defendant Robert B. Roosevelt without authority and negligently proposed, voted for, and procured the cancellation of the bond and mortgage for $100,000 made by the Holland Trust Company to the Holland Building Association without causing or procuring payment to be made to the Holland Building Association of the sum due under said bond and mortgage; that there has been a breach of the condition of the bond and mortgage whereby the mortgagee was entitled to enforce payment of the sum secured thereby which on account of the worthlessness of the consideration transferred to the Holland Building Association by the Holland Trust Company in return for 33 Nassau street consisting of all the indebtedness due the Holland Trust Company from Brigantine Beach Railroad, Brigantine Company, J. W. Coffin & Co., Moritz Lippmann, Coffin & Lippmann and their kindred companies at Brigantine Beach, with all the collateral belonging thereto, was $100,000 and interest, so far as the same is unpaid; and the Holland Building Association has thereby suffered loss to the extent of $100,000 with all unpaid interest thereon as hereinafter set forth; and that the defendant Roosevelt should pay for the benefit of the Holland Building Association the said sum of $100,000 with interest from August 1, 1901, as hereinafter provided. That the said defendant Robert B. Roosevelt without authority and negligently voted for and participated in the transfer to the Holland Trust Company of the sum of $3,900.81 belonging to the Holland Building Association; that such payment was unlawful and without consideration, and that said Roosevelt should pay for the benefit of the Holland Building Association the sum of $3,900.81 with interest from the 21st day of March, 1891, as hereinafter provided.

"It is further ordered, adjudged, and decreed that the defendant Robert B. Roosevelt pay to the Franklin Trust Company of the borough of Brooklyn, which is hereby appointed receiver for the purpose of receiving and administering the fund to be realized from this suit as hereinafter provided, the aforesaid sum of $100,000 with interest thereon from the first day of August, 1901, and the aforesaid sum of $3,900.81, with interest thereon from the 21st day of March, 1891, together with the sum of $1,398.39 as taxable costs, to be taxed by the clerk of this court and inserted in this decree; but if at said time a certain judgment obtained by the defendant Roosevelt against the defendant the Holland Building Association in the Supreme Court of the state of New York, county of New York, and docketed on the 18th day of April, 1902, for $7,477.18, remains in force, and if the said Roosevelt then tender to the Franklin Trust Company a satisfaction piece and discharge of said judgment, the said satisfaction piece and discharge shall be accepted by the Frank-

lin Trust Company as part payment of the sums above decreed to be paid by the said Roosevelt to said Franklin Trust Company, and the said Roosevelt shall be required to pay in cash to said Franklin Trust Company only the balance of the sum above decreed to be paid by him to said Franklin Trust Company after deducting therefrom the sum necessary to discharge the above-mentioned judgment in full with interest.

"It is further ordered, adjudged, and decreed that the said Franklin Trust Company collect and receive the sums above stated; and that upon the delivery to the defendant Roosevelt of such of the Brigantine securities originally transferred by the Holland Trust Company to the Holland Building Association in March, 1891, as are now held by said building association, and also all the securities subsequently received and now held by the Holland Building Association in place of securities originally transferred by the Holland Trust Company to the Holland Building Association in March, 1891, to wit, 50 shares of the stock of the Brigantine Building & Improvement Association, transferred to the Holland Building Association in March, 1891, and 800 shares of stock of the Brigantine Beach Railroad Company transferred to the Holland Building Association in March, 1891, together with 260 shares of preferred stock and 260 shares of common stock of the Philadelphia & Brigantine Railroad Company received by the Holland Building Association upon the reorganization of the Brigantine Beach Railroad Company in place of 71 bonds of $1,000 each of the Brigantine Beach Railroad Company transferred to the Holland Building Association in March, 1891, and, upon the delivery to the defendant Roosevelt of a duly executed assignment of the aforesaid securities, the said Franklin Trust Company shall distribute the money so received from the defendant Roosevelt as follows:

"First, that it pay to Duncan & Duncan, solicitors and counsel for complainants, the sum of twenty thousand dollars to be retained to said solicitors and counsel as reasonable compensation for their services as solicitors and counsel, and that it pay to said solicitors to meet the disbursements incurred on behalf of the complainants the sum of $1,398.39 taxable costs above referred to; that it also pay to Tunis G. Bergen, solicitor and counsel for defendant the Holland Building Association, one thousand dollars as reasonable compensation for his services herein as such solicitor and counsel; second, that said receiver pay and discharge the above-mentioned judgment obtained against said Holland Building Association by the defendant Robert B. Roosevelt in the Supreme Court, state of New York, county of New York, and docketed on the 18th day of April, 1902, for $7,477.18, if the same be in force, unless a satisfaction piece thereof shall have been tendered to said receiver by the defendant Roosevelt, and an allowance made to said defendant therefor as above provided; third, out of the balance of said sum said receiver is directed to retain the expenses of said receivership, including the sum of two hundred and fifty dollars, which is hereby fixed as the compensation of said receiver for carrying out its duties herein provided for; and, further, the Holland Building Association by its solicitor and counsel having consented to this provision of this decree, it is further ordered that the said receiver distribute the balance of said money so received from said Roosevelt, together with interest accrued thereon at the usual rate allowed by said trust company, among the then stockholders of the defendant the Holland Building Association pro rata according to their respective holdings of stock in said corporation in accordance with the stock record books of the Holland Building Association which the receiver is hereby directed to consult for the purpose of obtaining therefrom a correct list of said stockholders of record at the time of the delivery to the defendant Roosevelt of the Brigantine securities as aforesaid.

"And it is further ordered, adjudged, and decreed that upon the said receiver qualifying as hereinbefore provided it recover of said defendant Roosevelt the said sum of $100,000 with interest from the first day of August, 1901, and a further sum of $3,900.81 with interest from the 21st day of March, 1891, together with the sum of $1,398.39 taxable costs, amounting in all to the sum of $127,984.86 less, however, the amount necessary to satisfy and discharge the above-mentioned judgment obtained by the defendant Roosevelt against the Holland Building Association in the Supreme Court of the state of New York, county of New York in case the defendant Roosevelt tender to the said

receiver a satisfaction piece of said judgment as above provided; and that, as said receiver, the Franklin Trust Company have execution against the defendant Robert B. Roosevelt for the sums decreed to be paid by said defendant, unless due payment be made within thirty days.

"It is further ordered and decreed that either party hereto may apply to this court for further orders and directions at the foot of this decree as may seem necessary or proper for carrying out the purpose of this decree.

"Edward B. Thomas, U. S. J.

"It is hereby consented that the foregoing decree be amended by inserting on page 3 line 28 after '1891' the words and figures 3510 shares of the capital stock of the Brigantine Company of New Jersey transferred to the Holland Building Association in March, 1891.

"Duncan & Duncan, Solicitors for Complainant.

"Geo. C. Kobbe, Solicitor for R. B. Roosevelt.

"So ordered, Nov. 5, 1904.

"Edward B. Thomas, U. S. J."

On appeal to the Circuit Court of Appeals, Second Circuit, it appeared that the Brigantine securities referred to in such decree were in the possession of a receiver appointed by the United States Circuit Court, Southern District of New York, in a suit brought by the same complainant against the Holland Trust Company and the Holland Building Association, and which is the same action in which these proceedings are pending and being had, and thereupon the decree of the Circuit Court was affirmed, with suggestions of a modification or modifications, in that it was impracticable if not impossible for the building association to deliver the Brigantine securities to Roosevelt. Thereupon, on the coming down of the mandate of the Circuit Court of Appeals, the Circuit Court made the following amendment and modification, viz.:

"Ordered, adjudged and decreed that the decree of this court entered herein on the first day of November, 1904, and amended by the order of November 5, 1904, be, and the same is, modified and amended by striking out all portions thereof requiring or relating to the delivery or assignment of the Brigantine securities to the defendant or to the Franklin Trust Company, without prejudice to an application by defendant, upon satisfying this decree, to be subrogated in the suit pending in the United States Circuit Court for the Southern District of New York instituted by complainant herein against the Holland Trust Company, and the complainant herein is hereby enjoined from proceeding in such suit, or further taking any proceedings in such suit, until the defendant shall have reasonable opportunity to make such application."

In all other respects the decree was affirmed and made the final decree of the Circuit Court.

It seems that the Building Association became the owner of 33 Nassau street February 1, 1890, for $92,500, taking title subject to a mortgage of $82,500, held by one Stuart. March 18, 1891, Roosevelt, as president, and one Van Sicklen, as secretary and treasurer, of said building association executed a deed thereof to the Holland Trust Company, and they, as president and secretary, etc., of the trust company, also executed a mortgage to the building association, but this by agreement was never recorded. There was also transferred to the trust company $3,900.81 then belonging to the building association. There was transferred to the building association as consideration for the deed certain notes of the face value of $140,000. These were indorsed "without recourse. Holland Trust Company, R. B. Roosevelt, Presi-

dent." These notes accompanied by certain collateral are known as the "Brigantine securities." No authority for these transfers was given by the Holland Trust Company. March 12, 1891, at a meeting of certain of the trustees of the building association a resolution was adopted to accept the said Brigantine securities in lieu of cash for the said deed of 33 Nassau street, "provided Holland Trust Company guarantees the payment of $100,000 therefrom to this company, and also guarantees 6% per annum dividends on $100,000 to this company," etc., "with the privilege or call to said trust company to buy back said indebtedness and collateral act at any time for $100,000 cash," etc. The result of the transaction was that the association had parted with all its property and assets to the trust company for the unrecorded mortgage and the Brigantine securities, and became the owner thereof with certain conditions as to repurchase attached. These Brigantine securities were then practically worthless. Thereafter the unrecorded mortgage was canceled without payment, and the trust company sold and deeded the property 33 Nassau street, and received the full consideration. In the meantime the Brigantine loans were called, and the Brigantine securities were sold and bid in by the building association. This sale, etc., was to foreclose outstanding equities, and in no sense established any value in them. It left a deficiency of $35,803.19, with some 700 shares Brig. Co. Trustees' Stock Steel Rails, $20,967.50 unsold. The defendant Roosevelt took an active part in these transactions, and was largely responsible therefor, he being a principal officer in both the trust company and the building association. The court so held.

The long and the short of the story is that Robert B. Roosevelt was guilty of actionable negligence and culpable carelessness in managing the affairs of the building association, and in taking part in wasting the assets of the building association, and trading them off for these worthless notes and securities which became the only property of the trust company when the mortgage was canceled as aforesaid. In the meantime, and in January, 1903, said Brinckerhoff, on behalf of himself and all other stockholders of the Holland Building Association similarly situated, brought suit in equity in the Southern District of New York against the Holland Trust Company and the Holland Building Association, setting out at great length and with all necessary detail the transactions aforesaid; the negligent acts of Roosevelt and of the other officers, and alleging in substance that same was a fraud and a wrong on the building association; that the Brigantine securities and collateral, or others into which some of them had been converted, were in possession of the building association and capable of delivery to the Holland Trust Company, etc., and praying that the transaction be declared null and void and set aside; that the trust company account for and pay over the value of the property obtained by it, on restoration, if required by the court, of such Brigantine securities, etc. This in general is the object and purpose of this suit. It will be noticed that the complainant proceeds on the theory that if restitution is made to the building association the Brigantine securities should be returned.

In April, 1906, the final decree in the Eastern District having been entered, as amended March 20, 1906, Robert B. Roosevelt, one of the defendants in the action in the Eastern District, made a motion in this suit in the Southern District of New York to be allowed to come in and be made a party defendant, and to be allowed to intervene herein and to appear by his solicitor, and to file his cross-bill herein against said Brinckerhoff and against said Holland Trust Company and said Holland Building Association. The cross-bill was annexed to the order as finally amended, and granted May 24, 1906. This order was complied with; but thereafter said Robert B. Roosevelt died, and John E. Roosevelt, Robert B. Roosevelt, and Kenyon Fortescue were duly appointed executors of his last will and testament, and Samuel Bryant and James B. Van Woert having been duly appointed receivers of the Holland Trust Company, the said executors filed their cross-bill of revivor and supplement, and the said Samuel Bryant and James B. Van Woert, as receivers of Holland Trust Company, thereupon filed a plea to a part of the bill of revivor and supplement and to a part of said cross-bill filed by said Robert B. Roosevelt, and Holland Building Association also filed a plea to said bill of revivor and to said cross-bill. The executors aforesaid filed a replication to the answer of the receivers. The said receivers of the Holland Trust Company also now move to vacate the order of May 24, 1906, granted by his honor Judge Coxe, allowing the intervention and cross-bill of Robert B. Roosevelt, and the order allowing the bill of revivor and supplement. This motion should first be disposed of. That order of Judge Coxe was not appealed from, and has been acted upon by all the parties. No facts, not appearing before Judge Coxe, are presented. The status of the case is substantially the same now as then, so far as the merits are concerned. While Robert B. Roosevelt was not made a party defendant herein he is charged in the bill of complaint with gross negligence, working the great injury of an association of which he was president. I think Judge Coxe was clearly right in allowing him to come in and be made a party defendant, and in allowing him to file a cross-bill and meet and controvert the allegations of the bill. The proposed cross-bill was before Judge Coxe, and all the questions now raised on this motion were presumably considered and passed upon by him. I do not think it an abuse of the right given by the order of Judge Coxe. Again, I think the motion comes too late. The motion to vacate the order of May 24, 1906, and the order allowing the bill of revivor, is therefore denied.

The cross-bill of Robert B. Roosevelt alleges, with many other things, some of which would seem to be immaterial, that on the entry of the final decree in the suit in the Eastern District of New York he immediately paid the full amount directed to be paid with interest, some $127,984.86, and he claims that he is entitled to the Brigantine securities, so called, and their proceeds, if any, and those into which they or any of them have been changed. It is claimed that he was guilty of no intentional wrongdoing, and that he has not been adjudged guilty of any in such sense or degree as deprives

him of the right in a court of equity to have the property of the trust company transferred to the building association and received by it, through his negligent acts as an officer, in exchange for the property at 33 Nassau street, given to him, inasmuch as he has been adjudged to pay and has paid to the building association the value of the Nassau street property, and all the other property transferred at the same time by the building association to the trust company. It is claimed that as he, instead of the trust company, has made good the wrong done to and loss sustained by the building association through his negligent conduct as an officer, he is really "in the shoes" of the trust company, and, as it, on making good the loss, had it done so, was entitled to the Brigantine securities, he is now entitled thereto, and that the trust company, which has not restored anything and cannot now be called upon to restore anything, restoration having been made by Roosevelt, cannot, as against either Roosevelt or the building association, claim or hold the Brigantine securities. Also, that as the building association has been made good for all it parted with, it cannot hold or in equity claim to hold and retain such securities. The claim is, further, that in this suit, assuming the other had not been tried, should it be tried and adjudged that the transaction was fraudulent and for that reason should be set aside, and a decree made that the transfers be set aside and that the trust company restore 33 Nassau street, or its value and interest, and also the other property, it would be and should be on condition that the building association restore the Brigantine securities, the property received by it, inasmuch as both companies, as such, by their officers, participated in the transaction and knew and assented to all the details thereof. It is asserted that as this must be or should be the decree in this suit, if the complainant prevails, that Roosevelt (now his executors) has the right to show that he has been adjudged and decreed to make the building association good because of his participation in the transaction and that he has done so, in fact has made full restoration, and that therefore he (now his estate) is entitled to the said securities; that it is within the power of a court of equity having cognizance of the whole matter to direct and adjudge that such securities be returned and that they be returned to him; that having been compelled to meet the obligation of another, the trust company, he is entitled to the benefit of the doctrine of equitable subrogation; and that he is entitled to a decree in this suit for the return, or, rather, the turning over to him of such Brigantine securities. It is asserted that such a decree absolute must be based on a fact which did not appear and which could not appear in the suit in the Eastern District of New York, viz., that Roosevelt has actually made restitution to the Holland Building Association, and was compelled so to do, and, moreover, that such a decree lawfully could not have been made in that suit inasmuch as the Holland Trust Company is interested in this question, and was not a necessary party to that suit where the questions of the restoration of such securities and of subrogation were not necessarily involved, while here Roosevelt (now his executors), who has made restitution, but who received no benefit from the transaction, and both

the building association, which has the securities, and the trust company, which, as against the building association, is entitled to the securities, restitution having been made by one of its officers, are all parties present in court, and the object and purpose of the suit is to set aside the transaction and transfer, and secure or bring about a return to it of the property taken from the building association, or its proceeds, on doing equity in such manner as the court may direct. It would seem very clear that if the trust company were now in possession of the real estate and other property received by it from the building association, the court would decree on the showing made, assuming the finding of the court to be the same as in the Eastern District, that the transaction be set aside as fraudulent as to the building association, and that the trust company reconvey the property and restore the money or other assets received, on condition that the building association restore the Brigantine securities. Clearly the building association could not recover the property which its officers knowingly and designedly parted with without restoring that which its officers knowingly and designedly received in exchange therefor. The acts of Robert B. Roosevelt were not individual acts, but acts negligently done by him as an officer of the building association in connection with and aided by the other officers, all of which acts were knowingly assented to and participated in by the officers of the trust company. The building association has had its property, or its full equivalent restored, not by the trust company, for it was insolvent and had parted with the property received, and applied the proceeds to the payment of its obligations, but by one of its officers from his own funds. The building association, on its part, has not restored or returned the consideration received by it. Clearly, in good conscience it is not entitled to retain that property. It cannot profit by its own wrong or negligence, nor should its stockholders. These securities belonged to the trust company when transferred to the building association, and, if the transaction is declared null and void and set aside, the securities, prima facie, belong to the trust company and not to Roosevelt (now his executors), and would be returned to it however great the wrong of its officers in the transaction. But Roosevelt, one of its officers, having by compulsion made the restitution, says that, in equity, he, not the trust company, is now entitled to these securities. I think he is; but the question cannot now be finally decided as the court should have all facts before it on a full hearing. Roosevelt did not profit from the transaction complained of. In doing what he did he was attempting to aid the trust company with its full knowledge and assent as to every detail. That company had the property and its proceeds, and the proceeds went, personally, to its creditors. The cross-bill says none of it went to the officers.

And I do not think the suit and decree in the Eastern District is res adjudicata on all these questions. The Holland Trust Company was not a party there, and Roosevelt did not represent it, and the court could not properly have made a decree adjudicating the rights of the parties to these Brigantine securities especially as between the

Holland Trust Company and Robert B. Roosevelt. The decree in that suit is not res adjudicata that Roosevelt is not entitled to these Brigantine securities. If the Holland Trust Company had been a party to that suit, then possibly all the rights might have been determined. The Circuit Court finally decided not to adjudge a return of the Brigantine securities to Roosevelt as a condition of his making the building association good, for the reason it was not in position so to do and enforce its decree. Another court of concurrent power in another jurisdiction had taken possession of them, and was engaged in determining their final disposition. Into that suit has come Robert B. Roosevelt (now his executors), by permission of the court saying, "by reason of events which have occurred since this suit was commenced and after the suit in the Eastern District was tried and decided I am entitled to the Brigantine securities." Assuming the facts to be as Judge Thomas held them to be, adding the other facts, I think that in this suit, where the question of the ultimate right to these securities is directly involved, Roosevelt's executors are entitled thereto, and that the question is properly raised and presented here. Judge Thomas evidently took this view, and relegated Roosevelt to this court in this suit for an adjudication of his right to these securities, for he provided in the amendment to the original decree that his action in amending should be without prejudice to Roosevelt's right to do just what he has done, and what this court granted him permission to do.

Subrogation is "a remedy which equity seizes upon in order to accomplish what is just and fair between the parties, when the party seeking the aid of the court and the benefit of the rule has been no mere volunteer, and when his action is based upon general equitable rules which it is the peculiar province of a court of equity to enforce." Peckham, J., in Pease v. Egan, 131 N. Y. 273, 30 N. E. 102. In Sheldon on Subrogation, § 11, it is said, and this has frequently been quoted with approval:

"The doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another, is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnity from the fund out of which should have been made the payment which he has made to the creditor. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who in equity and good conscience ought to pay it, and to relieve him whom only a creditor would ask to pay, although as between debtor and creditor the debt may be extinguished, yet, as between the person who has paid the debt and the other parties the debt is kept alive so far as may be necessary to preserve the securities."

In 6 Pomeroy's Eq. Jurisprudence (2 Pomeroy's Equitable Remedies) p. 1496, § 921, it is said:

"Coming also within the class of payments made in performance of a legal duty are payments made by parties where obligation is imposed, not directly by contract, but by operation of law. Payments by a stockholder in discharge of an individual liability for corporate debts, or by a partner for debts of the firm are within this class, and in both cases the party making the payment is entitled to subrogation."

See Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

The defendant Roosevelt did not himself or with the other directors

or trustees appropriate the property of either company to their own use, or seek or derive any personal advantage or gain from the transaction. Hence they were not joint tort-feasors, or joint tort-feasors with either the trust company or the building association in any such sense as will preclude Roosevelt from invoking the doctrine of equitable subrogation as between himself and the trust company or its stockholders. These stockholders of the trust company have not suffered any loss, but on the other hand derived a gain to the extent of over $103,000. Roosevelt, by operation of law, was compelled to make this good, not because of any willful tort or wrong committed by him, not because he personally or in connection with others took any property and converted it to his or their use, but because he with others so negligently performed a duty to the building association that they all became individually and collectively responsible for the consequences of such negligence. All negligence sounds in tort, but there are differences in torts. Bigby v. United States, 188 U. S. 400, 407, 23 Sup. Ct. 468, 47 L. Ed. 519. In that case the court, per Mr. Justice Harlan, said, while holding that an action for negligence was one "sounding in tort" (see page 410 of 188 U. S., page 471 of 23 Sup. Ct., 47 L. Ed. 519):

"It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances, or laches of its officers or employés."

Mr. Justice Harlan is not given to tautology, and hence his use of all these words, and the final holding that negligence "sounds in tort."

In Gilbert v. Finch et al., 173 N. Y. 455, 459, 461, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623, the directors and incorporators not only wasted the funds, etc., but they took the money and converted it to their own use, and hence became joint tort-feasors in such a sense and to such a degree that equity would not afford relief. Haight, J., in giving the opinion of the court more than once emphasizes this fact.

The ground of recovery against Roosevelt was negligence in managing the affairs of the building association. That association as an association was not a joint tort-feasor with Roosevelt, nor was the trust company. In Gilbert v. Finch, supra, Judge Haight well says (page 462 of 173 N. Y., page 134 of 66 N. E. [61 L. R. A. 807, 93 Am. St. Rep. 623]):

"Indeed, we had supposed the policy of the law to be to leave wrongdoers without aid in equity from the burdens of the position in which they have placed themselves. The rule is well settled that, as among themselves, equity would not compel contribution or enforce subrogation."

He cites Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131; Miller v. Fenton, 11 Paige (N. Y.) 18; Thorp v. Amos, 1 Sandf. Ch. (N. Y.) 26, 34; Pierson v. Thompson, 1 Edw. Ch. (N. Y.) 212, 218, and other cases. But here, as already said, subrogation is not sought by one tort-feasor against another joint tort-feasor.

In Kolb v. National Surety Company, 176 N. Y. 233, 68 N. E. 247, the surety for one of several joint tort-feasors paid the whole of the

judgment, but it did not take an assignment. However, by an order of the court, it was subrogated to all the rights and securities of the judgment creditor under the judgment. One of the joint tort-feasors pending an appeal had agreed with the judgment creditor to pay a certain part of the judgment in any event in consideration of his release therefrom. It was held on several grounds that the surety company could recover on the agreement. Surely the surety company came into the case as surety for one of the tort-feasors and was in privity with him. It paid the whole judgment because its principal was liable therefor. Still, the court subrogated it to all the rights of the judgment creditor. Evidently the doctrine of equitable subrogation was applied to do justice notwithstanding the fact that the surety company voluntarily, as to liability, stood in the shoes of one of the joint tort-feasors.

In Drake v. Paige, 127 N. Y. 562, 28 N. E. 407, F. and P. were executors of one L., who devised one-fourth part of his real estate to F. There was a power of sale, etc. Certain moneys of the estate came into the hands of the executors, and this was turned over to F. who desired to misappropriate same, and who did misappropriate same to his own use. This was all done with the knowledge of P. In reality he assented to the devastavit. F. mortgaged his interest in the property to one Drake. P. claimed subrogation, and to be entitled to reimbursement from the share of P. as against Drake, having been held liable for the devastavit, and compelled to make same good. The Court of Appeals held (see page 574) that P. had an equity as against F., but that it was subordinate to that of Drake, the mortgagee. Here, again, is the doctrine recognized that equity will do equity even as between those guilty of a wrong each in some degree, but the one much more in the wrong than the other.

An agent who is negligent in the management of the property of his principal and who is compelled to reimburse him, nevertheless, will be subrogated to the rights of the principal against the one primarily causing the loss. Murrell v. Henry, 70 Ark. 161, 66 S. W. 647; Stoller v. Coates, 88 Mo. 514; Nichols v. Wadsworth, 40 Minn. 547, 42 N. W. 541; Hough v. Etna Life Ins. Co., 57 Ill. 318, 11 Am. Rep. 18. So a fire insurance company bound by its policy to make good a loss caused by a fire resulting from the negligence of a third party is entitled to be subrogated to the rights of the insured against the negligent party. Hart v. Western R. R. Co., 13 Metc. (Mass.) 99, 46 Am. Dec. 719. See, also, 2 Pom. Eq. Rem. § 921, p. 1495. It is unnecessary to cite cases holding that the doctrine of subrogation does not necessarily rest upon contract express or implied. Says Peckham, J., in Pease v. Egan, 131 N. Y. page 273, 30 N. E. page 105:

"In the cases of Gans v. Thieme, 93 N. Y. 225, and Arnold v. Green, 116 N. Y. 566, 23 N. E. 1, while not particularly in point here, are yet evidences of the rule that no contract need subsist upon which to base the right of subrogation."

The cross-bill of Roosevelt alleges that at the time the directors of the Holland Building Association passed the resolution of January 30, 1894, pursuant to which the unrecorded mortgage on 33 Nassau street was canceled, it was recited therein, among other things, "whereas,

Holland Trust Company has agreed to sell the said No. 33 Nassau street, and has assumed the payment to the stockholders of the Holland Building Association of the par value of their stock," now "therefore, resolved that said bond and mortgage be and the same are hereby canceled," etc.; that the Holland Trust Company had then duly agreed to assume and pay such stockholders the value of their stock as a consideration for such release and cancellation of the mortgage; that after the cancellation he learned to his surprise that the trust company had not adopted any formal resolution to the effect above stated, and requested that it be done or that the agreement in some form be put in writing, but was met with the statement that it would be a useless formality; that the duty of paying such stockholders was well understood, and would be lived up to and complied with; that it was lived up to and complied with by furnishing money to the building association with which the Holland Building Association paid dividends on its stock down to and including August, 1901, and by continuing down to that date to pay some of the stockholders as agreed, and paid $19,600 for stock to some of the stockholders, and in part performed its agreement; that it was then solvent and able to comply with such agreement; that the directors of the building association so voting for the resolution, containing the recitation above mentioned, were also trustees of the trust company, so that the trust company had full knowledge of the obligation assumed and incurred to the stockholders of the building association as consideration for the release of such mortgage. The cross-bill also alleges that the Holland Trust Company as a stockholder of the building association has received $19,600, of the sum paid in satisfaction of the said decree in the Eastern District. The relations of the building association and trust company, the amount of capital stock, etc., are also set out in full, and from the allegations it would appear that the association was a sort of subcompany, etc., to the trust company.

Assuming these allegations to be true it would seem that the trust company in consideration of the release became indebted to the building association or its stockholders to the amount of its capital stock and paid thereon at least $19,600, aside from dividends. If this indebtedness had been paid in full and accepted, it would seem the stockholders would have had no cause of complaint. The officers of the building association were certainly negligent in not obtaining the consideration or security therefor. The trust company became unable to pay, and because of the negligence each director became liable. Roosevelt was sued and held liable because of his negligence. He fully reimbursed the building association. In effect he paid the indebtedness of the trust company to the stockholders of the building association when he paid the judgment or satisfied the decree of the court in the Eastern District. Here, again, we have Roosevelt pleading facts which could not have been set up in the suit in the Eastern District, facts which, if true, give him equities against the trust company which had the real estate and its proceeds without paying anything therefor except the $19,600. Whether or not this agreement was made by the trust company is a question which could not have been adjudicated in

the suit in the Eastern District, as the trust company was not a party to that suit. These allegations of the cross-bill present a case where one party has in fact paid and been compelled to pay the debt of another party on the ground that he, as representing that party, was negligent in not obtaining payment or security for the payment of such debt. Roosevelt was an officer and an agent of the trust company. He with the other trustees represented it. He was also an officer of the building association, and he with its other officers represented it. Assuming that Roosevelt pleaded the agreement of the trust company to pay the stockholders of the building association; that payment was not made; that security for the payment was not obtained; that the trust company became insolvent; that the mortgage was discharged without payment or security or even a formal resolution of the trust company to pay the said stockholders—the decree of the Circuit Court of the Eastern District must have been the same because of the confessed negligence. And for reasons already stated that court could not have adjusted the equities between the trust company and Roosevelt in case of payment of the decree by him for the reason the trust company was not a party there, and it was not essential that it be brought in for any such purpose. Indeed, in view of the situation, I do not think that court at that stage would have entered on that inquiry by bringing in the trust company.

The decree in that suit is not res adjudicata. That suit did not directly or necessarily involve the questions presented here, but rather led up to them and made their presentation necessary and proper in some suit where the trust company was a party. Questions of contribution and subrogation properly arose after Roosevelt had been held liable, and after he had discharged the obligation. Now, the court is asked to pass on the rights of the parties here in view of what Roosevelt has been compelled to do and has done, not in view of what he might or might not do. The issues there were not the issues here. The cause of action there was negligence; the cause of action here is the right of equitable subrogation and contribution involving another party because of what the complainant in the cross-bill, defendant in that suit, was compelled to do by its decree in the way of satisfying a claim of the building association's stockholders for which the trust company was liable. It is claimed that the fact that Roosevelt and Brinckerhoff were stockholders in both the association and trust company made the trust company a party by representation, but this claim is without merit. No stockholder can speak for a corporation. The rules applicable are quite succinctly stated in 23 Cyc. 1527, 1528, as follows:

"Identity or Privity of Parties. A plea of former adjudication must aver that the parties are the same in the two suits, or allege facts which show that the relation of the pleader to the former action was such as to make the judgment conclusive in his favor, or that the party against whom the estoppel is alleged, if not directly a party to the former suit, was so connected with it in interest as to be bound by the result.

"Identity of Cause of Action. In pleading a former judgment in bar, it is necessary to show clearly and distinctly that the cause of action in the former suit is identical with that on which the present suit is based; and if the prior judgment is pleaded as a conclusive adjudication upon some point or question in issue, the plea must make it clearly appear that the same point or question

was actually litigated and decided in the former suit, or that it might have been litigated and determined under the issues in that suit."

This brings us to a consideration of the question whether or not the cross-bill presents grounds of relief as against the trust company. Assuming the allegations of the cross-bill to be true, as we must, as qualified by the allegations of the pleas and new matters therein set forth, the trust company became obligated to the building association and its stockholders. Through the negligence of Roosevelt and the other directors of the association this obligation and liability was not paid or secured to be paid. As a consequence, a cause of action arose in favor of the association enforceable at the suit of a stockholder against Roosevelt or Roosevelt and the other directors, the measure of damages being the value of certain real estate which had been lost to the association, but the consideration for which was the liability of the trust company referred to. It was so enforced, and Roosevelt by compulsion paid the said consideration which the trust company had agreed to pay for such real estate, but by way of damages for his negligence in not securing it when he ought to have done so. Can he look to the trust company? Having in effect paid the debt or satisfied the obligation of that company to the association by compulsion, is he entitled in equity to be subrogated to the rights and remedies of the association as against the trust company? It is said that he is not because he was a wrongdoer, and does not come into court with clean hands. He says that he acted in good faith; that he was not willfully negligent; that he committed no intentional wrong, and that in no event has it been adjudicated that he has as between himself and the trust company; that the trust company as such was not a tort-feasor; that he was not in any sense or to any degree that deprives him of the right to equitable relief; that as the trust company had the full value of the real estate in cash, and has not paid for it, and he has been compelled to do so, that he in equity is entitled to reimbursement from it; that this right is superior to rights of the creditors of the trust company, inasmuch as the creditors in due course have already had the value of the property he was compelled to pay for. The right of subrogation is not confined to cases of suretyship or contract. If one is compelled to pay the debt of another he is entitled to subrogation unless his conduct has been such that he is not entitled to the consideration of a court of equity. Cole v. Malcom, 66 N. Y. 363, 366; Arnold v. Green, 116 N. Y. 566, 571, 23 N. E. 1; Harris on Subrogation, § 1; Barnes v. Mott, 64 N. Y. 397, 401, 21 Am. Rep. 625; Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647; Stevens v. Goodenough, 26 Vt. 676.

I am of the opinion that in this suit Roosevelt's executors are entitled to show, if they can, that Roosevelt acted honestly and in good faith; that his negligence was not intentional; that he neither sought not received personal gain or advantage; that he intended to act for the best interests of both the companies; that he relied on the solvency of the trust company and its promise to pay all the stockholders of the building association the full value of their stock, etc.; and hence was not guilty of such wrong as disentitles him to the consideration of a court of equity. I am fully conscious of the rigid and wise rules that

he who comes into equity seeking subrogation must be willing and able to do equity, and must come with clean hands. German Bank v. U. S., 148 U. S. 573, 581, 13 Sup. Ct. 702, 37 L. Ed. 564; Guckenheimer v. Angevine, 81 N. Y. 394. But I do not think this rule closes the portals of the temples of justice to those who, although negligent, erred without design, or willfulness, or purpose to defraud, and who have made good the consequences of the error. Drake v. Paige, 127 N. Y. page 574, 28 N. E. 407. The right to subrogation and compensation from the trust company will depend largely on the character of Roosevelt's acts; on the character and degree of his negligence. It may appear so gross and bald as to amount to the intentional commission of a positive wrong, in which case equity would leave him and his estate where it found him, and refuse to grant his appeal for relief. But Judge Thomas who passed on the case in the Eastern District did not so regard his acts in so far as they were in question before him, and there is no suggestion in the opinion of the Circuit Court of Appeals that the decree of the court in the Eastern District was erroneous for the reason Roosevelt's conduct had been such that a decree for the delivery to him—a subrogation to the rights of the trust company of the Brigantine securities—was improper. Had his conduct been so regarded by that court, it could have and would have reversed so much of that decree as adjudged a delivery of such securities to Roosevelt as a condition of his reimbursing the building association. On the other hand, it suggested the impracticability of such return under the decree of the Circuit Court in the Eastern District inasmuch as the Circuit Court in the Southern District had possession of such securities, and suggested a modification which Judge Thomas accordingly made.

Accordingly the motion is denied, and the pleas are overruled, and defendants will answer within 15 days.

KEIPER v. EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES.

(Circuit Court, E. D. Pennsylvania. February 1, 1908.)

No. 107.

1. COURTS—FEDERAL COURTS—TRIAL—JUDGMENT NON OBSTANTE VEREDICTO.

In trial of an action at law in a federal court, sitting in Pennsylvania, where defendant's request for binding instructions is refused, defendant may file a motion for judgment non obstante veredicto, under Pa. Act 1905 (P. L. 286), providing that, whenever a point requesting binding instructions has been declined, the party presenting it may move the court for judgment non obstante veredicto on the whole record.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. INSURANCE—BREACH OF WARRANTY—SERIOUS ILLNESS—SUPPRESSION OF FACTS—FRAUD—QUESTIONS FOR JURY.

In an action on a policy, whether insured ever had any serious illness prior to that which caused his death; whether he suppressed material facts when he made out his application; and whether he fraudulently failed to disclose the existence of any illness or suppressed any information with intent to deceive the insurer—*held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1735, 1738, 1759.]

3. SAME—SCOPE OF WARRANTY.

Where an application for insurance, in which insured stated that he had not had any serious illness or disease other than those incident to childhood, was signed by him, and incorporated into the contract, which provided that all statements and answers therein were warranted to be true, insured thereby warranted that he had never had any serious illness or disease except those incident to childhood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 681-696.]

4. SAME—"SERIOUS ILLNESS."

The term "serious illness," in an application for life insurance means such an illness as has, or ordinarily does have, a permanently detrimental effect on the system, or renders the risk unusually hazardous, but does not include any sickness which may terminate in death, provided its effect on the individual has not been such as to permanently impair his constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 687, 689.

For other definitions, see Words and Phrases, vol. 7, p. 6421.]

5. SAME—MISSTATEMENT—BREACH OF WARRANTY—MATERIALITY—FRAUD—STATUTES.

Pa. Act June 23, 1885, § 1 (P. L. 134), provides that, whenever an application for life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement made in good faith by the applicant shall work a forfeiture or be a ground of defense in any suit brought on any policy of insurance issued on the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk. *Held*, that where the misstatement is made in bad faith, and for the purpose of misleading the insurer, the policy will be avoided under such section, though the fact inquired about is immaterial; but if the misstatement has been made in good faith, it will not avoid the policy, though untrue, unless it was material to the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 548, 549.]

6. TRIAL—REQUEST TO CHARGE—FORM—"I DIRECT YOU TO FIND A VERDICT FOR DEFENDANT."

In an action on an insurance policy, defendant requested an instruction that if prior to October 10, 1906, insured had any serious illness or disease of an organic type, accompanied by circumstances which would naturally lead a reasonable man to suppose that he was afflicted with an illness or disease that might impair his health, and must thereby necessarily have been impressed on his memory, it was his duty to disclose the same to the insurer, and his failure to do so warrants the jury in finding, and "I direct you to find, a verdict for defendant." *Held*, that the quoted clause was an implied direction to the jury to make an affirmative finding as to the facts stated in the instruction, which was therefore properly refused.

At Law. On motion and reasons for a new trial and for judgment non obstante veredicto.

Lewis B. Mathias, Wm. L. Kinter, and J. Claude Bedford, for plaintiff.

George D. Hay, B. Gordon Bromley, and Thomas De Witt Cuyler, for defendant.

HOLLAND, District Judge. This suit was instituted on a policy of life insurance issued by the defendant company on December 28, 1906, on the life of John F. Finney. It is the company's form of 20-

year 5 per cent. gold bond, and the claim of the plaintiff, under a certain condition therein contained, is for the sum of $32,500. The defense is (1) that decedent suffered from serious illness or disease other than those incident to childhood; (2) he concealed information in regard to his past history and health which was material to the risk; (3) and that he knowingly concealed these facts with the intention of deceiving the defendant.

The decedent was examined for insurance by Dr. Caskin, the defendant's physician, on October 9, 1906, who asked him all the questions contained in the company's "Medical Examiner's Report," and noted his answers, all of which were read to Finney before he signed it. In this examination he is reported to have answered that he never was afflicted with malaria, loss of consciousness, indigestion, jaundice, or any serious disease, injury, or infirmity. He also answered that he had not been, either directly or indirectly, concerned in the manufacture or sale of any kind of alcoholic beverage, and had never traveled in tropical countries, and that he had always lived in Pennsylvania. Subsequently, on October 10, 1906, the insured signed a formal written application for the insurance, which contained, inter alia, the following statement:

"I hereby agree that this subscription, and the contract of sale hereby applied for taken together, shall constitute the entire contract between the parties hereto; that all the statements herein are warranted to be true; that this contract shall not take effect until the first installment has been paid during my good health. I have not been declined or postponed by any life company or received a policy different in form from the one originally applied for, nor have I been intemperate, or had any serious illness or disease, except diseases incident to childhood, and there is no history of consumption or insanity in my family; i. e., among parents, brothers or sisters, uncles or aunts."

The application also contained the following:

"Note.—If applicant has ever been declined or postponed by any life company, or received a policy different from the form originally applied for, or been intemperate, or had any serious illness or disease other than childhood diseases, or if there is any history of insanity or consumption in applicant's family—among parents, brothers, sisters, uncles or aunts—state particulars here."

To this there was no answer. The policy was preceded by a two months and eighteen days term assurance which issued as of the date of the application, upon which the premium of $298.23 was paid. On December 28, 1906, a policy issued to which was attached the foregoing application, and a further premium of $2,524.74 was paid. The Medical examiner's report, however, was not so attached. The insured died on March 18, 1907, of what was termed in the proof of death, "Acute gastritis and collapse of central nervous system."

At the trial of the case it appeared (1) he had malaria fever in 1875; (2) he had lived and traveled in Peru in 1875 and 1876 where he had an attack of chagres fever; (3) he conducted a restaurant in 1878–1880 in connection with which liquors were sold; (4) he suffered from
s in his stomach resulting from indigestion in 1888 and 1889;
nd again in 1897, 1901, and 1904 he had attacks of indigestion and
algia of the stomach, the most severe of which occurred in 1901.

when he became unconscious for some time and the attending physician was unable to diagnose the real trouble, but there was a complete recovery. The decedent did not inform the insurance company of these facts, nor did it know of their existence until after his death. It further appeared that Finney, with the exception of being troubled with what one of the physicians called a lazy stomach, which at its best was slow in the digestion of food, and which when overtaxed caused him a great deal of pain and suffering, was a vigorous and healthy man. He was short and of stocky build, and on the 9th day of October, 1906, the examiner of the defendant company found him to be in perfect health, and after a careful examination, especially directed to the condition of the vital organs and to the general health, so reported to the company before the policy was issued. The application was made part of the policy, as required by the Pennsylvania act of May 11, 1881, § 1 (P. L. 20). It contained the statement, which is warranted to be true, as we have seen, that he (the decedent) never "had any serious illness or disease except those incident to childhood, and there was no history of consumption or insanity in his family; that is, among parents, brothers or sisters, uncles or aunts."

In the charge, at the trial of the cause, the court submitted three questions of fact to the jury, upon which they were requested to pass: (1) Did the insured ever have any serious illness prior to that which caused his death? (2) Did the insured in his answer to the questions in the medical examination, or his warranty in his application, which was incorporated in the policy, that he had never had any serious illness, suppress any fact material to the risk? (3) Even if insured did suppress no fact material to the risk, did he fraudulently fail to disclose the existence of any illness or suppress any information with the intent to deceive the defendant? The jury answered all these inquiries in the negative, and returned a verdict in favor of the plaintiff for the amount claimed. A motion and reasons for a new trial were duly filed as well as a motion for judgment non obstante veredicto. The latter motion is authorized by the Pennsylvania Act of 1905 (P. L. 286), which provides that, whenever a point requesting binding instructions has been declined, the party presenting it may move the court for judgment non obstante veredicto upon the whole record.

The defendant's first point was refused. It was a request for binding instructions as follows: "Under all the evidence in the case the verdict must be for the defendant." For reasons hereinafter stated, it will appear that the questions as to the seriousness of prior ailment, the materiality of any concealed information, and the intent of the decedent in failing to state this fact, if not material, were properly submitted to the jury, and this motion must be overruled.

There are 19 reasons assigned why the defendant should have a new trial, 8 of which are errors alleged to have been committed by the court in charging the jury, 7 in affirming plaintiff's points, and 4 in refusing to affirm certain points of the defendant. The errors assigned to the charge of the court raise the single question as to whether it was the duty of the court, as a matter of law, to determine these three questions in favor of the defendant instead of submitting them to the jury,

but the facts and circumstances in this case require that this question be resolved against its contention. All three were properly referred to the jury, as will appear upon a reference to them in their order.

First. Was the defendant entitled to have the court give binding instructions to the jury to find that the decedent had, prior to the issuing of the policy, "serious illness and disease other than those incident to childhood"? If the jury should have been so instructed, then this defendant would be entitled, under the Pennsylvania act, to judgment in its favor notwithstanding the verdict. The application for the policy in question, signed by the decedent, has been incorporated into and made part of the contract, and "all the statements and answers therein are warranted to be true." He therefore warranted, as contained in that application, that he had never "had any serious illness or disease except those incident to childhood," and the defendant contends that the evidence adduced at the trial, together with all the inferences properly drawn from it, is insufficient to support a verdict for the plaintiff, so that the court was bound to direct a verdict in its favor. Hews v. Equitable Life Assurance Society, 143 Fed. 850, 74 C. C. A. 676. The decedent had warranted as true that he had not suffered from any "serious illness or disease except those incident to childhood," and by this he is bound, but the plaintiff urges that the evidence establishes the truthfulness of this warranty. The evidence to establish that the decedent had been seriously ill for a long time prior to the issuing of the policy is substantially as follows: That he had chagres fever in 1875 while traveling in Peru, South America; attacks of indigestion or dyspepsia in 1888, 1889, 1895, and 1897; and a severe stomach trouble, resulting in a loss of consciousness, in 1901. Dr. Hughes, a specialist of Philadelphia, was called in, who said that "Finney was partially conscious only," "almost unconscious," and "in an exceedingly weak state," "thought he was going to die," "symptoms were pain in the abdomen," "collapse with extreme weakness and almost complete unconsciousness." "The pulse was weak; he was rather white; a little yellowish; there was a suspicion of jaundice;". "the whites of his eyes were colored a little yellow."

"Q. Did you arrive at any conclusion as to what the cause of his trouble was? A. I thought the first time I saw him that it was probably hemorrhagic pancreatitis. Hemorrhagic pancreatitis is a condition in which you find after death that the pancreas, which is an organ lying back of the stomach in the upper part of the abdomen, is infiltrated everywhere with blood. The condition very usually causes death. When I saw him the second time I doubted the correctness of the original diagnosis, largely because he had improved. At that second examination I still thought there probably was some obscure disease of the pancreas, but probably not of a hemorrhagic type. Q. Was his condition at the time of your first visit such as to indicate to your mind a possible fatal termination? A. I thought that there would be a fatal termination. * * * Q. As I understand you, he did not have this (hemorrhagic pancreatitis)? A. I presume he did not have it because he recovered. There have been reported cases in which recovery had ensued following the disease. That may be the result of faulty observation, or there may be possibly a recovery from it. Q. Your judgment is there is no recovery from it? A. I have never seen a case that I knew to recover. * * *"

The witness further stated that "I am not certain it was not (hemorrhagic pancreatitis). It might have been and there might have been

a recovery." Dr. Hughes further stated that he had no personal knowledge as to whether Finney recovered from this illness, but that he (the doctor) thought that Finney "could have recovered perfectly from any condition of the pancreas, for instance, which would not kill him at the time; that is, there would be a possibility of complete recovery." Dr. Brown, his family physician, called this attack "gastric neurosis," which he said meant simply "nervous indigestion," and it was shown that he died March 18, 1907, and Dr. Brown, his family physician, certified that death resulted from "acute gastritis and collapse of the central nervous system." He explained that by gastritis he meant a general disturbance of gastric affection, and in this particular instance to mean that Finney had a "lightening up of those old gastric affections which he had been suffering from for a number of years." "It was a lightening up, through some special cause, increasing the severity of the symptoms."

On the part of the plaintiff evidence was produced to show that the decedent was a stout and vigorous man, of stocky build, and of good, general health. Dr. Robinson, of Pottsville, testified that these attacks of dyspepsia were simply functional derangements, brought about by errors of diet, and that after they passed Finney immediately recovered his general good health. He had on January 24, 1904, made application to the New York Life Insurance Company for a policy of $5,000, which was issued to him, in which he stated to the question, "What illnesses, diseases, or accidents have you had since childhood?" that he had "Gastritis, one attack in October, 1901, duration six weeks. The attack was a severe one. Results, perfect recovery." And to the question, "How long since you consulted or have had the care of a physician, if so, for what ailment? Name and address of physician?" to which he answered, "One month ago. Indigestion, lasting a few days. Dr. Brown, 49th & Chester avenue." Dr. Bobb was the medical examiner for the New York Life, and, after receiving Finney's answers to all questions, made a thorough examination of him, the result of which he testified to be that he found heart, lungs, stomach, and kidneys in good condition, and the pulse normal, and that Finney at that time was a good risk, and this company insured him. Dr. Caskin was the medical examiner for the defendant company, and, after recording the answers of Finney to the questions propounded to him, made for himself a physical examination of the decedent, the result of which he certified to the company, showing that all his vital organs were sound and healthy, and that an examination of his pupils and reflexes showed there was no disturbance of his nervous system, and further certified that "compared with the average of lives of the same age and sex, the chances of life in this subject seemed to be first-class." Dr. Brown, his family physician, who attended the insured throughout his illness of 1901, testified that his health was even better after his illness than before, and that he had increased in weight, and led a very strenuous life down to within a few days before his death.

Notwithstanding this conflict of evidence on the question of whether or not the decedent ever had any serious illness other than those

incident to childhood, prior to the date of the policy, the defendant contends it was entitled to binding instructions in its favor. It might even be doubted whether it would be entitled to such a disposition of the case on the strength of a most favorable view of its own evidence. It may be pancreatitis may be adjudged as a serious illness, as a matter of law, but Dr. Hughes, while not certain, gives it as his judgment that the decedent in 1901 had not suffered from that disease. The weight of the evidence is to the effect that he suffered from nervous indigestion and dyspepsia at times, as a result of indiscretions in diet, and this, as a matter of law, cannot be held to be a serious illness. McClain v. Provident Life Assurance Association of New York, 110 Fed. 80, 49 C. C. A. 31. But when taken in conjunction with the evidence of the plaintiff tending to show that no sickness from which the decedent suffered prior to the date of the policy was serious other than those incident to childhood, it was clearly a case to be submitted to the determination of a jury, upon which point the jury was instructed as follows:

"The term 'serious illness' in an application for a life policy is such an illness as is likely to impair permanently the constitution and render the risk more hazardous. Did these troubles which he had impair permanently his constitution and render the risk more hazardous? Was his stomach or digestive power, the digestive power of the stomach, good and healthy, or was it of a kind that could be cured of the acute and troublesome condition? Or was there any danger, by reason of its lazy condition, of it becoming impaired by slight over-indulgence? Was it of that character which really was permanent? Was it of that character which was incurable? All these you will pass upon, and you will look to the evidence for the purpose of saying whether or not these attacks were temporary or permanent, whether they were serious or whether they were only, as the plaintiff says, a slight indisposition, as the result of slight and at times over-indulgence? The court has also said that the term 'serious illness,' as used in applications for a life policy, as to the question whether the applicant ever had any serious illness, means a grave, important and weighty trouble. In the Century Dictionary the words 'serious illness' are defined as attended with dangers giving rise to apprehension. Were the illnesses, or was any illness from which he suffered, dangerous, giving rise to apprehension? And again, it has been said that the term 'serious illness,' as used in an application for life insurance, means an illness that permanently impairs the health of the applicant, and does not mean an insignificant illness. The term does not include every sickness which may terminate in death, as such an interpretation would cause it to embrace almost every distemper in the entire category of disease."

The term "serious illness" has been construed to mean such an illness as has, or ordinarily does have, a permanent detrimental effect on the system, or renders the risk unusually hazardous. Cooley's Brief on Law of Insurance, vol. 3, p. 2112. What is to be understood by "serious illness"? If any sickness which may terminate in death, then it must embrace almost every distemper in the entire catalogue of diseases. To give such an interpretation to this expression, would, we have no doubt, defeat a recovery in a large majority of the certificates issued by the society. The true construction of the language must be that the applicant has never been so seriously ill as to permanently impair his constitution, and render the risk unusually hazardous. This was said in sustaining the verdict of the jury in Illinois Masons' Benevolent Society v. Winthrop, 85 Ill. 537. Before any

temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health or the continuance of life, or such as, according to common understanding, would be called a disease. When the applicant says that he has never had any serious illness, the courts will construe the meaning to be that he had never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous. Rand v. Life Insurance Society, 97 Tenn. 291–295, 37 S. W. 7. If any illness which Mr. Goucher had prior to his application for membership in this association, other than typhoid fever in 1866, was merely temporary, and if its effects were temporary and had entirely passed away before he made the application, and if it did not affect his health or shorten his life, then it was not a severe illness within the meaning of the question asked. The answer to the question in such case was substantially true, and the nondisclosure of such illness is no defense to the action. Goucher v. Northwestern Traveling Men's Association (C. C.) 20 Fed. 596. It was for the jury to say whether or not the ailments from which the decedent suffered were serious within the meaning of his warranty. In Boos v. World Mutual Life Ins. Co., 64 N. Y. 236, it was left for the jury to pass upon the question as to whether an attack of pneumonia, which lasted 10 days, and a sunstroke suffered by the applicant, were serious sicknesses or diseases; and in Black v. Travelers' Insurance Co., 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500, the insured had received a gunshot wound in the back of his head by which the external table of the skull was fractured, and a piece about one-half inch square taken out, on the strength of which he had received a pension from the government, which had afterward been increased on account of alleged resulting vertigo and impaired vision, the Circuit Court of this district held that, upon a warranty by the insured that he had never had any bodily or mental infirmity, the question was one for the jury to determine. Smith v. Metropolitan Life Ins. Co., 183 Pa. 504, 38 Atl. 1038, and Barnes v. Fidelity Mutual Life Association, 191 Pa. 618, 43 Atl. 341, 45 L. R. A. 264, are Pennsylvania Supreme Court cases to the same effect.

Second. The foregoing discussion bears directly on the second question submitted to the jury in the case at bar, viz., whether the insured in his answers to the questions in the medical examination and warranty that he never had any serious illness suppressed any fact material to the risk? The jury on this point were charged that if any of the ailments, including the illness of 1901, were serious, they were material, and, if insured had suppressed the material fact, the plaintiff could not recover. A verdict for the plaintiff is equivalent to a finding that no facts were suppressed material to the risk. There was evidence to warrant the jury in so finding, and it was properly submitted to them.

The evidence shows that on December 9th, 1898, decedent applied to the Fidelity Mutual Life Insurance Company for a $5,000 policy, stating in answer to the questions in the medical examination that he had chagres fever in 1875, and dyspepsia on several occasions, giving the name of Dr. Robinson, of Pottsville, as the attending physician. In

the same application he stated his ownership of a restaurant and bar. With this information in its possession, the Fidelity Mutual Life Insurance Company issued to Finney a policy for $5,000, and upon a similar application, dated May 11, 1899, containing the same answers to these questions, issued to him a second policy for $5,000. On March 14, 1906, the decedent applied to the Provident Life & Trust Company for a policy for $5,000. In the answer to a question in the application as to whether he had ever been seriously ill, or had typhoid, typhus, yellow, remittent or intermittent fever, rheumatism, rupture, etc., "dyspepsia or impaired digestion to any extent," Mr. Finney replied "No; except yellow fever in early manhood." Subsequently, the policy having been issued upon his application, Finney examined the copy of the medical examination attached to the policy, and addressed the following letter to the Provident Company:

"Gentlemen: I desire to have answers to certain questions on the back of my policy, No. 125,032, corrected as follows: Question No. 7 to read 'No, excepting an attack of neuralgia five years ago, and fever in early manhood.' Question No. 17, to contain the names of Dr. Brown and Dr. Donald Hughes. Question No. 18 to read, 'New York Life $5,000, and Fidelity $5,000.' Truly, John F. Finney."

This letter was indorsed by the Provident Company, "Risk approved as before, 3 mo–27th, 1906, C. H. W." There were four additional policies applied for in the Provident Life & Trust Company on April 20, 1906, each for $2,500, making a total of $10,000. The answers in the four applications to these policies contained the modified answers, as indicated by the above quoted letter, and the policies were issued on these four additional applications. It will thus be seen that the Fidelity Mutual Life Insurance Company, with the knowledge in its possession that the decedent had suffered from chagres fever in 1875, had frequent attacks of dyspepsia from errors of diet, had traveled in Peru, South America, and that he had been the owner, for a short time, of a restaurant with a bar attached, did not regard all this information material to the risk, as they issued their policy at the usual rate to him on December 9, 1898, for $5,000, and the Provident Life & Trust Company, with the knowledge of his gastric troubles, and the attention he received from Dr. Hughes and Dr. Brown in 1901, which was the most severe attack, also regarded these ailments as immaterial, and issued policies to him to the extent of $15,000.

In a well-considered opinion in Penn Mutual Life Insurance Co. v. Mechanics' Bank, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70, Judge Taft said:

"A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised, or the risk is rejected, then they do."

The evidence of the action of the other companies upon receiving the information as to these prior ailments was submitted in the case, and it

alone was sufficient to carry the question of its materiality to the jury. In addition to this, there was considerable evidence on the part of the plaintiff as to his general good health, and the temporary condition of the stomach troubles from which he suffered. But, at any rate, two of the important insurance companies of the country did not regard these ailments as material to the risk. This fact, together with the other evidence in the cause as to its materiality, clearly made it a question for the jury, and their finding against the materiality was amply justified.

The Pennsylvania Act of June 23, 1885, § 1 (P. L. 134), on the question of materiality is as follows:

"Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

Under this act, if the matter is not material to the risk and the statement is made in good faith, although it is untrue, it shall not avoid the policy. March v. Metropolitan Life Ins. Co., 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887. The question of the materiality of the statements alleged to be false is for the jury under the Pennsylvania act above referred to. This has been repeatedly asserted by the Supreme Court of that state. March v. Life Ins. Co., supra; Keatley v. Ins. Co., 187 Pa. 197, 40 Atl. 808; McClain v. Provident Saving Association of New York, supra.

Third. It is strenuously urged that, whether the ailments above alluded to were serious and material or not, the decedent suppressed information in regard to them with a fraudulent intent of withholding this information in order that he might procure the policy on which the suit was brought, and that this was so clearly established by the evidence in the cause that it was the duty of the court to so decide. As construed by the Supreme Court of the state in March v. Metropolitan Life Ins. Co., supra, and the Circuit Court of Appeals in the Sixth Circuit in Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70, reaffirmed by the same court on a rehearing in 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70, the Pennsylvania act of 1885 leaves open to judicial investigation, in the ordinary way, the question whether any fact concerning which inquiry was made, and an untrue answer given was material to the risk. If found to be material, the policy will be avoided, whether the untrue answer was made in good faith or not. If found not to be material, then the breach of warranty will work no prejudice to the insured, if the answer was given in good faith; but if given in bad faith, and for the purpose of misleading the company, then the policy will be avoided, notwithstanding the immateriality of the fact inquired about.

Under the act, untrue answers, made in good faith, as to immaterial matters, even in the warranty or where it is expressly stipulated to be part of the contract, will not avoid the policy; but in this case the un-

true answers, set up for the purpose of avoiding the policy, were not incorporated in the contract, nor were they warranted as true, nor was a copy of the answers attached to the policy so that the decedent could have examined them for the purpose of ascertaining whether they were in accordance with his answers made to the medical examiner. They are answers made by the insured to the defendant's medical examiner who wrote them down (as he testified at the trial) "disregarding things that in his judgment had no bearing on the risk, either because of triviality, or because of the time beyond which they occurred," and in view of the fact that experienced insurance men regarded insured's prior ailments as immaterial to the risk, and in view of the further fact that Finney never had an opportunity to correct any answer recorded by the examiner, in the absence of proof to the contrary, the jury might well infer that Dr. Caskin may have disregarded information imparted to him by Finney "as having no bearing on the risk," either because he regarded it as trivial, or having occurred at a time too remote, which, if recorded, would have now an important bearing on decedent's good faith. The documentary evidence shows a conscientious endeavor on the part of Mr. Finney to answer truly, so far as he knew, as to his prior condition of health in his applications for other insurance before and about the time the policy in suit was issued, and how much of this same information was imparted by Finney to Dr. Caskin and "disregarded" by him as matter, in his judgment, having no "bearing on the risk, either because of triviality, or because of the time beyond which they occurred," the evidence fails to disclose. This statement of Dr. Caskin and the statement of Dr. King, together with the confidential report of the latter to the Fidelity Company, after examining insured in 1898, stating that "Major Finney was a man thoroughly conscientious, and in giving his personal history perhaps states troubles which an ordinary person would overlook," and the fact that Maj. Finney corrected the answers to the medical examiner's report made on March 14, 1906, to the Provident Life & Trust Company for a policy for $5,000 in that company, with the oral evidence on this point at least, we think made a case to be submitted to the jury as to the good or bad faith of the decedent in imparting information to the defendant concerning his past history and health. I might here remark that the case at bar strongly illustrates the vice of omitting from the policy, in violation of the spirit of the Pennsylvania act of May 11, 1881, the answers of the decedent as to his past history and prior condition of his health.

The alleged errors in the other reasons for a new trial we think have been fully disposed of in the questions considered, excepting the seventeenth reason, which was the tenth point submitted by the defendant to the court to charge the jury as follows:

"(10) If the evidence shows that at any time prior to October 10, 1906, the insured had any serious illness or disease of an organic type as contradistinguished from a functional disorder, accompanied with circumstances that, to a reasonable and prudent man, must naturally lead him to suppose that he was afflicted with an illness or disease which might affect or impair his health and thereby must necessarily have been impressed upon his memory, it was his duty to disclose the same to the insurance company, and his failure to do so warrants you in finding, and I direct you to find, a verdict for the defendant."

This was refused by the court because the latter part of this point is somewhat confused. The last sentence, to wit, "and I direct you to find a verdict for the defendant," is an implied direction to the jury to make an affirmative finding as to the facts stated in the point, and this was a question entirely for the jury. As it stands, we think it was properly refused.

The motion for judgment non obstante veredicto is overruled, and the motion for a new trial is refused.

WALLENBURG v. MISSOURI PAC. RY. CO. (two cases).

(Circuit Court, D. Nebraska. February 14, 1908.)

Nos. 7, 8.

1. ALIENS—NATURALIZATION—DECLARATION OF INTENTION—"CITIZEN."
An alien's declaration of his intention to become a citizen of the United States did not make him a citizen, he having never taken out his naturalization papers.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, pp. 7602, 7603.]

2. REMOVAL OF CAUSES—GROUNDS—PETITION—PROOF.
Where a removal petition was based wholly on the ground of diverse citizenship, defendant was not entitled to removal on proof that the plaintiff was an alien, and that the case was removable on the ground that it was an action brought by an alien in a state court against a citizen of another state.

3. SAME—AMENDMENT.
Where a removal petition was based wholly on diverse citizenship, and the proof showed that plaintiff was an alien, the federal court had no jurisdiction, nor could the defect be cured by amendment which would necessitate the setting up of an entirely new and distinct ground for removal.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 178.]

4. "CITIZENS"—WHO ARE CITIZENS—WOMEN MARRIED TO ALIENS.
Where a woman was born a "citizen" of the United States, she did not lose her citizenship by marrying an alien, at least so long as she continued to reside in the United States.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Citizens, § 7.
For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, pp. 7602, 7603.
Citizenship of married women, see note to 65 C. C. A. 5.]

5. REMOVAL OF CAUSES—ALLEGATION AND PROOF OF CITIZENSHIP.
Where a petition to remove a cause filed in a Nebraska state court alleged that plaintiff was a citizen and resident of Nebraska, and that defendant was a corporation organized under the laws of Missouri and was a citizen of that state, but the proof showed that plaintiff was a citizen of Louisiana, the removal was erroneous.

McCoy & Olmsted, for plaintiffs.
James W. Orr and John F. Stout, for defendants.

W. H. MUNGER, District Judge. The plaintiffs in these two cases are husband and wife, and each brought an action in the state court

against the defendant to recover damages alleged to have been sustained by reason of an injury received by Maggie Wallenburg, by reason, as alleged, of the negligence of the defendant. The defendant filed its petition in the state court in each of said cases, asking to have them removed into this court, on the sole ground of diversity of citizenship, alleging in each case that the plaintiff was a citizen and resident of Nebraska, and the defendant a corporation organized under the laws of the state of Missouri, and a citizen of Missouri. Plaintiffs in each case have filed their pleas in this court denying the jurisdiction of the court, denying that they were citizens of the state of Nebraska, but alleging that they are citizens of the state of Louisiana. On the trial the evidence disclosed that the plaintiff August Wallenburg was born in Germany, and a subject of that empire; that he came to the United States some years ago, and declared his intention to become a citizen of the United States, but had never taken out his naturalization papers. The declaration of his intention to become a citizen of the United States did not make him such, and he remains an alien. City of Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31.

Defendant contends that, where a suit is brought in the state court by an alien against a citizen of another state, the case is a removable one into the United States court, notwithstanding the objection of the alien plaintiff, and therefore that this case should not be remanded. Conceding, for the purposes of the argument, though not deciding, that where an alien brings suit in a state court against a citizen of another state such defendant may remove the case into the federal court over the objection of the alien plaintiff, we do not think that aids the defendant in this case. The petition for removal to the state court was, as we have said, based wholly on the ground of diverse citizenship. When the jurisdictional fact is disputed, it devolves upon the petitioner seeking to have the case removed to establish the right of removal, and this right must appear to exist upon the ground stated in his petition for removal. The allegations in the petition and the proof must correspond. Woolridge v. McKenna (C. C.) 8 Fed. 650. The proof failing to establish diversity of citizenship, it follows that this court has no jurisdiction, nor could this defect be cured by amendment. While a petition may be amended in this court by making a more perfect statement of the alleged ground of removal, an amendment will not be permitted which sets up an entirely new and distinct ground for the removal. As said by Justice Miller, in Cameron v. Hodges, 127 U. S. 322–326, 8 Sup. Ct. 1154, 32 L. Ed. 132:

"There is no precedent known to us which authorizes an amendment to be made even in the Circuit Court by which grounds of jurisdiction may be made to appear which were not presented to the state court on the motion for removal."

For this reason, the case of August Wallenburg v. Missouri Pacific Railway Company is remanded to the state court.

Another and different question is presented in the case of Maggie Wallenburg v. Missouri Pacific Railway Company. The evidence shows that she was born a citizen of the United States; that she was

married to August Wallenburg August 30, 1904, and has always resided within the United States. Does the fact of marriage by a woman, a citizen of the United States, to an alien, change her status in respect to citizenship? The federal decisions are not uniform upon this question, as will be seen from a reading of the cases of Shanks v. Dupont, 3 Pet. 242, 7 L. Ed. 666; Pequignot v. City of Detroit (D. C.) 16 Fed. 211; Comitis v. Parkerson et al. (C. C.) 56 Fed. 556, 22 L. R. A. 148; Jennes v. Landes (C. C.) 84 Fed. 73; Ryder v. Bateman (C. C.) 93 Fed. 16–21; Ruckgaber v. Moore (C. C.) 104 Fed. 947. Without undertaking to review the reasons given for the conclusions reached in each of the foregoing cases, I am clearly of the opinion that a woman, a citizen of the United States, does not lose that citizenship by marriage to an alien, at least so long as she continues to reside in the United States, and that under the proofs in this case Maggie Wallenburg was, at the time of the bringing of this action, and still is, a citizen of the United States.

A careful consideration of the testimony leads me to believe that, at the time of the bringing of the action, she was a citizen of the state of Louisiana, and not a citizen of the state of Nebraska, and the case is therefore controlled by Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264.

For this reason, the case will be remanded to the district court of the state.

UNITED STATES v. BROWNELL.

(Circuit Court, S. D. New York. November 23, 1907.)

No. 4,586.

CUSTOMS DUTIES—CLASSIFICATION—CASEIN—"LACTARENE."

Casein is "lactarene," as enumerated in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 594, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1684].

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,453 (T. D. 27,645), in which the Board of General Appraisers sustained the protest of W. M. Brownell against the assessment of duty by the collector of customs at the port of New York.

D. Frank Lloyd, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn and J. Stuart Tompkins, of counsel), for importers.

PLATT, District Judge. The merchandise in suit is invoiced as casein, and was treated by the collector as a nonenumerated manufactured article at 20 per cent. ad valorem. The importer protested, claiming that it is either albumen, lactarene, or glue stock, which are on the free list of Act July 24, 1897, c. 11, § 2, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1684].

The Board reversed the action of the collector, on the ground that it is the identical article which the court ruled to be free as albumen in Merchant's Despatch Transp. Co. v. United States (C. C.) 121 Fed. 443, and which later the court ruled to be free as lactarene, in B. P. Ducas Co. v. United States (C. C.) 143 Fed. 362, and that upon the larger record before them they found nothing which "differentiates the commodity" or would lead the court to change its ruling. Left to themselves, I am inclined to think that the Board would have sustained the collector, but they were constrained by the situation to send it to the free list.

The real contention before them was as to whether or not it is the lactarene of paragraph 594. It seems too clear for discussion that it is neither albumen nor glue stock, and that it is a manufactured article. A Scotchman named Pattison invented the term "lacterine" in connection with the English patent of 1848, which explained how to produce an improved material for fixing paint or pigment colors on woven fabrics. He used acids on buttermilk, and said the same treatment could be applied to skimmed milk. His patented article found some favor and gradually invaded the commerce of this country, taking naturally the name which he gave it. I am satisfied that it was this product which Congress dealt with in paragraph 594.

Is the merchandise in suit that thing or something else? The patentee said that his acid treatment could be applied to any kind of milk, including skimmed. It is true that under conditions existing at the time of the patent, and long thereafter, it was impossible to produce any lactarene which would not contain a considerable percentage of butter fat, and, as the fat soon became rancid, its presence in the material rendered it unfit for the uses for which it was intended, until our trade got into such a condition, that in the late '80s and early '90s the article had been practically eliminated, and the name almost forgotten by the calico printers. Nevertheless, the Congress used the name in 1897. It is the duty of the court to discover, if it can, what the Legislature meant by such action. It will not do to say that it was an oversight, if a reasonable account can be had of it.

Here is the way it strikes me: The mechanical separator began to get in its work of making the skim less fatty as far back as 1890. By 1897, the skim had become so very free from fat, that lactarene made in pursuance of the patented process would be practically freed of the substance which had hindered its usefulness. These facts must have been known to the legislators. The name was being used to some extent in our trade. The prior act had used the word, and it was used again. The same policy which had made the lactarene free in the prior acts would have made this improved article free in 1897. It will do what the patented material proposed to do and many things beside. In other words, the patented material could, in 1897, be produced under the disclosures of the patent in a much improved form. I think the merchandise in suit was so produced, and is the very thing which was made free by paragraph 594.

Thus force is given to the law, the court decisions, although based on different grounds, produce the same result, and the doings at the

custom house will proceed smoothly. I am sorry for the farmer, and would help him, if my conscience did not stand in the way, but it does so stand, and I am as helpless as the farmer. I shall lose no sleep if help comes to him from above, but I cannot for the life of me see how any court can reach any different conclusion. It so happened that my eye fell, the other day, upon the word "lacterene" in the Encyclopedia Americana, Edition of 1904, which, under the auspices of the Scientific American, claims to be of special service to this country. I found it thus defined: "The casein of milk *as commercially prepared by being freed from fat,* precipitated by an acid, thoroughly purified, dried and powdered." (The underscoring is mine.)

The decision of the Board is affirmed.

TURNER v. CITY OF FREMONT et al.

(Circuit Court, D. Nebraska. February 12, 1908.)

No. 13.

1. CONTRACTS—CONSTRUCTION—PRIMARY OBJECT.
   In construing a contract, the primary object is to discover the intention of the parties.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 730.]
2. SAME.
   In construing a contract, the entire agreement must be considered, and, if possible, it should be construed so as to give effect to each of its provisions.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]
3. MUNICIPAL CORPORATIONS—PAVING—BID CONSTRUED.
   Where the specifications upon which paving bids were based provided that the city engineer might make certain tests of the brick to be used at any time during the progress of the work, and that if they did not stand the tests they should be rejected, and required the bidders to deposit samples of the brick on which their bids were based, such samples to be labeled, showing the commercial name of the brick, a statement in plaintiff's bid that he proposed to use "Capital" brick, as per samples submitted, did not work a modification of his proposal to do the work according to the plans and specifications so as to make the quality of his samples determine the quality of the brick to be used, unaided by the tests provided for in the specifications.
4. SAME—FAILURE TO COMPLY WITH BID—RELETTING OF CONTRACT—EFFECT.
   Where plaintiff refused to enter into a municipal paving contract, after having been declared the lowest bidder, the city council, by declaring another bidder to be the lowest bidder, without readvertising for bids, did not rescind its finding that plaintiff was the lowest bidder, so as to release his deposit made to secure his entry into a contract.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 865.]
5. DAMAGES—BREACH OF CONTRACTS—FORFEITURES—CONSTRUCTION.
   Though, generally, courts do not look upon forfeitures with favor, and will, where the contract is susceptible of so doing, construe such a provision as a penalty rather than liquidated damages, such construction should be given as will carry out the intent of the parties, if such intent is clearly ascertainable from the contract.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 156, 157.]

6. SAME—BID FOR STREET PAVING.

Where, when a bidder for street paving deposited checks for $3,700 to secure his entry into a contract on the acceptance of his bids, the damages to the city and the public which would flow from his failure to enter the contract could not be known, on a forfeiture, the deposit must be treated as liquidated damages for plaintiff's default, and not merely a penalty, though the actual damage, as shown by subsequent events, was only about $2,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 170–175.]

Baily & Shipp, for plaintiff.

C. E. Abbott and F. Dolezal, for defendants.

W. H. MUNGER, District Judge. The city of Fremont is a municipal corporation of the state of Nebraska. In December, 1906, the city council created two paving districts known as Nos. 10 and 12, and in March, 1907, the board of public works published a notice inviting bids for the paving in said districts, said notice providing that the work should be done according to plans and specifications on file in the office of the city engineer and of the board of public works. Among the provisions of the specifications referred to were the following:

"The city reserves the right to reject any and all bids, or parts of bids, which may not be advantageous to the city.

"Each bidder will be required to deposit with his proposal a certified check on some bank of Fremont, Nebraska, for an amount equal to five per cent. of the value of the work as per bid, as a guarantee of good faith which is hereby agreed shall be considered as liquidated damages, which shall be forfeited to the city of Fremont if such a proposal is accepted, the work awarded and the bidder fails to enter into the contract in the form hereinafter prescribed with legally responsible sureties within ten days after written notice so to do have been given the bidder by the board of public works, when the contract and bond have been approved as by law provided, the bidder's certified check will be returned to him. * * *

"The pavement must be of the best quality of vitrified paving brick or brick block of uniform dimensions and true in form, and especially made for street paving purposes; the vitrified bricks shall not be less in size than two and one-quarter (2¼) by four (4) by eight (8) inches and the vitrified brick blocks not be less than three and one-fourth (3¼) inches thick, four (4) inches deep and eight (8) inches long, but only one size and make shall be used on the street in the improvement district being paved. Ten (10) samples of each kind of brick blocks bid upon duly labeled showing name of bidder and commercial name of the brick or brick block shall accompany the bids; failure to submit such samples shall invalidate the bid.

"The brick and brick blocks shall be of the kind known as 'repressed brick' and shall be repressed to the extent that the maximum amount of material is forced into them. They shall be free from lime and other impurities; shall be as nearly uniform in every respect as possible, shall be burned so as to secure the maximum hardness; so annealed as to reach the ultimate degree of toughness and thoroughly vitrified so as to make a homogeneous mass. The brick shall be free from all laminations caused by the process of manufacture, and free from fire cracks or checks of more than superficial character or extent.

"All brick so distorted in burning or with such prominent kiln marks as to produce an uneven pavement shall be rejected.

"To secure uniformity in vitrified paving brick and paving brick blocks delivered for use, the following tests, as recommended by the National Brick Manufacturers' Association, shall be made:

"Specimen vitrified paving brick and vitrified brick blocks shall be placed in

a machine known as a 'rattler' twenty inches long, twenty-eight inches in diameter, making thirty revolutions a minute. Nine to twelve bricks shall constitute a charge for a single test. In addition 300 pounds of cast-iron foundry shot shall be placed in the rattler. These shot will be of two sizes, viz.: one and one-half (1½) inch cubes, and oblong pieces two and one-half (2½) inches square section, and four and one-half (4½) inches long. The number of revolutions for a standard test shall be eighteen hundred, and if the loss of weight by abrasion or impact during such test shall exceed 18 per cent. of the original weight of brick or brick blocks tested then the brick or brick blocks shall be rejected. All pieces of one pound weight or less shall be counted as loss. An official test to be the average of two of the above tests. The city engineer may, at any time during the progress of the street work, take any number of the bricks or brick blocks for testing purposes, and should they not meet the requirements, other satisfactory brick or brick blocks shall be substituted at once."

Mr. Turner, the plaintiff, on April 5, 1907, submitted bids to do the paving in said two paving districts. His proposal in District No. 10 contained among other things, the following provisions:

"The undersigned, after examining plans, specifications and work to be done necessary to complete the paving, curbing and grading of District No. ——— in the city of Fremont, Nebraska, proposes to furnish all the material and do all the work in compliance with the plans and specifications on file in the office of the city engineer, for the following prices, to wit: * * *

"The undersigned hereby agrees to enter into a contract within ten days of the notice of that award, should his proposal be accepted. * * * In the event of the failure to enter into such contract within ten days of the notice of the award, then the inclosed check for $2.100.00 as a guarantee thereof shall be forfeited as prescribed in the specifications,"

—which proposal was signed by plaintiff, and his post-office address given. Underneath the same was written the following:

"If awarded the contract, I propose to use 'Capital' brick or block, as per samples submitted."

His bid for District No. 12 contained the same provisions, excepting that, instead of having written underneath his name the brick proposed to be used, as in the bid for District No. 10, there was written at the top of the proposal the following words:

"I propose to use 'Capital' brick or block, as per samples submitted."

And the check accompanying the same was for $1,600.

The board of public works recommended to the city council the acceptance of said bids of plaintiff, they finding the plaintiff to be the lowest responsible bidder. The city council, with the approval of the mayor, found that plaintiff was the lowest responsible bidder, accepted his proposal, and awarded the contract to him. He was duly notified, and two contracts, one for each district, were forwarded to him to be executed, said contracts providing that the work was to be done in accordance with the plans and specifications referred to. Plaintiff refused to execute said contracts, but submitted to the board of public works two other contracts, providing that the work should be done according to the plans and specifications, except that the brick to be used were to be only according to the samples which he submitted. He refused to execute a contract requiring the brick to be subjected to the tests required by the specifications, claiming that the written provisions referred to in his bid, to wit, that he proposed to

use bricks of the samples submitted, was a modification of the proposal that the work was to be done according to the plans and specifications. The city council thereupon declared that, because of Turner's refusal to execute the contracts in accordance with his bid, the checks which he had deposited should be forfeited.

The checks so deposited by plaintiff were drawn upon the Fremont National Bank, payable to his own order, and were duly certified by the bank. The checks were indorsed upon the back as follows:

"Pay to the order of city, and E. N. Morse, Chairman of Board of Public Works, Fremont, Neb., in event that work bid for is awarded undersigned and refusal is made to enter into legal contract as per specifications and bid dated April 5th, 1907. J. W. Turner."

Plaintiff has brought this suit to recover the amount of said checks, and to enjoin the bank from paying, and the city treasurer from receiving payment of, the said checks.

The first question to be determined is whether or not plaintiff refused to enter into a contract in conformity with his bid. That the advertisement for bids, plaintiff's bid, and the acceptance thereof by the proper city authorities constituted the agreement between them is unquestioned, the controversy being as to the interpretation thereof. it is fundamental that the primary object of construction in contract law is to discover the intention of the parties. To do this, the entire agreement is to be considered. Not what separate parts may mean, but what the agreement means when considered as a whole, and, if possible, the agreement should be construed so as to give effect to each provision inserted therein. With these principles in view, it is not difficult to determine what was the agreement between the parties and as understood by them.

The notice inviting bids provided, as we have seen, that the work was to be done according to certain plans and specifications. The specifications indicated the character of the material to be used, and the test to which the brick were to be subjected to determine whether or not they complied with the provisions of the contract, and it provided that these tests should be made by the city engineer at any time he desired during the progress of the work, and if the brick did not comply with the tests they were to be rejected and other brick substituted in their stead. The specifications also provided that each bidder should deposit with his bid 10 samples of the kind of brick upon which his bid was based, such samples to be labeled, showing the commercial name of the brick or brick blocks. This, however, did not do away with the express provision that the brick should be from time to time, as the city engineer desired, subject to the tests provided by the specifications. The statement in the bid of plaintiff that he proposed to use "Capital" brick, as per samples submitted, was merely a statement that the samples which he submitted were the samples asked for by the specifications, and was not intended as a statement that the brick with which he proposed to do the work, if according to sample, should not be required to undergo the test expressly provided for in the specifications. This holding gives full force and effect to each provision of the contract. If the specifications had not

required the bidders to present samples, and plaintiff, having presented samples with his bid with the statement that he proposed to use brick as per samples, his argument that such provision was to be a substitute for the test provision would have some force. Considering the fact that the specifications required samples to be submitted with the commercial name thereof upon which the bidder's bid was based, together with the tests which might be made from time to time by the city engineer in determining whether the brick used complied with the specifications, it seems to me clear that the statement by the plaintiff that he purposed to use brick, the commercial name of which was "Capital," was only a statement that the samples were the samples called for by the specifications. The contract was to be let to the lowest responsible bidder. The object of the samples, and the commercial name thereof, was to enable the authorities to investigate, ascertain the probabilities of the contractor being able to procure brick of that commercial name in sufficient quantities to fulfill the contract, and whether the brick of that commercial name would generally comply with the specifications. It was not intended, and could not have been understood by plaintiff in making his bid, that the quality of the samples alone was to determine the quality of the brick to be used in the construction of the work, unaided by the tests provided for in the specifications. I think the evidence clearly establishes a refusal on the part of plaintiff, after his bid had been accepted and the contract awarded to him, to enter into such a contract as was required by the specifications, and as referred to in his indorsement upon the certified checks. The evidence shows, as we have seen, that after plaintiff's refusal to enter into such contract the city council declared his deposit forfeited, and then declared Mr. Murphy to be the lowest bidder. This, it is argued upon the part of the plaintiff, constituted a rescission of the former finding that plaintiff was the lowest bidder. I cannot so hold. When it was found that plaintiff was the lowest bidder, and the contract awarded to him, and he refused to enter into the contract provided for, the rights and obligations, as between the city and plaintiff then became fixed, and I do not think were effected by the city subsequently awarding the contract to Mr. Murphy, by declaring him the lowest bidder, as, at that time, plaintiff, having by his own act eliminated himself from the transaction, could no longer be considered, and, with him eliminated, it was proper for the municipality to declare that Mr. Murphy was then the lowest responsible bidder. At least, plaintiff cannot complain because the city awarded the contract to Murphy without readvertising.

The next and only remaining question to be considered is whether or not the amount of the checks deposited is to be treated and considered as liquidated damages for plaintiff's failure to enter into a contract, or only a penalty. While it may be stated as a general proposition that courts do not look upon forfeitures with favor, and will, where the contract is susceptible of so doing, construe such provisions as a penalty rather than as liquidated damages, yet I think it may be said that the true rule is to give such a construction as will

carry out the intent of the parties, if such intent is clearly ascertainable from the contract. That the decisions of the state courts are not uniform may be shown by the citation of two authorities. Willson v. Mayor, etc., of Baltimore, 83 Md. 212, 34 Atl. 774, 55 Am. St. Rep. 339, was a case where sealed proposals for furnishing city supplies were advertised for. The bids provided that each proposal must be accompanied by a certified check for $500. If the successful bidder enter into contract with bond without delay, his check was to be returned as were those of unsuccessful bidders. The contract was awarded, but the bidder was unable to obtain a surety, and the contract was let to another. It was held that the deposit was a penalty, and could be enforced only to the extent of the actual loss resulting from a failure to complete the contract. Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N. E. 1085, was a case where a deposit was made with a bid to enter into a contract to do certain paving. The party to whom the bid was awarded refused to enter into the contract, and he brought suit to recover the deposit. It was held that he could not recover. In the opinion it was said:

"The rule that courts incline against forfeitures has no application to this case. There is no question of construction here involved, and it is well settled that that rule will never be carried to the extent of relieving parties against the express terms of their own contracts."

In Abbott's Municipal Corporations, vol. 1, § 272, it is said:

"To prevent fraud or collusion, and to secure bids from those who are financially responsible, and will perform the contract should it be awarded them, in the public advertisement calling for bids conditions are valid that bidders must furnish a bond with good and sufficient sureties for the proper performance of the work, upon the awarding of the contract, or that a certain deposit must accompany their bid, to be forfeited in case the award is made to them and they refuse to execute a contract based upon such award."

The following federal decisions are applicable to this case: Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 523, was a case in which a deposit of $10,000 by the contractor was made, to be forfeited as liquidated damages in case of failure to construct for the city an electric lighting plant. The plant was not erected, and suit was brought to recover the deposit. It was held that no recovery could be had. Judge Caldwell, speaking for the Court of Appeals, said:

"Cases of penal bonds between private persons, where the damages resulting from a breach are readily ascertainable, have no application to this case. A city is a public corporation, designed for local government. It is an agency of the state to assist in the civil government of the territory and people of the state embraced within its limits. It has no private interests. It is a public agency and acts for the public, and when it contracts for the establishment and maintenance by a private corporation of waterworks, gas or electric lights, street railroads, and other like public utilities, it does so in the performance of its public functions, and for the purpose of promoting the convenience and preserving the health of its citizens, and protecting them in their persons and property. And when a private corporation which has engaged with the city to construct and maintain one of these public utilities—as in the case at bar, to light the public streets of the city—fails to comply with its contract in that regard, the city, in its corporate capacity, does not suffer any loss or damage capable of judicial ascertainment. Nor is the inconvenience and loss suffered by the public, on whose behalf and for whose benefit and protection the contract was made, capable of ascertainment. * * * For this reason

it is common for municipal corporations, in making contracts of this character, to stipulate for the payment of a fixed sum as liquidated damages in case the public utility is not constructed and put in operation within the time limited by the contract. * * * This is the only method by which the city can obtain anything like an adequate compensation for the loss and damage sustained by the public by the breach of such a contract."

In Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, it was held that the naming of a stipulated sum to be paid for the nonperformance of a covenant was conclusive upon the parties in the absence of fraud or mutual mistake. In Woods et al. v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256, it was held that, in a contract to erect certain machinery on plaintiff's premises, a provision that defendant would pay $50 per day as liquidated damages for each turbine which remained uncompleted after the date named could not be construed as a penalty, and that defendant could not reduce the amount of recovery by showing that plaintiff sustained no loss by the delay. To the same effect is the case of Stephens v. Essex County Park Com., 143 Fed. 844, 75 C. C. A. 60. In the case at bar, at the time that the bids were advertised for, and plaintiff made his bid, the damages, if any, which would be sustained by reason of his failure to enter into the contract, could not be ascertained. What the loss would be to the public, by reason of delay which might result from readvertising and reletting, could not be known.

While the evidence discloses that the city subsequently let the contract to one Murphy, and procured the paving for some $2,500 (in round numbers) more than complainant's bid, and that the actual damage to the city and its taxpayers, as shown by subsequent results, was some $1,200 less than the amount of plaintiff's deposit, yet such fact does not aid in determining the character of the agreement under which the deposit was made. If the agreement was one of security or a penalty only, then of course only actual damages could be recovered, but if the agreement was one of liquidated damages, and the parties held bound to the agreement as one of liquidated damages, then the proof as to actual damages becomes immaterial.

On the authority of Brooks v. City of Wichita, Sun Printing & Pub. Ass'n v. Moore, Woods et al. v. Niagara Falls Paper Co., and Stephens v. Essex County Park Com., supra, I must hold that the certified checks deposited in this case were intended by the parties, as shown by their contract, to be absolutely payable to the city upon the plaintiff's failure to enter into a contract to do the paving, should his bid be accepted, and the work awarded to him.

Finding as I have that he failed to enter into the contract without just cause, it follows that he cannot recover, and the bill is dismissed for want of equity.

THANHAUSER v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. February 7, 1908.)

No. 36 (1,768).

1. CUSTOMS DUTIES—CLASSIFICATION—CHRISTMAS TREE ORNAMENTS—"TOYS."
The provision for "toys" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], *held* not to include fragile, flimsy articles of tinsel, in the shape of rings, stars, etc., which, while they may amuse or entertain children when hung on a Christmas tree, are not suitable to be played with, and, besides being used as Christmas tree ornaments, are employed in shop decorations.

2. SAME—COMMERCIAL DESIGNATION—"TOYS."
An article is not necessarily a toy simply because children can or do play with it. In order to fall within that designation its intended and principal use must be for the amusement of children; or, if capable of other uses, it must nevertheless be commercially known as a "toy."
[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7036, 7818.]

On Application for Review of a Decision by the Board of United States General Appraisers.

Frank P. Prichard and Ralph B. Evans, for importer.

Jasper Yeates Brinton (J. Whitaker Thompson, U. S. Atty., on the brief), Asst. U. S. Atty.

J. B. McPHERSON, District Judge. The nature of the dispute now before the court will appear from the following decision of the Board of General Appraisers, affirming a ruling made by the collector of the port of Philadelphia:

"The merchandise consists of ornaments made of tinsel wire, lame, and other materials, tinsel wire or lame being the component material of chief value. Duty was assessed on them at the rate of 60 per centum ad valorem, under the provisions of paragraph 179 of the Tariff Act of 1897, and they are claimed to be dutiable properly at 35 per cent. under paragraph 418 of said act, as toys. In G. A. 4,784 (T. D. 22,559), and again, in abstract 1,956 (T. D. 25,411), the Board passed upon articles differing in no essential respect from these, and held that they were dutiable at the rate herein expressed. The only testimony in the present cases is that of the importer himself, and that is insufficient to establish a commercial designation. Neuss v. United States (C. C.) 142 Fed. 281, T. D. 26,597."

The two paragraphs in question are as follows:

"179. Tinsel wire, lame or lahn, made wholly or in chief value of gold, silver, or other metal, 5 cents per pound; bullions and metal threads, made wholly or in chief value of tinsel wire, lame or lahn, 5 cents per pound and 35 per cent. ad valorem; laces, embroideries, braid, galloons, trimmings or other articles made wholly or in chief value of tinsel wire, lame or lahn, bullions or metal threads, 60 per centum ad valorem."

"418. Dolls, doll heads, toy marbles of whatever materials composed, and all other toys not composed of rubber, china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this act, 35 per centum ad valorem." Tariff Act July 24, 1897, c. 11, § 1, Schedules C, N, 30 Stat. 166, 191 [U. S. Comp. St. 1901, pp. 1644, 1674].

As the briefs of the parties show distinctly, there has been more or less uncertainty for a good many years concerning the proper classi-

fication of articles that may be described in a general way as Christmas tree ornaments. As a help toward the settlement of the controversy, it may be worth while to take advantage of the industry of counsel, and refer somewhat in detail to the course of decision.

In T. D. 2,147, the Secretary of the Treasury in March, 1875, overruled an appraiser who had imposed duty at 50 per cent. ad valorem, less 10 per cent., upon certain so-called glass balls, believing them to be "beads" (Rev. St. [2d Ed.] p. 473, and section 2503, p. 459). The importers' position was that the articles were "glass balls manufactured of, or made of, molded glass, and used to decorate Christmas trees"; and the Secretary agreed with this contention, and directed the balls to be classified as "children's toys," and a duty of 50 per cent., without deduction, to be imposed (Rev. St. [2d Ed.] p. 481). In November, 1886 (T. D. 7,853) the Treasury decided that "Christmas tree ornaments, made of gilt paper, representing animals, pipes, fishes, etc., intended for the amusement of children at Christmas festivals," were dutiable as "toys" under the clause in the act of 1883 that imposed a duty of 35 per cent. ad valorem on "dolls and toys" (Act March 3, 1883, c. 121, § 1, Schedule N, 22 Stat. 512); and not under the clause that imposed an ad valorem duty of 15 per cent. on "manufactures of paper" (Schedule M, 22 Stat. 510). The decision refers to two other rulings of the department, as well as to No. 2,147, supra. Several months later, in February, 1888 (T. D. 8,656) the same clause relating to "toys" was held to impose the duty upon "small pieces of tinsel thread woven into a cotton cord, which is cut into lengths of about three feet, and intended for use as ornaments for Christmas trees." The Treasury agreed with the collector and the appraiser that as these articles are "intended exclusively for the amusement of children" they were dutiable as "toys," following expressly the foregoing decisions, Nos. 2,147 and 7,853. The question arose again in January, 1891 (G. A. 283, T. D. 10,730) concerning "metal ornaments for Christmas trees * * * made from tinsel thread," which it was claimed by the importer should come in at 25 per cent. ad valorem as "metal threads, filé or gespinst" (Schedule N, 22 Stat. 511); the merchandise having been classified as "toys," dutiable at the higher rate of 35 per cent. The opinion of the Board of General Appraisers—to whom the decision of such questions had now been transferred—is put upon the ground that the Treasury Department had, for many years, held Christmas tree ornaments to be "constructively toys." The opinion adds:

"We can see no good reason for departing from this ruling. The courts have defined toys to be articles mainly designed for, and ordinarily employed by, children for their amusement, and as Christmas tree ornaments are designed for the amusement of children the ruling of the department would seem to be correct. The ones under consideration are no longer tinsel thread. They are either dutiable as manufactures of metal or as toys. We incline to the latter classification as the proper one."

In June, 1892, under the tariff act of 1890 (G. A. 1,542, T. D. 12,991) the Board held that "wax angels" were not dutiable as manufactures of wax under Act Oct. 1, 1890, c. 1244, Schedule N, 26 Stat. 601, par. 459, 1 Supp. Rev. St. (2d Ed.) p. 846; but as "toys not composed of rubber," etc., under paragraph 436, 26 Stat. 600, p. 844, of 1

Supp. Rev. St. (2d. Ed.). The decision is put upon the ground that "the chief use of wax angels is in the ornamentation of Christmas trees." Under the same statute two other rulings were made in April, 1894 (G. A. 2,571, T. D. 14,942, and G. A. 2,574, T. D. 14,945). In the first, the articles were small molded trick glasses, adapted solely for use as "playthings for children," and articles of thin blown glass consisting of "diminutive figures in the form of deer, antelopes, peacocks, and birds in cages." These were all found by the board to be "commonly and commercially known as toys," and were therefore held to be dutiable under paragraph 436, and not under paragraph 108, as "thin blown glass, blown with or without a mold," etc. In No. 14,945, the articles in question were "tin clips about 1¼ inches in length and having copper or iron wire springs attached thereto." They were designed chiefly for holding small wax candles and fastening them to Christmas trees, and were held not to be dutiable as manufactures of tin under paragraph 143, but as "toys" under paragraph 436. The Board gave as the reason for their decision that:

"The flimsy construction of these articles, which unfits them for any considerable use other than for the amusement of children, would seem to point to the correctness of the appellant's contention. The Treasury Department uniformly classified Christmas tree ornaments as toys under the Act of March 3, 1883, and the Board has frequently affirmed the correctness of the Department's decision as to such articles imported under the present act. We can see no good reason for differentiating the clips in question from Christmas tree ornaments, all being alike intended for the amusement of children while in play."

It will be observed that, in these rulings a number of widely differing articles were held to be "toys," upon the single ground that they were designed to be used and were actually used for the amusement of children. The incorrectness of this reasoning, if it were intended—as it apparently was intended—to be of universal application, was pointed out by Judge Dallas in Wanamaker v. Cooper (C. C.) 69 Fed. 465, a case decided in June, 1895. The following extract from his opinion will show the facts and the basis for his decision:

"As to the use and trade-name of the article described in the opinion of the Board of Appraisers as 'metal ornament for Christmas trees,' there is, under the evidence, no room for doubt. Its principal and almost exclusive use is for the decoration of Christmas trees, and it is known in the trade as 'tinsel,' 'tinsel thread,' 'lametta,' etc., but never as a 'toy.' In fact, it is a metal thread, though, in the condition in which it was imported in this instance, it is not fit to be employed as a metal thread for embroidering or other manufacturing purposes. I do not understand that the Board of Appraisers found these facts to be otherwise than I have stated them. If they had done so, I would, of course have regarded their finding with much respect. There is, however, no conflict of evidence, and the only question is as to the correctness of the conclusion which they deduced from the clearly established facts. Their decision was wholly founded upon the assumption that because a toy, broadly defined, is an article mainly intended for the amusement of children, therefore anything which is chiefly used to decorate an object designed to amuse children should itself be taken as a toy. I think this reasoning is unsound. In common speech the word 'toy' certainly has no such comprehensive significance, and the evidence shows that in the trade the material in question is not known or designated as a toy. When placed upon Christmas trees, it does no doubt contribute to the amusement of children, but so do many things which could not with any aptitude be classified as toys. A toy is a thing to

amuse children, but it does not follow that everything which amuses them, or which enters into a device for their amusement, is in itself a toy. I am constrained to overrule the decision of the Board of General Appraisers as to this merchandise."

Following this decision the Treasury Department in August, 1899, instructed the collector at New York to classify "thin glass balls used as ornaments for Christmas trees," as manufactures of glass and not as toys (T. D. 21,509). It appearing, however, that the balls in question were always colored, gilded or silvered, the instruction was modified in the following September, so as to require them to be classified as decorated articles of glass under paragraph 100 (T. D. 21,551). The appraisement having been made in obedience to the instruction of the Department, the question came before the Board in October (T. D. 21,718, G. A. 4,589); and, after testimony had been heard on behalf of the importers to the effect that the balls had been universally known to the trade as "toys" long before the passage of the tariff act of 1897, the Board reversed the ruling of the collector and held the articles to be dutiable as "toys." They distinguished the case from Wanamaker v. Cooper on the ground that the metal thread involved in that dispute was never known as a toy, while the commercial designation of the glass balls under consideration had been proved by positive and uncontradicted testimony to be "toys." The Treasury acquiesced in this ruling, for the reason that "the trade testimony in the case was unanimous to the effect that the glass balls in question were known as toys," but advised the Board that the Department desired the decision to be confined to "merchandise like that under consideration, to wit, glass balls intended for Christmas tree ornaments" (T. D. 21,733).

Evidently the Board had no disposition to enlarge the scope of the decision, for they took an early opportunity (October, 1900, G. A. 4,784, T. D. 22,559) to point out that they had plainly found in G. A. 4,589 that the glass balls there passed upon were not "toys within the ordinary meaning of the word as a plaything for children." but had put their ruling upon the single ground that "the merchandise was shown to be commercially known as toys, and in accordance with the well-settled principles were held to be dutiable as such." And they proceeded to emphasize the distinction by refusing to classify as toys "artificial pears composed of cotton with a piece of metal thread in place of a stem," and also "artificial roses composed of cotton, with a stem of wire covered with paper, and some sprays of tinsel wire loosely attached to the stem"—both pears and roses being designed for use as Christmas tree ornaments. The ground for this ruling was, that sufficient proof had not been offered to show that the articles were toys in fact, or were commonly known as toys, the circumstance that they were handled in toy stores and toy departments being declared not to be conclusive upon this question. And, to make it perfectly clear that each article intended for use as an ornament upon a. Christmas tree must be considered separately, the Board also held in the same opinion, that "clowns" made of cotton were dutiable as toys, because they "closely resemble and are of the character of 'dolls,' and, although they

may be intended for Christmas tree decoration, they are undoubtedly used as playthings for children, and are toys in fact."

Bearing upon the general question, when an article should be classified as a "toy," the decision of the Board in G. A. 4,973 (T. D. 23,197) may be noticed in passing, where certain merchandise —which, however, was not intended for use as Christmas tree ornaments—was classified as toys because testimony was offered and accepted that the articles were known by that designation. Finally, in T. D. 25,411 (abstract 1956, p. 1034), the present appellant, in June, 1904, prevailed upon the Board to decide that metal clips for holding small candles were toys, because they were "flimsy affairs of tin, suitable for no other use than the amusement of children"; while he failed in the effort to obtain a similar ruling concerning "ornamental articles made of lahn or tinsel," although they were intended for use on Christmas trees, because they were "apparently susceptible of use for other ornamental purposes" and no evidence was offered to show "that they are commercially known as toys."

From this review, I think it is clear enough that, although there has been some vacillation about the proper classification of Christmas tree ornaments, this has been probably due to the fact that such ornaments may be very different in character, some being plainly toys as well as ornaments, while others resemble toys merely because one of their possible or actual uses is the entertainment of children. But, as Judge Dallas has stated, an article is not necessarily a toy simply because children can or do play with it; otherwise a father's watch or a mother's workbasket might, on occasion, fall within this category; and it is necessary, therefore, to go further, and inquire in each case whether the intended and the principal use of the article in question is the amusement of children, or, if it appear to be also capable of use for other purposes, whether it is nevertheless commercially known as a toy. These are questions of fact to be decided according to such evidence as may be offered, and upon both there is testimony in the present case. I shall not review it in detail, but shall only say that I have considered it all without being led to the conclusion that the importer's position should be sustained. In my opinion, the evidence shows that the fragile, flimsy articles in question, mainly composed of tinsel in different shapes—stars and rings and nondescript devices—are not intended, and are not suitable to be played with. They amuse or entertain because they are adapted to decorate, and no doubt they entertain children when they are hung on a Christmas tree; but on such an occasion they entertain adults also in the same way, although the entertainment differs in degree. Moreover, it clearly appears that the articles in question are often used by confectioners, stationers, and other merchants to make their wares or their shops more attractive, and this use has little reference to the amusement of children.

Neither does the evidence bear out the importer's contention that whatever the articles may be in fact nevertheless they are commercially known as "toys." No doubt they are often sold in toy stores

and toy departments, but this circumstance is not conclusive, for they are sometimes found in the stock of a notion department, where they would seem to be as properly placed as among the playthings of children. But, wherever they may be offered for sale, the evidence satisfies me that they are not generally recognized and designated by the trade as toys, and cannot properly be classified as such.

Without prolonging the discussion, which I fear has already gone too far I shall only state my conclusion that the ruling of the General Appraisers was right, and should be affirmed.

In re LITTMAN et al.

(District Court, E. D. Pennsylvania. February 17, 1908.)

No. 2,144.

BANKRUPTCY—PROCEDURE—CERTIFIED QUESTION—FINDINGS—REVIEW.

Where a referee's finding in bankruptcy that no partnership existed between two persons alleged to constitute a bankrupt firm was based on conflicting evidence, such finding will not be reversed on certificate to the district judge, unless it appears from the evidence that the referee was clearly wrong.

In Bankruptcy.

The following is the opinion of Hoffman, Referee:

To the Honorable the Judges of the Said Court:

The referee, to whom was referred the answer of Joseph Zaretsky to the petition of Joseph Littman, individually on behalf of the firm of Joseph Littman and Joseph Zaretsky, trading as Littman and Zaretsky, upon which Joseph Zaretsky was commanded to show cause why said firm should not be adjudicated bankrupt, with an order that the referee should take testimony and report whether or not the said Joseph Zaretsky and the firm of Littman and Zaretsky are insolvent; with the further order that the referee take such steps as may be necessary for the administration of the partnership assets, respectfully reports that the questions involved are: (1) Whether or not Joseph Zaretsky at any time was a partner of the said Joseph Littman. (2) If he was not a partner at the time of the contraction of the indebtedness to the Consumers' Brewing Company, did the said Joseph Zaretsky subsequently become a partner of Joseph Littman, and is he, as is contended in his behalf, entitled to enforce a claim as a partner against the fund realized from the sale of the license taken out in the joint name of Littman and Zaretsky?

Pursuant to the reference, the referee held a meeting on March 15, 1905, and on March 29th, April 7th, and May 24th, which meetings were attended by Reuben O. Moon, Esq., attorney for Consumers' Brewing Company, Samuel P. Tull, Esq., and Jay H. Gratz, Esq., attorneys for Joseph Zaretsky, and Benj. Dintenfass, Esq., attorney for Joseph Littman. The witnesses examined were Joseph Littman, James V. O'Neill, M. J. Welsh, Joseph Zaretsky, and Charles Palvor, and the testimony taken appears in the schedules hereto annexed.

From the testimony taken before him, the referee finds the following facts: The Consumers' Brewing Company were creditors of an Italian, by the name of Solino, who was the proprietor of a saloon at Eighth and Wharton streets, Philadelphia. Solino was in financial difficulties, and a committee of creditors was appointed to look after his affairs, of which committee Mr. Foster, president of the Consumers' Brewing Company, was chairman. The sale of the license of Solino was under the control of the Consumers' Brewing Company, who acted through their agent, James V. O'Neill. On the 16th of September, 1904, Mr. O'Neill was called upon by Joseph Zaretsky and Joseph Littman.

According to the testimony of Joseph Zaretsky (page 39) Zaretsky had not previously known Littman, but made his acquaintance on this day. Littman suggested to Zaretsky that they should jointly take this saloon, and for that purpose they called upon Mr. O'Neill. Mr. O'Neill told them that that day was the last day for filing applications, and, without delaying to look at the place, Zaretsky put up a deposit to bind the bargain, the bargain being that the license should be transferred to them for a consideration of $8,000, of which $7,000 was to be loaned to them by the Consumers' Brewing Company on their note, and $1,000 to be paid in cash. The application was accordingly made in the name of Littman and Zaretsky. On the 26th of September the license was transferred in accordance with the application, and on the same day Zaretsky went with Littman to view the premises. On the view of the premises, Zaretsky became dissatisfied with the place, and, according to his testimony, he found the place "without stock and very dirty and sloppy." According to the testimony of Zaretsky, he testified: "I came back and there was supposed to be a settlement, so I came back and told Mr. O'Neill. I would not take the place because the place is not worth that. That is the first thing. It is very dirty, and no stock at all, so I will back out. Q. Mr. O'Neill said what? A. He said I lose that $50 deposit, and I said I would lose it, and I didn't want the place." After this occurrence negotiations were had between Littman and O'Neill which resulted in Mr. O'Neill agreeing to increase the amount of cash advanced by the Consumers' Brewing Company on the individual note of Joseph Littman from the original amount fixed of $7,000 to $7,400, Littman to pay the balance of $8,000, or $600, in cash. This amount of money was furnished by Littman with the knowledge of Zaretsky, and understanding that at the next license court the transfer should be allowed so that the license should be made to the name of Joseph Littman. Subsequent to this, it appears from his testimony that Joseph Zaretsky took part in the management of the saloon, and furnished, for the purpose of management, various sums of money aggregating the sum of $600, that were used in the purchase of stock and other running expenses. The testimony of Zaretsky was that he was taken into partnership by Littman, but he does not allege any written articles of partnership, nor does he allege any date or conversation in which any agreement of partnership was had between them. On the contrary, Joseph Littman testified that he never entered into partnership with Zaretsky, but employed him as a bartender at $10 per week. This testimony of Littman is confirmed by the testimony of O'Neill, who testified (page 26): "Zaretsky said as long as Littman was going to run the saloon, why not give him a job as a bartender. He said this to me. We said, 'We have nothing to do with that. You will have to speak to Littman.' * * * Q. Did you visit the place after that? A. I visited it three times. Twice I saw Mr. Zaretsky there, and I asked him what he was doing there, and he said he was the bartender." O'Neill further testified that "when you loaned this money to Littman (page 32) and put the deal through with Littman alone after the license court had passed on the matter, you did it on the assumption that you were dealing with Littman, individually, didn't you? A. I did it because Mr. Zaretsky told me that he would not become a partner to the business, and that he would sign the necessary papers to transfer the business to Littman individually. Q. Then you did deal with Littman on the assumption that you were acting with him alone? A. Yes." The conversation in which Zaretsky told O'Neill that he was a bartender occurred about the 6th or 7th of October, at which date Littman and Zaretsky began to run the saloon. Zaretsky denied specifically the testimony of Littman that he acted as bartender and received $10 per week. He testified that he only drew out $5 per week, the same as Littman, and he also denied, specifically, all the interviews and conversations testified to by O'Neill. The only testimony confirmatory of Zaretsky's contention that he was a partner is the testimony of the witness Welsh, a driver of a beer wagon. He said he called at the saloon to inquire if they wanted to purchase beer, and found Zaretsky behind the bar. He said to him, "I am a partner."

Law. The referee has carefully reviewed all the testimony. These excerpts give the full force and effect of all that was testified to. From this testimony the referee is asked to find on behalf of Joseph Zaretsky that a partnership

subsequent to the transfer of the license was entered into by Zaretsky, and that the only debts which he is liable for are those contracted after that date. and that he has the full rights of a partner to an accounting for the value of the license without any responsibility for the indebtedness on the note of Joseph Littman to the Consumers' Brewing Company. The referee does not find from the testimony any evidence upon which a partnership could be established as against Littman and the Consumers' Brewing Company, who furnished $7,400 in cash under the assurance that they were dealing exclusively with Joseph Littman. It is not therefore necessary to go into the doctrine of equitable estoppel as to the enforcement of Zaretsky's right as a partner if the partnership were established. The testimony of Zaretsky does not even show a fact from which there could be a legal implication of a partnership, nor does it show a contract of partnership, and in such circumstances as exist in this case a contract of partnership must be clearly proven. In this case there was no division of profits, nor any alleged arrangement for the division of profits; nor responsibility for losses, and, in addition to this, there is Littman's contradiction that he had formed a partnership agreement with Zaretsky. "In an action to hold several persons liable as partners the declarations of some of the defendants as to a partnership is not evidence as to the others." Walker v. Tupper et al., 152 Pa. 1, 25 Atl. 172; Edwards v. Tracy, 62 Pa. 374. A full review of the facts necessary to prove a partnership in contemplation of law will be found in the following Pennsylvania cases: Gibbs' Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; Hallstead v. Coleman, 143 Pa. 353, 22 Atl. 977, 13 L. R. A. 370, and numerous cases cited in the authorities. The referee is clearly of opinion that the only claim that can be made by Zaretsky is as an ordinary creditor of the bankrupt estate. No testimony was taken as to his solvency or insolvency, nor was it urged on behalf of the creditors that he was a partner. The referee therefore finds that the petition to have Zaretsky declared a bankrupt should be dismissed.

Reuben O. Moon and Francis J. Maneely, for creditors.
Samuel P. Tull and Edgar C. Van Dyke, for Zaretsky.

J. B. McPHERSON, District Judge. This case illustrates admirably the value of the rule that findings of fact made by a tribunal before whom the parties and the witnesses have appeared and been examined are not to be lightly set aside. From the record now before the court, which I have read attentively from beginning to end, it is very difficult, if not impossible, to ascertain with even a fair degree of certainty what really occurred during the three or four weeks under investigation. Both Littman and Zaretsky are of foreign extraction, apparently more at home in some other tongue than English, and the stenographer's notes seem frequently to indicate either that the questions of counsel were not accurately understood, or that the witness could not command sufficient English words to express his answers with clearness. Under such circumstances, experience has shown abundantly that it is almost essential that the witness should be seen and heard in order that one may feel a reasonable confidence that the answers have been understood in the sense intended by the speaker. Without the aid of sight and hearing, a mere transcript of his words may be nearly, if not quite, unintelligible, and at the best is likely to be confusing. In the present case, however, I have been able to see with sufficient distinctness, that there is a substantial conflict of testimony upon the vital point whether there was an oral agreement of partnership between Littman and Zaretsky that should affect the distribution of the fund arising from the receiver's sale, but I have found it impossible to

conclude that the referee was clearly wrong in finding that the fact of such partnership had not been established.

His ruling upon this point must therefore be affirmed, and the order should carry with it the dismissal of the petition so far as it may concern the alleged firm of Littman & Zaretsky, or the individual interest of Zaretsky himself.

In re WISEMAN & WALLACE.

(District Court, E. D. Pennsylvania. February 14, 1908.)

No. 1,321.

BANKRUPTCY—ASSETS—ABANDONMENT BY TRUSTEE.

Prior to the bankruptcy of a firm it had recovered judgment against R., which was shown on the bankrupt's books. The account was uncollectible, and was not entered on the bankrupt's schedules, nor was anything done with it until after settlement of the bankrupt's estate, when, after the death of R.'s father, the judgment was revived and an attachment executed against his executors, which resulted in judgment against the executors. Several months after this the trustee in bankruptcy was informed of these proceedings and immediately communicated with the attorney holding the claim for collection, and the proceeds of the claim were subsequently paid to the trustee. *Held*, that the trustee was under no duty to take action either to sell or collect the judgment while it was uncollectible, and, having asserted his right to the proceeds as soon as he was informed that there was a probability of collecting it, his mere nonaction prior thereto and until after the settlement of the estate did not constitute an abandonment of the claim of the bankrupts.

In Bankruptcy. On certificate of referee concerning claim of bankrupt to assets of the estate.

Francis J. Maneely, for claimant.
Rudolph M. Schick, for trustee.

J. B. McPHERSON, District Judge. The question for decision arises upon certain undisputed facts, which are thus stated upon the brief of the claimant's counsel:

"The voluntary petition of bankrupts was filed April 9, 1902, and adjudication same day.

"Account of trustee and dividend in July, 1904.

"Horace T. Royer was indebted to bankrupts in July, 1895, in the sum of $970.33. October 30, 1895, he gave them a judgment note for $810.83, which on the same day they sent to John Faber Miller, Esq., of Norristown, to be entered of record. The account was uncollectible, and nothing more was done with it. The account was not entered on the schedule of the bankrupts, doubtless because in their opinion it was worthless.

"The books of the bankrupt were turned over to the trustee promptly after his appointment. The ledger showed this account, and on the page was noted the above facts as to the judgment note.

"In November, 1904, Dr. Lewis Royer, the father of Horace T. Royer, died, and immediately after the probate of the will the attorney, Mr. Miller, issued a sci. fa. to revive an attachment execution against the executors. This resulted in a judgment against the executors.

"On June 8, 1905, the trustee was informed of these proceedings and immediately communicated with the attorney.

"John Wiseman, the survivor of the bankrupts, claimed this account as his property, either by virtue of an assignment to him of all scheduled as-

sets, which assignment had been made by authority of the creditors, or by reason of the failure of the trustee to accept the judgment as an asset of the estate. The trustee claimed that the account had not passed by the assignment because it had not been scheduled.

"By arrangement between the trustee and the bankrupt, the trustee's name was substituted on the record of the judgment as plaintiff, and the question of title to the fund was reserved to be decided after the fund was collected.

"The amount realized from the claim after deduction of costs and Mr. Miller's fee is $1,004.38, which is in possession of the trustee.

"Mr. Wiseman now claims the fund, not on the ground that it passed to him under the assignment, but on the ground that the trustee had elected not to accept the claim as an asset of the estate, and that it had therefore reverted to the bankrupts."

The learned referee (Richard S. Hunter, Esq.) decided that the trustee had not abandoned the judgment or refused to accept it, and declined to award the fund to the claimant. I agree with this ruling, which needs little support beyond what is furnished by the facts themselves. It may perhaps be added, however, that the claimant offered no direct evidence to establish his averment that the judgment had been abandoned or declined as onerous or unprofitable to the estate, reliance being placed solely on the trustee's failure to proceed upon the judgment, and not in any degree on his affirmative conduct or declarations. This position might be sound enough, if the trustee had been called upon during the first two years of his administration to take any active step toward the collection of this debt. In that event, failure to move might be one circumstance, at least, bearing upon the question whether he had refused to accept and prosecute the claim of the estate against this particular debtor. But it will be observed that there is no evidence from which it can be found that the trustee had any reason to suppose that the judgment would repay an effort to collect it before June 8, 1905, when it is agreed that he acquired such knowledge and immediately acted upon it by communicating with the attorney in whose hands the matter had been previously placed by the bankrupts, and by taking up at once the litigation that was afterwards carried on to a successful conclusion. Indeed, as will also be observed, it does not appear satisfactorily that the trustee even knew that the judgment was in existence until he received information to that effect from the attorney who was in charge of the case. The single circumstance that the bankrupts' ledger contained a memorandum of the debt and the judgment is hardly sufficient to bring notice home to the trustee; for, without fault of his own, the memorandum might easily have escaped his attention; and when it is considered, further, that the title to the judgment passed to the trustee by operation of law at the time of the adjudication, and that the claimant was bound to prove (in order to rebut the ordinary presumption of continuing ownership) that the title had been refused or abandoned by the trustee and had therefore revested in the bankrupts, it is not perhaps without significance to note that the claimant did not ask the trustee himself whether he actually knew of the judgment, and had declined to accept title thereto, or had abandoned it afterwards. But, without laying stress on the failure to call an obviously important witness, and assuming for present purposes that the trustee had actual

knowledge of the judgment, it is material to note that the debt was concededly uncollectible until November, 1904, several months after the bankrupt estate had been closed. In view of this fact, the trustee was certainly not called upon to make any effort during the course of administering the estate to collect a debt which by the very concession would not then have repaid the cost of execution. It is true that the trustee might have sold the judgment, or even refused to have anything to do with it; but either step would have been affirmative in its nature, and there is no pretense that any affirmative act or declaration has been shown from which the trustee's refusal or abandonment can be inferred. In my opinion, neither refusal nor abandonment can be properly established by mere silence or inaction under the circumstances disclosed by the foregoing statement of facts. When there is a duty to act, either actually known to exist or legally imposed by reason of such notice as is the equivalent of knowledge in fact, failure to stir may be significant; but, when no such duty exists, mere inaction furnishes ordinarily an unsafe basis for the inference that doing nothing should be held to be as weighty as conduct.

The principal cases cited by the claimant's counsel—Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Dushane v. Beall, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; and First Nat. Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408—do not support his position, as a brief consideration will, I think, make clear. In Sparhawk v. Yerkes the controversy was over two membership seats owned by Yerkes, a bankrupt broker, on the New York and the Philadelphia Stock Exchanges. The assignee in bankruptcy knew that the seats had belonged to Yerkes and that membership had been suspended by reason of his insolvency. Other facts are thus stated in the opinion (page 13 of 142 U. S., page 106 of 12 Sup. Ct. [35 L. Ed. 915]):

"At the time of the filing of the petition in bankruptcy, November 10, 1871, and of the bankrupt's discharge, October 3, 1873, these suspended memberships were confessedly of no value to the estate and were so appraised, because no possible dividend could be paid equal to the excess of the debts due members over the then value of the memberships.

"It may be assumed that the assignees regarded the expenditure of money in the payment of annual dues and charges, and in settlement with creditor members, as not justifiable under the circumstances. At all events, for 12 years after their appointment, and 10 years after the bankrupt's discharge, they took no steps to obtain possession, and asked no assistance in that regard from either the bankrupt or the courts; made no payments to the associations and attempted no settlements with the creditor members; considered the realization of anything as substantially impracticable in view of the situation and of judicial decision; and contented themselves with the hope that masterly inactivity might enable them to assert a claim if by the efforts of the bankrupt the load of debt which weighed down the right to the seats was lifted, and in the progress of years the value of such seats happened to increase, instead of diminish.

"Nor did they seek a sale, nor to compel the creditor members to realize upon or agree to a valuation of the seats and prove only for the balance of their claims, under Rev. St. § 5075, if applicable, or otherwise to gain the benefit of such reduction as might thus be obtained, but, on the contrary, allowed these creditors to prove their debts in full, and paid dividends thereon, without objection.

"Except that they notified the exchanges of their appointment, they did nothing in the way of taking possession or of the preservation of the property, and for several years prior to the reinstatement they communicated neither with the bankrupt nor the exchanges in regard to the matter. Their conduct can be viewed in no other light than that of an election not to accept these rights as property of the estate."

Plainly this was "laches and acquiescence of the most pronounced character" (page 16 of 142 U. S., page 107 of 12 Sup. Ct. [35 L. Ed. 915]) differing materially from the situation now before the court.

Sessions v. Romadka is a similarly clear case of an active election by an assignee in bankruptcy. The following quotation from page 39 of 145 U. S., page 801 of 12 Sup. Ct. (36 L. Ed. 609), shows the ground upon which the court's decision is put:

"In this case the assignee had taken a year to wind up the estate, and had given no sign of his wish to assume this property, if, indeed, he knew of its existence. On being asked with reference to it by the proposed purchaser, he replied that the estate was all settled up, that he had no power to do anything in the matter, and that Poinier (the bankrupt) was the only one who could give a title. A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the patent, it was his duty to inquire into the matter if he had any thought of accepting it, and not to mislead the plaintiff's agent by referring him to the bankrupt as the proper person to apply to. Under the circumstances, plaintiff could do nothing but purchase of Poinier. Bearing in mind that no claim to this property is now made by the assignee, but that his alleged title to it is set up by a third person, who confessedly has no interest in it himself, it is entirely clear that the defendants ought not to prevail as against a purchaser who bought it of the bankrupt after the assignee had disclaimed any interest in it.

"Had the existence of this patent been concealed by the bankrupt, or the assignee had discovered it subsequently—after his discharge—and desired to take possession of it for the benefit of the estate, it is possible that the bankruptcy court might reopen the case and vacate the discharge for that purpose. Clark v. Clark, 17 How. 315, 15 L. Ed. 77. But it does not lie in the mouth of an alleged infringer to set up the right of the assignee as against a title from the bankrupt acquired with the consent of such assignee.

"It is quite evident from the facts stated that this patent, which seems to have been the cause of Poinier's insolvency, was thought to be of little or no value, that the assignee so regarded it, and that its real value was only discovered when the plaintiff had brought to bear upon the manufacture of the device his own skill and enterprise."

In Dushane v. Beall, 161 U. S. 516, 16 Sup. Ct. 639, 40 L. Ed. 791, the court states the general rule to be that:

"If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration, or distinct action or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in Smith v. Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052, he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the possession of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto."

The fact appearing, however, that the assignee in bankruptcy had for the first time, so far as the record disclosed, discovered on August 10, 1888, that the bankrupt had a possible or probable interest in a certain suit against a railroad company, and it appearing, further,

that the assignee had promptly taken part in the litigation and actively promoted the bankrupt's right, it was held that the court below was in error in deciding that the assignee had chosen to abandon the claim; the decision by that court having apparently been put upon the single ground that the litigation had been pending for several years before the assignee intervened, and therefore that he must be held to have abandoned the bankrupt's interest therein. The Supreme Court declared this ground to be erroneous, because there was no evidence to justify the conclusion that [the assignee] had knowledge or sufficient means of knowledge of its existence prior to August 10, 1888—a reason which may be applied with much force to the lack of evidence in the case now under consideration.

And, finally, First National Bank v. Lasater is in my opinion an authority against the claimant, rather than in his favor. The bankrupt there was entitled to recover usury paid to the bank, but did not schedule the claim among his assets or advise the trustee or the creditors of its existence, and, so far as appeared, the trustee knew nothing about the right of action from any other source. Soon after the bankrupt's discharge he put the claim in suit, and it was held that he could not recover, because the title of the trustee had not been divested, either by his act or by his neglect. Mr. Justice Brewer, speaking for the court, said, inter alia (page 118, of 196 U. S., page 208 of 25 Sup. Ct. [49 L. Ed. 408]):

"The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings; he having returned no assets to his trustee, and having failed to notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. American Fife Co. v. Garrett, 110 U. S. 288, 295, 28 L. Ed. 149, 152, 4 Sup. Ct. 90; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; Sessions v. Romadka, 145 U. S. 29, 36 L. Ed. 609, 12 Sup. Ct. 799; Dushane v. Beall, 161 U. S. 513, 40 L. Ed. 791, 16 Sup. Ct. 637. But that doctrine can have no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property."

As it seems to me, these authorities show clearly that the learned referee was right in deciding that the fund in dispute should not be awarded to the claimant.

The proceedings are therefore affirmed.

In re WEST SIDE PAPER CO.

(District Court, E. D. Pennsylvania. February 10, 1908.)

No. 2,673.

1. LANDLORD AND TENANT—DISTRESS—PARTIES.
Where a landlord did not accept the tenant's assignee as a substituted tenant, the original lessees were properly named as defendants in a distress warrant for failure to pay rent.

2. SAME—OWNERSHIP OF GOODS—WARRANT AGAINST PERSON.
A landlord's distress warrant, though really directed against the lessee, is in fact against movable property found on the leased premises, the ownership of which, as against the landlord, is in general immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1098.]

3. BANKRUPTCY—LIENS—DISTRESS PROCEEDINGS.
Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], provides that all levies or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a bankruptcy petition against him shall be void in case he is adjudged a bankrupt, and the property affected by the levy or lien shall pass to the trustee discharged of the lien, etc. *Held*, that where a landlord's distress warrant, issued as authorized by 2 Purd. Dig. (13th Ed.) p. 2174 et seq., against the lessees, was in fact levied on the goods of an assignee of the lease found on the premises within four months prior to the filing of a bankruptcy petition against the latter, such distress proceeding, though in form against the original lessees, was in fact against the bankrupts, so that the lien acquired thereby was discharged by section 67f.

4. SAME—PRIORITY—QUALIFIED PREFERENCE.
2 Purd. Dig. Pa. (13th Ed.) p. 1558, § 83, provides that goods on leased premises taken by virtue of an execution and liable to the distress of the landlord shall be liable for not to exceed one year's rent at the time of taking; and section 84 declares that after sale by the officer of any such goods he shall first pay from the proceeds the rent so due, and the surplus shall be applied to the execution. *Held* that, a landlord under such act being entitled to priority of payment out of chattels distrained for rent, such preference will be allowed in bankruptcy proceedings against the owner of the chattels as a preferred claim, within Bankr. Act July 1, 1898, c. 541, § 64b, cl. 5, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing for payment of debts owing to any person who by the laws of the states is entitled to priority.

In Bankruptcy. On certificate of referee concerning claim of landlord to priority.

Francis G. Gallagher, for claimant.
Charles Sinkler, for trustee.

J. B. McPHERSON, District Judge. The learned referee (Joseph Mellors, Esq.) refused to allow the landlord to be first paid out of the proceeds of certain personal property upon which he had distrained previous to the filing of the petition in bankruptcy. The distress, which was for six months' rent, was stayed by the court. The property was sold by the trustee, and the referee postponed the landlord to the costs of the proceeding and to wages due to workmen, holding that Act July 1, 1898, c. 541, § 64b, cls. 3, 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], gave precedence to claims arising thereunder. To this rul-

ing the landlord objected, asserting that he had obtained a valid lien by his distraint, to which the trustee's title was subordinate.

The distress was levied on November 27, 1906, the day before the petition in bankruptcy was filed and the adjudication was entered, and there is no doubt that a lien was acquired by the levy and that (if nothing else is to be considered except these facts) the trustee's title, which is no better than the bankrupt's, was subject to the lien and could only be made fruitful after the landlord had been fully satisfied. But there is a most important matter to be considered before the landlord's position can be agreed to, namely, the bankrupt act itself, which has not overlooked the possibility that liens of apparent validity might have been acquired against a bankrupt's property during four months preceding the filing of a petition against him, and has made careful provision concerning their ultimate validity and effect. At present it is only necessary to refer to paragraph "f" of section 67, which declares:

"That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt," etc.

This language includes a lien such as was acquired by the levy under consideration (Re Dougherty Co. [D. C.] 109 Fed. 480); and, since the lien was obtained through legal proceedings that were taken under the Pennsylvania statutes (2 Purd. Dig. [13th Ed.] p. 2174 et seq.), and was acquired within four months preceding November 28th, it is expressly made null and void, and can furnish no support for any claim whatever against the bankrupt estate. I am speaking now solely of the lien acquired by the levy, and am not referring to such support as the act of 1836, to which I shall advert in a moment, may offer to a qualified claim for payment in full. As I understand the argument on behalf of the landlord, the general proposition is accepted that a lien acquired by distraint within four months of the bankruptcy is avoided by paragraph "f" of section 67; but it is insisted that this paragraph must be confined to its precise terms, and that a lien is not obnoxious thereto unless it has been acquired by proceedings against a person who is insolvent—that is (as the rest of the paragraph shows), against the person who is afterwards adjudged a bankrupt. Therefore, the argument proceeds, the lien in controversy is not affected by the act, because it was acquired by a legal proceeding against perfectly solvent persons, who have not been adjudged bankrupt, and, indeed, have not been petitioned against at all.

Upon this point the facts necessary to understand the argument are briefly these: The landlord leased certain real estate to MacAlpin & Son, by whom the lease was lawfully assigned to the bankrupt corporation. The landlord, however, did not accept the paper company as a substituted tenant, although he knew that the assignment had taken place and that the bankrupt had gone into possession, but preserved his right to hold the original lessees for the rent. The dis-

tress warrant was directed against MacAlpin & Son, by name, but was levied, not upon their goods, but solely upon the personal property of the paper company; this being found upon the demised premises. At the time of the levy the company was insolvent, while it is agreed that both the original lessees were solvent persons. It will be seen, therefore, that the success of the landlord's contention that his lien is not affected by section 67 depends entirely upon his ability to convince the court that the lien was acquired, not by proceedings against the insolvent corporation at all, but by proceedings against MacAlpin & Son, who are agreed to be financially responsible. But, in my opinion, this contention cannot be sustained. It is true that the warrant of distress is directed against MacAlpin & Son by name, thus making them formal defendants; but they were defendants in form only although it was perfectly proper to name them in the warrant, for they were the original tenants, and were still bound by their express agreement to pay the rent, and such of their property as might be found upon the demised premises was liable to seizure and sale in satisfaction of the landlord's claim. But a landlord's warrant is not really directed against a person, but against movable property found upon a definite piece of ground, and it makes no difference to the landlord who may be the owner (with certain exceptions not now material), as long as the goods are discovered upon the demised premises. 9 Am. & Eng. Ency. Law (2d Ed.) 618, 619; 24 Cyc. 1280, E. In the present case, the bankrupt's property was upon the land, and the landlord seized it, as he had a right to seize it, merely because it was in that particular place, and not because it had any connection with the persons formally named in the warrant. The levy was not upon property belonging to MacAlpin & Son, but to the bankrupt, and, as this property was liable to distress simply because it was upon the landlord's ground, it seems clear that the proceedings were in substance and in reality directed against the bankrupt itself, and not against MacAlpin & Son at all, save in a merely nominal sense. I think, therefore, as I have already stated, that the lien of the levy was a lien acquired through legal proceedings against the bankrupt, and is avoided by the paragraph heretofore quoted.

But, while the bankrupt act makes ineffectual the claimant's attempt to acquire a lien by levy, nevertheless his right to a qualified priority rests upon a satisfactory foundation, although his claim to be paid in full out of the fund before any other person whatever cannot be sustained. His right to a qualified priority rests upon sections 83 and 84 of the Pennsylvania statute of June 16, 1836 (P. L. 777; 2 Purd. Dig. [13th Ed.] p. 1558, note "m"), which provide as follows:

"Sec. 83. The goods and chattels being in or 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 taking such goods in execution: Provided, that such rent shall not exceed one year's rent.

"Sec. 84. After the sale by the officer of any goods or chattels as aforesaid, he shall first pay out of the proceeds of such sale the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution," etc.

Under these provisions it was held by the Supreme Court of the United States, in Longstreth v. Pennock, 20 Wall. (U. S.) 575, 22 L. Ed. 451 (1874), that where an assignee in bankruptcy under the act of 1867 seized goods that were upon the demised premises and were liable to distress, the seizure so far resembled a levy under execution as to be within the equity of the Pennsylvania statute, and therefore that the landlord was entitled to be paid in full out of the fund derived from a sale of the goods before a dividend should be paid to creditors generally. Judge Cadwalader had made a similar ruling in this district several years before (1868) in Re Appold, Fed. Cas. No. 499, 1 Nat. Bkcy. Reg., folio page 178; and this ruling was followed under the present act in Re Gerson, 8 Pa. Dist. R. 277, where a careful discussion of the subject by a very capable referee (the late Joseph Mason) may be read with advantage. See, also, Re Hoover (D. C.) 113 Fed. 136 (Buffington, D. J.); Wilson v. Penna. Trust Co., 114 Fed. 742, 54 C. C. A. 374; Re Mitchell (D. C.) 116 Fed. 87 (Bradford, D. J.); and Re Duble (D. C.) 117 Fed. 794 (Archbald, D. J.).

By virtue, therefore, of the Pennsylvania statute, a landlord is entitled to priority of payment not exceeding the rent for one year, and this preference will be recognized by a court of bankruptcy in obedience to the direction of section 64b (5). But, as the claim to priority in the federal court can only be allowed because the bankrupt act, and not the Pennsylvania statute, proprio vigore, requires such an allowance, it follows that the landlord must urge his claim in subordination to the federal act, and can only be paid in full after certain other claims, which the act has declared to be higher in right, have been first discharged. These are specified in section 64b, and among them are: "(3) the cost of administration," etc.; "(4) wages due," etc.—both classes being made superior to the landlord's claim for rent, which takes rank under clause 5. The exact point arose recently in this district in Re Consumers' Coffee Co. (D. C.) 151 Fed. 933, and was decided against the position now taken by the claimant.

The decision of the referee is affirmed.

[Per contra, see In re Morris, 159 Fed. 591.—Ed.]

PRESCOTT v. WILLIAMSPORT & N. B. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. February 11, 1908.)

No. 24.

1. LOST INSTRUMENTS—ACTIONS ON—EQUITY JURISDICTION.

Equity courts have jurisdiction to establish lost instruments, not being deprived thereof because law courts have assumed or have been given by statute the same jurisdiction. They have jurisdiction especially in cases of negotiable instruments lost before maturity, and, upon assuming jurisdiction, complete relief will be afforded, even to the extent of authorizing a recovery for principal and interest, upon the execution of an indemnity to secure defendant against further liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lost Instruments, § 29.]

2. BONDS—"SPECIALTY" DEFINED.
A "specialty" is a bond, or the coupon originally attached to it, though the latter be unsealed and detached for the purpose of demand of payment and action.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6597-6598; vol. 8, p. 7803.]

3. LIMITATION OF ACTIONS—SUIT ON BOND COUPONS.
A suit on bond coupons is governed by the statute of limitations applicable to sealed instruments, and not that applicable to simple contract debts.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 104, 108-111.]

4. LOST INSTRUMENTS—BONDS—RIGHT TO RECOVER ON—INDEMNITY.
Recovery may be had on lost bonds without their production; defendant being properly protected by the entry of an indemnity bond against future liability.
[Ed. Note.—For case in point, see Cent. Dig. vol. 33, Lost Instruments, §§ 41-45.]

5. BONDS—SUIT ON BEFORE MATURITY—RIGHT TO BRING.
Where, before maturity, a total bond issue, excepting eight lost bonds owned by complainant, has been paid off or exchanged for other bonds, and the mortgage securing the issue has been satisfied, complainant may recover on his bonds, though on their face they are not due; the destruction of complainant's security by the satisfaction of the mortgage being, in effect, a declaration by the obligor and the trustee that they elected to regard the bonds due and stood ready to pay to them, in which complainant could acquiesce.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 134.]

6. LOST INSTRUMENTS—RECOVERY ON—INTEREST—OVERDUE COUPONS.
In a suit to recover on lost bonds, complainant cannot recover interest on overdue coupons which were not presented for payment and which became overdue because complainant's agent negligently lost them, where so far as the record shows defendants were ready and willing to pay the interest when it was due.

In Equity.

Francis Rawle, for complainant.
J. W. Bayard and J. G. Johnson, for respondent.

HOLLAND, District Judge. This is a bill in equity filed for the purpose of recovering the principal and interest of eight bonds, each for $1,000, which were lost on the 5th day of November, 1884, together with all the coupons attached, including those due May 1, 1885. Answers were filed by both defendants, to which the complainant replied. From the pleadings and proofs we gather the following facts:

On or about the 1st day of November, 1882, the Williamsport & North Branch Railroad Company executed and delivered a certain indenture of mortgage upon its railroad and property to the Fidelity Trust Company (then called the Fidelity Insurance, Trust & Safe Deposit Company) in trust to secure the payment of an issue of 1,000 bonds of the Williamsport & North Branch Railroad Company, of the denomination of $1,000 each. It was duly recorded in Lycoming county, Pa., in Mortgage Book No. 13, page 392. The bonds were issued November 1, 1882, and were made payable on the 1st day of November, 1912, with interest thereon at the rate of 6 per cent. per annum,

payable semiannually, in two payments, on the 1st day of May and November of every year until maturity, upon the surrender of the respective interest coupons attached thereto. Both the principal and interest coupons were made payable by the terms of the bonds and the coupons at the office of the Fidelity Trust Company in Philadelphia. Oliver Prescott, the father of the complainant, became the lawful owner of eight bonds, numbered 88 to 95, both inclusive, each of which had attached thereto all the unmatured interest coupons, beginning with the one due May 1, 1885. He continued to be the lawful owner of these bonds and coupons until the day of his death, which occurred on the 11th day of June, 1890. His will was duly probated in Bristol county, Mass., on the 5th day of July, 1890, and letters testamentary thereon granted to William W. Crapo, Oliver Prescott, Jr., and Helen H. Prescott, which executors, on the 13th day of August, 1902, transferred the entire ownership of principal and interest in these bonds to complainant.

The bonds, it appears, were lost on November 13, 1884, the very day of their delivery, by Abel Prescott, a brother and agent of Oliver Prescott, who had received them from a contractor in Philadelphia and lost them before leaving the city. Nothing has ever been known of the bonds or coupons since that time. None of them has ever been presented for payment to either of the defendants. Efforts were immediately made to recover the lost bonds by advertising in the newspapers in Philadelphia, Williamsport, and New York, beginning with the advertisement in the Public Ledger of Philadelphia as early as November 15, 1884, and notice of the loss was directly communicated to the officers of the railroad company and the Fidelity Company in the same year. The bonds were not registered, and were made payable to the bearer on November 1, 1912, etc. To each of the bonds were attached coupons, signed on behalf of the railroad by its secretary, to pay to bearer, at the office of the Fidelity Insurance, Trust & Safe Deposit Company (now the Fidelity Trust Company), in the city of Philadelphia, at the several dates specified, six months' interest on such coupon. Each contained a stipulation that it should "pass by delivery," except in case of registration; but the registration should "not restrain the negotiability of the coupons by delivery merely." On October 31, 1892, the total bond issue secured by this mortgage, excepting these eight lost bonds, was paid off or exchanged for other bonds of another issue of the Williamsport & North Branch Railroad Company, and satisfaction was entered on the mortgage by the trustee on November 14, 1892. The railroad company executed another mortgage upon this property to secure the payment of other bonds, which is still of record unsatisfied. Sixteen bonds of the new issue were retained by the trustee as security against liability for the lost bonds. Subsequently, on May 28, 1901, there was substituted for these bonds an indemnity bond, executed by the railroad company and the American Surety Company of New York.

The relief sought is (1) a decree that the complainant is the owner of the eight bonds, with the interest coupons dated May 1, 1885, and all subsequent interest coupons thereto respectively belonging; (2) the

railroad company and trustee, upon being first indemnified, be ordered and decreed to pay the complainant the sum of $8,000 in full payment of the principal of the lost bonds, together with the additional sum representing all interest thereon at the rate of 6 per cent. per annum from November 1, 1884, to the date of such payment; (3) interest on overdue coupons. This last claim was urged at the argument of the case under the prayer for general relief.

The trustee, in its answer, admits the execution and delivery of the first mortgage, and that subsequently all bonds secured by this mortgage were duly exhibited to it, excepting the eight lost bonds in question, and upon being indemnified by the railroad company entered satisfaction on the mortgage; that a new mortgage was subsequently executed by the railroad company to the trustee; and that no demand was ever made for the payment of the eight bonds. The trustee, being without knowledge, declined to make further answer. The defenses interposed by the railroad company in its answer are (1) neither principal nor interest upon the bonds can be collected in the present suit, but that the complainant's remedy, if any he has, is at common law; (2) that outside of the coupons the holder of bonds has no right to collect interest, and that all the coupons on these lost bonds which matured antecedently to the 1st day of November, 1898, are barred by the statute of limitations and are not collectible; (3) that there is no right in the complainant to demand payment of the coupons attached to the bonds only upon their production to the trustee, where they are made payable; (4) the lost bonds are payable only upon their production, that no production or presentation of the bonds has ever been made, that they have not matured, and that payment cannot be demanded until such production or maturity.

First. It is well settled that courts of equity have jurisdiction to establish lost instruments, and they are not deprived of jurisdiction by reason of the fact that courts of law have assumed, or by statute have been given, the same jurisdiction, and especially have courts of equity jurisdiction in cases of negotiable instruments lost before maturity (25 Cyc. 1609; Bispham's Equity [6th Ed.] § 177), and upon assuming jurisdiction complete relief will be afforded, even to the extent of authorizing a recovery for principal and interest upon the execution of an indemnity to secure defendant against any future liability (25 Cyc. 1611; Bispham's Equity [6th Ed.] § 177; Snyder v. Wolfley, 8 Serg. & R. [Pa.] 328; Bisbing v. Graham, 14 Pa. 14, 53 Am. Dec. 510; Reisinger v. Magee, 158 Pa. 280, 27 Atl. 962).

Second. The law of limitation of actions is thus stated in 25 Cyc. 1035: Coupons detached from the bonds to which they were formerly annexed retain the same nature and character, and do not thereby become simple contract debts, and as to the period of limitation are governed by the same statute as other sealed instruments. This proposition is sustained by the following federal authorities: Burton v. Koshkoning (C. C.) 4 Fed. 373; Kershaw v. Hancock (C. C.) 10 Fed. 541; City v. Lamson, 76 U. S. 477, 19 L. Ed. 725; City v. Butler, 81 U. S. 282, 20 L. Ed. 809. The law of limitations applicable in this case is the Pennsylvania act, and the six-year limitation applies only to actions "upon any lending or contract without spe-

cialty". By "specialty" is meant a bond (Penrose v. King, 1 Yeates [Pa.] 344; Gardiner Estate, 18 Wkly. Notes Cas. 148), or the coupon originally attached to it, though the latter be unsealed and cut off from the bond for the purpose of demand of payment and action (Helmbold v. Railroad Co., 14 Wkly. Notes Cas. 128; Philadelphia Trust Co. v. Philadelphia & Erie Railroad, 160 Pa. 590, 28 Atl. 960). The authorities, we think, sustain the complainant's right to recover for all the coupons.

Third and Fourth. The objection that neither the bonds nor coupons have ever been produced, and there can be no recovery without their production, cannot be seriously considered, because it might be that they could never be found and no recovery could ever be had. Nothing has been shown in this case to take it out of the general rule of allowing a recovery on lost instruments without their production. The defendant can be properly protected by the entry of an indemnity bond against any future liability. The fact that the bonds were made payable in 1912, and are therefore upon their face not yet due, cannot avail as a defense. The defendants, by their own act, destroyed complainant's security by satisfying the mortgage. This, in effect, was a declaration on defendants' part that they elected to regard the bonds due upon that date, and stood ready to pay them. Complainant had a right to acquiesce and demand his money, which he has done by bringing suit to recover the amount, and he is entitled to judgment upon indemnifying the defendants against loss.

Fifth. We do not think the complainant is entitled to recover interest on overdue coupons. It is no fault of the defendants that the overdue coupons were not paid. They were not presented for payment, and not refused. They are overdue on account of the owner of the bonds, through his agent, negligently permitting them to be lost. The defendants are in no way responsible, and should, therefore, not be required to pay compound interest. So far as the record shows, they were ready and willing to pay the interest on these bonds at the time it was due, and the fact that they are not now paid is no fault of theirs. North Penna. R. R. Co. v. Adams, 54 Pa. 95, 93 Am. Dec. 677.

The complainant is entitled to a decree in his favor in accordance with this opinion; but he will first be required to properly indemnify the defendants by a bond executed in their favor, satisfactory to them. Counsel will prepare a decree in accordance herewith and submit it to the court.

VAN RAALT et al. v. SCHNECK.

(Circuit Court, E. D. Wisconsin. January 27, 1908.)

1. TRADE-MARKS—INFRINGEMENT—INJUNCTION.

Complainants, packers of Holland herring in the Netherlands, arranged with S., a fish broker in Milwaukee, to handle such herring under the supervision of B. & Co., complainants' Western representatives. B. & Co. suggested that the herring sold by S. should be identified by a brand; the word "Globe" being selected for that purpose with complainants' consent. In 1903 S. sold the business to defendant, who continued to use the "Globe" brand until 1904, when complainants changed their brokers and consigned

their fish to K., when they discontinued the use of the "Globe" brand. Defendant, believing that the symbol belonged to him, registered it as a trade-mark in the Netherlands and applied for registration at Washington, when complainants filed an interference and were entitled to priority, but registration was denied because of prior registration by defendant, who thereupon disclaimed all title to the symbol and ceased to use it, also renouncing any claim under the Netherlands registration; nor was there any proof that defendant, after such disclaimer, ever sold any Holland herring under that name. *Held* insufficient to justify an injunction restraining defendant from infringing complainants' right to such symbol.

2. SAME—ACCOUNTING—EQUITY.

Where, in a suit to restrain infringement of a trade symbol, complainant was not entitled to an injunction, equity would not retain jurisdiction for a naked accounting of profits and damages; complainant's remedy at law being adequate and complete.

In Equity.

This is a suit in equity for unfair competition in trade and the infringement of a trade symbol. The bill was filed in July, 1906. Prayer for injunction and accounting. The complainants are dealers in fish, who reside in the Netherlands, and are engaged in importing fish to America. It is alleged that, the complainants desiring to build up a trade in Milwaukee and vicinity in Holland herring, one of the members of the firm visited this country in 1900 and made arrangements with one Selle, a fish broker at Milwaukee, to handle the Holland herring packed by them. Boak & Co., of Chicago, also brokers, handled the output of the complainants in Chicago, and had also a supervision over the Milwaukee trade. The fish were sold outright by the complainants, but under a trade arrangement Selle was obliged to account to Boak & Co. for a share of the profits of the business. Boak & Co., as the immediate representatives of the complainants, suggested to Selle that he ought to have a particular brand under which he might work up a trade, and proposed that he adopt a symbol that Boak & Co. prepared, and which was called the "Globe" brand. No fish had theretofore been sold by the complainants under this symbol. By mutual agreement between Boak & Co. and Selle, this brand was adopted to be used in the Milwaukee business, and complainants assented to the arrangement. In 1902 Selle sold an interest in his brokerage business to the defendant, who afterwards continued to use the Globe brand and built up a considerable business in Milwaukee and vicinity. In 1903 Selle sold out his interest in the firm to the defendant, who continued the business and the use of the Globe brand until 1904, when the complainants changed their brokers and consigned their fish to one Kuehn, another Milwaukee broker. Selle testified that he supposed in good faith that the Globe brand belonged to him, and so informed the defendant, who supposed, as he avers, that this symbol passed to him with other assets of the business.

When the complainants began shipping their fish to Kuehn, they discontinued the use of the Globe brand, and thereafter the Holland herring of the complainants were sold under an "O. K." brand which belonged to Kuehn. Defendant during a visit abroad met the complainants, and was assured by them that he was the only party in the West who received shipments of Holland herring under the Globe brand. In the letters to Selle and to defendant, frequent reference is made to the Globe brand as "your Globe." Under the supposition that the symbol belonged to him, defendant applied for and secured registration of the same as a trade-mark in the Netherlands, and then applied for the registration of such trade-mark at Washington. When the attention of complainants was drawn to the fact of registration, they made application to the Patent Office at Washington in their own behalf to register this symbol as a trade-mark. Thereupon an interference was declared in the Patent Office. Proofs were taken, and complainants were held entitled to priority; but no registration could be given to them under the rules because of the prior registration by the defendant. As soon as the decision in the interference proceeding was announced, in April, 1905, defendant disclaimed

all title to the symbol, and ceased to use the same, and never has used it since that time. He also, at the request of complainants, signed a paper renouncing any claim under the Netherland registration and authorizing the cancellation of the same.

After this disclaimer and abandonment, some 15 months elapsed before this bill was filed, during which time there was no actual or threatened invasion by the defendant; nor is it contended that up to the present time there has been any infringement or threat of infringement. The only proof of any infringement is that the defendant, when a witness in the interference proceedings, admitted that between August, 1904, and April, 1905, he sold a small amount of Norwegian herring and some other fish under this brand. No Holland herring were so sold. There is no proof that complainants dealt in Milwaukee or vicinity in any other variety of fish except Holland herring.

Victor M. Harding, for complainants.
Mark A. Kline, for defendant.

QUARLES, District Judge (after stating the facts as above). The record in this case is crude and unsatisfactory, resulting largely from the fact that the defendant was not able to employ an attorney and has undertaken to manage his own case. The result was what might have been expected when one party is represented by shrewd counsel and the other side is without professional guidance or protection. The efforts of defendant to cross-examine were thwarted by technical objections, while the rules of evidence were not scrupulously observed in shaping up the complainants' proofs. No evidence was offered before the master by the defense. Subsequent to the closing of proofs a stipulation was entered into admitting in evidence all the proofs taken in the interference proceeding.

This case is sui generis. It is not the ordinary case where a trader has, by the use of a uniform brand or symbol, built up a large demand for his product, whose character and genuineness are attested by his trade emblem. On the other hand, this symbol was specially adopted and prepared for use by Mr. Selle in the Milwaukee territory. It was designed by Boak & Co., the representatives of complainants, after Selle had agreed to handle complainants' product in Milwaukee. It was then sent on to Selle for his approval, and afterwards transmitted to the complainants, who prepared the brands and sent them on to Selle. The two brands intended for the Milwaukee market were called the "Globe" and the "Banner," and the Globe were to be used on the superior quality of goods. It appears to have been the policy of the complainants to give any broker handling their goods one or two brands under which he was expected to build up a trade. Thus it appears that complainants were using some 12 to 15 other brands in various territories of the United States. The same quality of fish was shipped under various brands. For instance, the "Flag" brand and the "Globe" brand were used indiscriminately. Therefore whatever of value the symbol acquired in the Milwaukee market was directly attributable to the efforts of Selle and the defendant in advertising and selling complainants' product.

Another distinguishing feature in the case is that the defendant is not charged with imitating or simulating a well-known trade-name for the purpose of pirating an established business. The use of the

Globe brand by the defendant was entirely regular and proper up to 1904, when the complainants transferred their business to another broker in Milwaukee. The only infringement alleged consists in selling a small quantity of Norwegian herring, and some other kinds of fish under this symbol between August, 1904, and April, 1905, while the question to the title to the trade-name was pending in the Patent Office. The defendant contested the interference case because he claims that he supposed in good faith that he was entitled to the symbol. In my opinion this is not a case calling for injunctive relief. The peculiar facts disclosed by the evidence may well have induced the belief in the mind of the defendant, who was ignorant of the law, that the symbol specially designed for his territory and exclusively used by him and his predecessor was an appurtenance of the business.

The disclaimer by the defendant in April, 1905, upon the adverse decision of the Patent Office, appears to have been made in the utmost good faith. This was evidenced by his willingness to release all claim to the foreign registration. It appears that he signed such a release submitted to him by complainants' attorney. Furthermore, he ceased absolutely to use the symbol for about 15 months before the bill was filed. Over 2½ years have now elapsed since the decision of the Patent Office, and there has been no actual or threatened invasion of complainants' rights. Under such circumstances, it is difficult to see why complainants have not had everything that an injunction could confer. Kane v. Huggins (C. C.) 44 Fed. 287; Brammer v. Jones, 3 Fisher, Pat. Cas. 340, Fed. Cas. No. 1,806; Brennan v. Emery-Bird-Thayer Dry Goods Co. (C. C.) 99 Fed. 971. In Clark Thread Co. v. Clark Co., 55 N. J. Eq. 658, 37 Atl. 599, the court say:

"The principle upon which the injunction goes is that the defendant was a wrongdoer when the bill was filed, and, having been a wrongdoer once, he may be so again," etc.

It is strenuously urged in argument that, although denying the injunction, equity would retain jurisdiction for the purpose of an accounting. But this contention has been set at rest by the Supreme Court in Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, where the court say:

"Our conclusion is that a bill in equity for a naked accounting of profits and damages against an infringer of a patent cannot be sustained," etc.

If complainants have suffered damage by act of defendant, there is a complete and adequate remedy at law. It is unnecessary to discuss the numerous authorities cited by complainants' counsel. We have carefully examined them all, and find peculiar circumstances which differentiate them from the case at bar.

It is doubtful whether the proof shows any substantial loss or damage resulting from alleged infringement which would warrant an accounting. It appears that complainants' herring have been sold since August, 1904, in Milwaukee by Kuehn under the "O. K." brand, and that their business has been constantly increasing; but I am inclined to rest the case on the proposition that the proofs do not warrant equitable interference by means of injunction.

For these reasons, the bill will be dismissed, without prejudice to the right of complainants to institute a suit at law for damages, if so advised.

In re RUOS.

(District Court, E. D. Pennsylvania. February 27, 1908.)

No. 1,093.

1. WITNESSES—ATTORNEYS—PRIVILEGE.

An attorney's privilege only extends to confidential communications between him and his client, and does not entitle the attorney to refuse to identify documents which he has witnessed, nor to testify with reference to facts concerning which he obtained knowledge from third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 759, 762.]

2. BANKRUPTCY—JURISDICTION OF REFEREE—RULINGS ON EVIDENCE.

Where, in a proceeding before a referee in bankruptcy, a question arises concerning the competency of a witness or the admissibility of evidence, the referee should decide the question in the first instance, and should not certify the question to the court until requested to do so in a proper manner.

In Bankruptcy. On certificate of referee concerning refusal of witness to answer.

John C. Swartley and William Stuckert, for trustee.
Francis Shunk Brown and Webster Grim, for bankrupt.

J. B. McPHERSON, District Judge. The question certified by the referee calls upon the court to determine whether the privilege that protects confidential communications between attorney and client justified the witness in refusing to answer certain questions that were asked during the course of his examination. The referee has been engaged in an effort to discover the whereabouts of the bankrupt's estate, having been directed to examine the bankrupt and other witnesses for this purpose. In order to understand the situation now presented, it is necessary to state briefly the facts out of which the controversy arises: The bankrupt was a merchant, dealing (among other articles) in agricultural implements, and Adriance, Platt & Co. are manufacturers of such implements, who had made consignments thereof to the bankrupt as their agent or factor. When the petition was filed and the adjudication was entered, in September, 1901, the bankrupt owed several thousand dollars upon this consignment account, and the consignors were pressing for payment. The claim was in the hands of Thomas Ross, a member of the Bucks county bar, and he is the witness who has refused to answer the questions hereafter quoted, that were put to him by the counsel for the trustee. Other facts relevant to the present dispute are thus stated by the learned referee:

"Henry D. Ruos testified: That shortly after execution was issued against him on September 4, 1901, an agent from Adriance, Platt & Co. called on him and threatened him with arrest if he did not pay the money which was due them on a consignment account, amounting to about $6,000. That on Sep-

tember 6 or 7, 1901, he consulted Robert M. Yardley, Esq. (now deceased), his counsel, in relation to the matter, and paid him (Yardley) the sum of $4,000 in cash 'for any thing that might turn up,' and told Mr. Yardley to use his own judgment about this money. This $4,000 was secured from the sales of his stock in the general course of business.

"That he was afterwards arrested at the instance of Adriance, Platt & Co., on the charge of embezzlement as consignee, and the case returned to court, but that he was not tried, and that the case had been settled. That after he had been arrested he did not tell Mr. Yardley to pay the money he had given him to his prosecuting creditors. That he does not know of his own knowledge what was done with this money, or if any of it was paid to Adriance, Platt & Co. in settlement of their claim against him. He was not called on afterwards to pay any more money to them, but that Mr. Yardley had subsequently told him 'it had been fixed,' and had given him to understand that the money he had given had been used in settlement of the criminal prosecution against him. The bankrupt also testified that the reason he did not present this evidence at former examinations was that Mr. Yardley had advised him not to say anything about it, inasmuch as the Adriance, Platt & Co. claim was a consignment account. The bankrupt's schedules withheld the information that he had placed the sum of $4,000 in Mr. Yardley's hands, which he says was done under advice of counsel.

"Joseph A. Ruos testified: That on or about September 8, 1901, a Mr. Pulsifer came to see him in relation to the account due from the bankrupt to Adriance, Platt & Co., and that he (Pulsifer) stated that unless the same was paid the bankrupt would be arrested. That on or about the day the bankrupt was arrested he told Mr. Yardley at his office what Pulsifer had told him and then Mr. Yardley went to his safe and gave him (Joseph A. Ruos) the sum of $3,900 in cash in an envelope, and told him the Adriance, Platt & Co. claim had better be settled. That he took the $3,900 and gave it to Mr. Brock, who sealed the envolope and placed it in a vault in the Doylestown National Bank. He subsequently consulted Henry Lear, Esq., who advised him that the Adriance, Platt & Co. claim or contract was a consignment account, and the money belonged to them. That a year or more afterwards he received the said envelope and money from Mr. Brock, and paid to Adriance, Platt & Co., or their representatives, between $3,000 and $3,500 of the $3,900, and retained the balance. He could not fix the exact amount that was paid or the time, other than it was some time after Henry D. Ruos had been declared a bankrupt. Questioned as to whether or not the Adriance, Platt & Co. claim had been assigned to him, he stated he did not know how the matter had been fixed, and refused to answer whether or not he received the first dividend on the bankrupt's estate on the Adriance, Platt & Co. claim.

"From this testimony it is evident that the bankrupt or his agents, a year or more after he had been adjudicated a bankrupt, disbursed $4,000 taken from his business, of which sum between $3,000 and $3,500 was paid in settlement of a claim and criminal prosecution against him, and that the balance, between $750 and $900, remains in the hands of Joseph A. Ruos. * * *

"In contradiction of the above testimony that the claim of Adriance, Platt & Co. was paid by the bankrupt, Mr. Stuckert, the attorney for the trustee, called George G. Mills, to show that he (Mills) settled the claim, and not the bankrupt; but the witness declared he never heard of this claim, did not pay any money in the purchase or settlement of the same, and disclaimed any knowledge in relation to the matter whatever. The attorney for the trustee thereupon called Thomas Ross, Esq., to prove that he (Ross) was the attorney for Adriance, Platt & Co., that as attorney the witness made a settlement of the claim after the bankrupt had been arrested, and that the sum of $3,150 was paid to Adriance, Platt & Co. in purchase of the claim. Mr. Ross refused to testify at all in relation to the matter because of his professional relation with Adriance, Platt & Co., and, after declining to answer the questions of Mr. Stuckert, the attorney for the trustee, Mr. Stuckert moved that the testimony of the witness be certified to this court for action thereupon to determine whether or not the said witness was guilty of contempt and should be compelled to answer, which motion was granted by the referee, and said question has been this day certified to the court for its opinion thereon."

In support of the theory that the bankrupt's money had been used to settle the claim—the name of one George G. Mills having been used as a mere cover—the two papers following were exhibited to Mr. Ross:

"Exhibit F.

"Doylestown, Pa., May 21, 1902.

"It is hereby agreed as follows:

"Adriance, Platt & Company agree to sell to George G. Mills their claim against Henry D. Ruos, bankrupt, consisting of two promissory notes and check aggregating five thousand five hundred and seventy-nine dollars and ninety-eight cents ($5,579.98) for the price or sum of three thousand one hundred and fifty dollars ($3,150). This sale is made without recourse to Adriance, Platt & Company.

"George G. Mills hereby agrees to buy said claim for the price aforesaid and pay for the same $1,500 in cash and the balance on or before September 1st, 1902, with lawful interest; the said Mills to execute a promissory note for the deferred payment. It is further agreed that the said Mills shall have the right to use the name of Adriance, Platt & Company in collecting any dividend in bankruptcy on said claim, protecting and indemnifying Adriance, Platt & Company from all liability for costs; or, if said Mills desires it, Adriance, Platt & Company, through their attorney, will collect any dividend in bankruptcy and pay same over to Mills without any counsel fee or charge for collection.

"Witness our hands and seals the day and year first aforesaid.

"Signed, sealed and delivered in the presence of (as to Pulsifer) Thos. Ross.

"Adriance, Platt & Co. [Seal.]

"H. D. Pulsifer, Genl. Agt.

"_____. [Seal.]

"Received May 21, 1902, of George G. Mills, fifteen hundred dollars, first payment on account of above contract as stipulated for.

"Adriance, Platt & Co.,

"H. D. Pulsifer, Genl. Agt.

"Received May 29, 1902, of George G. Mills, twelve hundred and fifty dollars on account of the amount mentioned in above agreement.

"Thos. Ross,

"Atty. for Adriance, Platt & Co.

"June 25, 1902, $400, balance principal of contract & $2. interest—$402 paid.

"Ross, Atty."

"Exhibit H.

"It is hereby stipulated and agreed that a general release executed and delivered by Joseph A. Ruos and Henry D. Ruos to Adriance, Platt & Co., dated the 24th day of September, 1902, does not affect the right of the said Joseph A. Ruos to receive from Adriance, Platt & Co. all dividends and sums of money received from the bankrupt estate of the said Henry D. Ruos on the claims of the said Adriance, Platt & Co. against the said Henry D. Ruos, in pursuance of a former agreement made between the said Joseph A. Ruos and the said Adriance, Platt & Co. All dividends and sums of money received by the said Adriance, Platt & Co. from the estate of Henry D. Ruos are to be paid over to the said Joseph A. Ruos as if the said general release above referred to had not been executed and delivered.

"Thos. Ross,

"Atty. for Adriance, Platt & Co.

"September 24, 1902."

A check of $418.35 (Exhibit I), dated June 25, 1902, to the order of Mr. Ross as attorney, in payment of a dividend awarded out of the bankrupt estate to Adriance, Platt & Co., and indorsed by Mr. Ross, was also offered, and it was proposed to ask whether he paid the money received upon the check to George G. Mills, or to Joseph A. Ruos, or to the bankrupt.

With these facts in mind, it is easy to appreciate the bearing of the following questions asked by counsel for the trustee, to all of which the witness refused to answer:

"How much money was paid to the Adriance-Platt people in the settlement of their claim?

"Did you receive any money in the settlement of that claim, and, if so, how much?

"Just look at that paper, Mr. Ross (Exhibit F shown witness). Mr. Ross, is that a paper that was executed in your presence?

"Is that your signature as a witness?

"Is that your signature to a receipt?

"Receipt dated May 29, 1902. Is that your signature to that receipt?

"Mr. Ross, I show you paper marked 'G,' and call your attention to a receipt of June 25, 1902, for $400 balance of principal and $2 interest—$402 paid Ross, attorney. Have you the original of that, or do you know where it is?

"Did you receive $400 on account of the claim of Adriance, Platt & Co. on June 25, 1902?

"Mr. Ross, I show you a paper marked 'H.' Is that your signature at the bottom of that paper?

"Mr. Ross, I want to show you a check (check marked 'I' shown witness). Is that your indorsement on that check?

"Did you receive upon that check the sum of $418.35 from the trustee, J. T. Search?

"Did you pay any money that you received on account of that check to George G. Mills, or to Henry D. Ruos, or to Joseph A. Ruos?

"Did you sign papers marked 'F' and 'H' as attorney for Adriance, Platt & Co.?"

The refusal of the witness is put upon the ground that to answer these questions would violate the professional confidence between his client and himself, and, of course, his refusal was proper, if such violation of confidence would result from his replies. But the witness cannot be permitted to decide this question for himself. As was said by Judge Dallas, speaking for the Court of Appeals, in People's Bank v. Brown, 112 Fed. 654, 50 C. C. A. 411 (7 Am. Bankr. Rep. 475):

"It is requisite that in every instance it shall be judically determined whether the particular communication in question be really privileged, and in order that such primary determination may be advisedly made it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances. There is no presumption of privilege, and, although its allowance in a clear case may be founded upon the voluntary statement of the attorney that his knowledge of the fact about which he is asked to testify was acquired in professional confidence, yet wherever, as in this case, the circumstances suggest that the sufficiency of the grounds for that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity. * * * The witness declines to answer, not after inquiry and adjudication by the court, but upon his own mere declaration that the matters to which his declination relates were privileged communications, and thus, both of the facts and the law, he constitutes himself the exclusive judge. The province of the court cannot be thus usurped. If it could be, it is obvious that the rule under consideration, which is designed to promote the administration of justice, might readily be used for its obstruction, and become in consequence too pernicious to be tolerated."

The facts reported by the referee enable the court to decide satisfactorily, I think, that the privilege pleaded by the witness does not

cover the matters about which he was interrogated. In speaking generally concerning the rule protecting confidential communications between attorney and client, I cannot do better than adopt the language of the court in People's Bank v. Brown, supra:

"This court has neither authority nor inclination to repudiate the rule which protects from exposure, unless with the client's consent, all communications between him and his counsel, made during the subsistence of that relation in reference to any matter respecting which the latter has been, and properly could be, professionally consulted. This rule was applied, apparently for the first time, in the case of Berd v. Lovelace, Cary, 88, and for three centuries at least it has been steadily upheld by the courts upon the ground that for the proper administration of the law the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance should upon all occasions be inviolable. But it has been forcibly and vehemently assailed (Bentham, Judicial Evidence, book 9, pt. 4, c. 5), and the suppression of evidence which it effects can be justified only when the limitations which restrict the scope of its operation are assiduously heeded."

How far the modern rule goes, and what are its proper limitations, will nowhere be found so lucidly set forth as in the fourth volume of Wigmore's admirable treatise on Evidence (1905), in section 2290 et seq. Here and there during the course of the long judicial discussion concerning the proper application of the rule, dicta may be found which may go so far as to cover such transactions between the attorney and third parties as are now under consideration; but I think no recent decision can be found which extends the privilege as the court is now asked to extend it. If any such definite ruling is to be discovered, it is likely to have been made in some early stage of the discussion. The ground upon which the rule has been rested for more than a century is the vital importance to the client that he should feel perfectly safe in disclosing the secrets of his case to his legal adviser. Protected by the privilege, he may be confident that (with few exceptions) whatever he may communicate cannot thereafter be used against him. Clearly this reason does not apply in a situation where the attorney becomes acquainted with facts from another source than his client. In no proper sense can he be said to have learned such facts from the confidential communications of his client, and it is only to such communications (speaking generally) that the rule applies. Abundant authority exists for these statements. For example, I may quote from Prof. Wigmore's treatise in section 2315:

"When the attorney is made a witness to attest the execution of a document (and not merely to draft it), there is no confidence contemplated, and therefore no privilege for the occasion when the attorney is called upon to fulfill the function thereby assumed. He cannot be an attesting witness and yet not attest. * * * Accordingly, it has always been held that an attorney who signs in attestation of a deed is compellable to testify."

And in section 2317:

"The privilege is designed to secure subjective freedom of mind for the client in seeking legal advice. It has no concern with other persons' freedom of mind, nor with the attorney's desire for secrecy in his conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular third person for the benefit of the client."

See, also, 1 Greenleaf on Evidence (Lewis' Ed.) § 244; 23 Amer. & Eng. Ency. of Law (2d Ed.) p. 71, par. 7n; Dierstein v. Schubkagel, 6 L. R. A. 481, note; Southwark, etc., Co. v. Quick, 9 Eng. Ruling Cases, note on page 595 et seq.; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 632, note; Randolph v. Quidnick Co. (C. C.) 23 Fed. 278; Edison, etc., Co. v. United States, etc., Co. (C. C.) 44 Fed. 298; and a recent and very elaborate note upon the whole subject, which will be found in 66 American State Reports (1899) at page 213. For present purposes, the following quotation from page 220 will be sufficient:

"An attorney called as a witness is bound to testify to any matters which come to his knowledge in any other way than through confidential communications from his client. His privilege does not extend to information derived from other sources than through his client, even while he is acting as an attorney. He must not disclose anything confided to him by his client, but he is bound to testify to any matter which in any other way has come to his knowledge." (Citing cases.)

The discussion need not be prolonged. If the foregoing statement of the rule and its limitations is correct, it is clear that none of the questions which the witness refused to answer was objectionable, and that the inquiry upon which the trustee proposed to enter was legitimate. None of the questions relates to any communication from Adriance, Platt & Co. to the witness, and, so far as the writings are concerned, it is somewhat difficult to understand upon what theory they could for a moment be supposed to be a confidential communication from a client to his legal adviser.

A word upon the practice before referees may be appropriate. Where a question arises concerning the competency of a witness or the admissibility of evidence, the referee should decide the point himself in the first instance, instead of turning the matter over to the court. It will be time enough to certify the question when he is asked to do so in a proper manner. Very often his ruling will be acquiesced in, and the delay of referring the dispute to the court will thus be avoided.

The witness is directed to answer the questions certified by the referee, and all similar questions concerning the settlement of the claim of Adriance, Platt & Co. against the bankrupt.

THE CITY OF BOSTON.

(District Court, D. Massachusetts. December 18, 1906.)

No. 1,765.

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—TIME FOR FILING CLAIM.

In a proceeding in admiralty for a limitation of liability, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition, in a proper case, and such permission will be granted where the claim was forwarded by mail to the clerk on the last day of such time and received before any action was or could have been taken respecting such claims.

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

2. SAME—ESTOPPEL TO MAINTAIN PROCEEDING—LITIGATION IN STATE COURT. Prior litigation in a state court of the question of his liability growing out of a collision will not deprive a vessel owner of the right to institute proceedings in an admiralty court for a limitation of his liability, however far the prior litigation may have proceeded, and upon the institution of such proceedings all matters relating to the petitioner's liability are brought within the jurisdiction of the court of admiralty, which is required by admiralty rule 54 on motion of the petitioner to make an order restraining the further prosecution of all or any suit or suits against the petitioner in respect of any claim, and has no power to refuse or limit such order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 650.]

In Admiralty. Proceeding for limitation of liability. On petitions by Mary L. and Vernon B. Davenport for leave to file answers and proofs of claim after return day of monition, and on motions by Mary L. Davenport to dismiss the proceedings or for modification of restraining order.

John O. Teele, and Arthur P. Teele, for Winnisimmet Co.
William A. Davenport, for Mary L. and Vernon B. Davenport.

DODGE, District Judge. The monition issued April 16, 1906, directed the marshal to cite these petitioners and all other persons claiming damages by reason of the collision described in the petition for limitation of liability to appear on or before Friday July 20, 1906, to make proof of their claims. These petitioners were duly cited April 18, 1906, as appears by the return on the monition. With the monition was issued a restraining order enjoining these petitioners and all other persons claiming damage as above from prosecuting any claims for such damage save in these proceedings. These petitioners have been duly served with this order, also on April 18, 1906, as appears by the return thereon.

The petitioners live at New Salem, Mass. Their proctor lives in Greenfield, Mass. On July 20, 1906, written directions from him to the clerk to enter his appearance for them in this case were filed here. On July 21, 1906, answers to the petition for limitation of liability were received at the clerk's office from him, one on behalf of each of these petitioners, containing sworn statements of their respective claims, and also on behalf of the petitioner Mary L. Davenport two motions, one to dismiss the proceedings, the other to modify the restraining order so far as to permit her to prosecute to judgment a suit in the state court for her damages which she had commenced against the Winnisimmet Company before its petition in this court was filed. It appears that all these papers had been sworn to at Greenfield on July 20th and on the same day mailed to the clerk of this court. The Winnisimmet Company having moved to dismiss them from the docket because not filed within the time limited by the monition, these petitioners now ask that they be ordered filed as of July 20, 1906, or allowed to be filed late.

So far as the answers and proofs of claim are concerned, this is an application similar in its nature to an application to set aside a default and admit an answer in the case of an ordinary libel. By admiralty rule 29 the court has discretion to grant such an application

upon proper terms. No reason is perceived why a like discretion may not be exercised in limited liability proceedings. Admiralty rule 54 requires that all persons claiming damages be cited to appear at or before a certain time, but a citation of this kind appears to be no more absolute or peremptory in character than a summons to appear in answer to a libel at or before a certain time. No authority is found for the proposition that the court is without power to permit a damage claimant to intervene after the time named in the monition, whatever the circumstances. Such permission has been granted by this court in one case at least; in that instance the action of the court was assigned as error, but the point was waived at the argument. The H. F. Dimock, 77 Fed. 226, 239, 23 C. C. A. 123. While it is of course true that the object of the monition is to compel all damage claimants to come into this court within a definite period, in order that all parties concerned may be before the court before any further steps are taken, and while a claim is ordinarily to be treated as barred if not presented within the time limited in the monition, I think the court has power, in a proper case, to allow the presentation of a claim after that time has expired, and that the circumstances here shown make this a proper case for the exercise of that power. These answers and proofs of claim were received at the clerk's office before any of the steps to be taken after the filing of damage claims were or could have been taken. They may be treated as if filed in time, and the motion to dismiss them from the docket is overruled.

Having thus become a party to these proceedings, the petitioner Mary L. Davenport is entitled to a hearing upon her motions to dismiss and for a modification of the restraining order, and such hearing has now been had.

The motion to dismiss is based upon the contention that the Winnisimmet Company has submitted to the jurisdiction of a state court in the matter of Mrs. Davenport's claim, has thus waived, so far as she is concerned, its right to a trial of that claim in this court, and is estopped from requiring her now to litigate in this court.

The collision of which these proceedings are the result was on March 13, 1904. Mrs. Davenport, who claims to have been a passenger on the ferryboat belonging to the Winnisimmet Company, brought suit against the company August 26, 1904, in the Massachusetts superior court within and for the county of Franklin. The company appeared, answered, and went to trial before a jury in that suit. The trial was at the sitting of the court in November, 1905, and it resulted in a verdict against the company for $2,600. A motion by the company for new trial was overruled. It filed a bill of exceptions January 8, 1906. Its petition in this court was not filed until April 2, 1906. When it was filed, the allowance of its bill of exceptions was still pending in the superior court.

The Winnisimmet Company had without doubt ample time after the collision to file a petition for limitation of liability before Mrs. Davenport's suit against it came on for trial. It is true, as urged on her behalf, that allowing its petition to be filed here after the verdict in that suit is in effect allowing the company to take the chance of a verdict in the state court in its favor, but to hold in reserve at the same time

the power to defeat an adverse verdict by resorting to this court. It has been repeatedly held, however, that prior litigation of the question of his liability in the state courts will not deprive a vessel owner of the right to resort to an admiralty court for limitation of liability, however far the prior litigation may have proceeded. In The S. A. McCaulley (D. C.) 99 Fed. 302, there had been two years' litigation in the state court and a verdict against the petitioner. In Re Old Dominion S. S. Co. (D. C.) 115 Fed. 845, a judgment had been obtained against the petitioner. In Gleason v. Duffy, 116 Fed. 298, 54 C. C. A. 100, there had been a judgment against the petitioners from which they had appealed, and the state appellate court had affirmed the judgment. In The Ocean Spray (D. C.) 117 Fed. 971, there had been an adverse judgment, an appeal by the petitioner, and the state appellate court had reversed the judgment and remanded the case for a new trial. In Re Starin (D. C.) 124 Fed. 101, there had been two successive appeals by the petitioner from a state court judgment against him, the final result whereof had been affirmance of the judgment. These decisions are all based upon the principles declared in The Benefactor, 103 U. S. 239, 26 L. Ed. 157. In view of them and of the law as stated by the Supreme Court in that case, this petitioner cannot be regarded as having waived or lost its right to claim the benefit of the limited liability act, notwithstanding its delay in asserting its claim to that benefit here, and notwithstanding the contest it has maintained with regard to Mrs. Davenport's claim in the state court.

The Winnisimmet Company's petition is not therefore to be dismissed for any cause now shown, the proceedings thus far had under it are regular and valid, and Mrs. Davenport has been lawfully enjoined against prosecuting her claim against the company save in these proceedings. As to the modification of this order which she requests—once the jurisdiction of the District Court is invoked for the purpose sought in this case—it must be exercised according to admiralty rules 54–57. The restraining order has been made in pursuance of rule 54. Mrs. Davenport's claim is now one of those presented in pursuance of the monition issued under the same rule. It is not within the discretion of the court to relax or modify the restraining order in order to allow her claim to be proved otherwise than as directed by rule 55. The Supreme Court in Providence, etc., Co. v. Hill, etc., Co., 109 U. S. 578, 3 Sup. Ct. 379, 27 L. Ed. 1038, has declared the meaning and purposes of these rules in terms which leave no room for doubt that the continuance of other suits for the same loss or damage in other courts during the pendency of limited liability proceedings in the District Court is one of the things the rules were expressly intended to prevent. It is there said to be hardly possible to read the rules in connection with the act "without perceiving that, after proceedings have been commenced in the proper District Court in pursuance thereof, the prosecution pari passu of distinct suits in different courts, or even in the same court by separate claimants is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose." Page 594 of 109 U. S., page 389 of 3 Sup. Ct. (27 L. Ed. 1038). Neither the limited liability act nor the rules contemplate, as does the bankruptcy act (sections 57n, 63b, Act July 1, 1898, c. 541,

30 Stat. 561, 563 [U. S. Comp. St. 1901, pp. 3444, 3447], the liquidation of disputed claims by litigation in other courts. The admiralty courts are the appropriate courts to administer the relief provided for by the act, and it is recognized as a necessity that the court exercising the jurisdiction in any case should have exclusive control of the case. Providence, etc., Co. v. Hill, etc., Co., 109 U. S. 578, 595–598, 3 Sup. Ct. 379, 27 L. Ed. 1038. No modification of the injunction against prosecution of suit, except in these proceedings, can therefore be allowed.

THE CITY OF BOSTON.

(District Court, D. Massachusetts. July 9, 1907.)

No. 1,765.

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—PERSONS CONCLUDED BY DECISION.

   Where the question of fault for a collision between two vessels was determined in a proceeding by the owner of one of the vessels for a limitation of liability, in which proceeding all damage claimants were cited to appear and had the opportunity to be heard, the decision on such question is conclusive on such a claimant although he did not appear.

   [Ed. Note.—Limitation of liability of vessel owners, see note to The Longfellow, 45 C. C. A. 387.]

2. SAME—SCOPE OF PROCEEDING—CLAIMS PROVABLE.

   In a proceeding by a vessel owner for limitation of liability growing out of the sinking of the vessel in a collision, although she is exonerated from fault for the collision, a claim for injury to a passenger resulting from the alleged negligence of the vessel after the collision is within the scope of the proceedings and may be proved therein.

3. SAME—SINKING OF VESSEL IN COLLISION—DUTY TO PASSENGERS.

   Where a vessel with passengers on board was sunk as the result of a collision, those in charge were bound to use the utmost exertions in their power to avert injury to the passengers from the impending peril, which duty continued until the passengers were safely landed, but the vessel is not liable for injuries resulting from errors of judgment in the emergency on the part of those in charge who were in general competent.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 538.]

4. SAME—INJURY TO PASSENGER—LIABILITY OF VESSEL.

   Claimant was a passenger on petitioner's ferryboat which was sunk as the result of a collision in the evening. On discovering that the vessel was sinking, immediately after the collision the master ran her ashore into shallow water. A member of the crew went through the cabin on the lower deck, and notified claimant and all other passengers, who were few in number, that the boat was sinking, and to go up to the upper deck, and remained until he supposed all had preceded him there. Claimant did not go with the others, and, becoming confused, remained until the water entered and she became wet, but was afterwards assisted to the upper deck by some man who discovered her, and later was sent ashore in a boat with the other passengers. She suffered injury from the wetting and exposure, but it did not appear that those in charge knew of her having been in the water. *Held*, that there was no negligence on the part of the vessel which rendered it liable for the injury.

In Admiralty. Proceeding for limitation of liability. On claim for loss, damage, and injury presented by Mary L. and Vernon B. Davenport.

John O. Teele and Arthur P. Teele, for Winnisimmet Co.
William A. Davenport, for Mary L. and Vernon B. Davenport.

DODGE, District Judge. On December 18, 1906, leave was given these two damage claimants to file their respective answers, which had not been received at the clerk's office until after the time limited in the monition had expired. A motion by Mary L. Davenport to dismiss the proceedings or modify the restraining order has been denied, for reasons stated in the opinion filed on the above date. A hearing has since been had on the merits of both the claims which the answers seek to establish.

I find that Mary L. Davenport was a passenger on board the petitioner's ferryboat City of Boston, at the time of the collision between that boat and Scow 34, belonging to the Eastern Dredging Company, on March 13, 1904, which collision is described both in the petition and also in her answer thereto, filed as of July 20, 1906, and amended since that date. She does not claim to have received any injury at the moment of collision, but the ferryboat, as both petition and answer allege, was sunk by the collision. She alleges that when the ferryboat sank "she was immersed in water and exposed to cold for several hours, so that it made her ill, and she suffered great pain of body and anguish of mind, and was severely wrenched and strained, and other injuries were then and there received by her, and she was incapacitated from working for a long space of time." She denies that the ferryboat was managed with due care, alleges that the collision could not have occurred if proper lights and especially a search light had been used, and alleges, also, that negligence on the part of the ferryboat contributed to the collision. She alleges, after denying what is alleged in the third article of the petition, that the damages sustained by her were due to the petitioner's negligence, and were with its privity and knowledge.

By a petition filed in this court November 23, 1904, the Eastern Dredging Company, owner of Scow 34 with which the City of Boston collided, sought to limit its liability as owner of the scow for all damage caused by this same collision. It has been adjudged in the proceedings had under that petition that Scow No. 34 was solely to blame for the collision, and the dredging company as its owner solely liable for the damage thereby caused. See the opinion filed in that case March 15, 1906. The case is No. 1,669 on the docket of this court, and the record in it, which was admitted against these claimants' objection, shows that a monition was issued November 26, 1904, in accordance wherewith the Winnisimmet Company and any and all persons claiming damages for loss of property or personal injuries due to the collision were summoned, by service on the company named, and by publication, to prove their claims on or before March 3, 1905. In a letter to the dredging company's counsel, dated November 28, 1904, Mrs. Davenport's counsel who had previously brought suit for her against the dredging company in a state court waived any further service upon her of the monition, and also of the restraining order issued on the same day and served in like manner upon the Winnisimmet Company, and by publication. This order enjoined the prose-

cution of any and all suits upon claims against Scow 34 or the petitioner as her owner arising out of the collision; except in the limited liability proceedings. Mary L. and Vernon B. Davenport were bound by this monition and restraining order. They have also had full opportunity to intervene and prove any claims such as the monition and restraining order described against Scow 34 in the limited liability proceedings referred to. Whether the collision was caused by negligence on the part of the ferryboat or its owner, or by negligence on the part of Scow 34 and its owner, or on the part of both, were questions necessarily involved in those proceedings. Neither Mary L. nor Vernon B. Davenport appeared in them, but, having had the right and full opportunity to do so, they are bound by the result, and cannot, now that the court has, by its decree entered in those proceedings, held that there was no negligence on the part of the ferryboat, expect it to reopen that question for the purposes of this case.

The claim made by Mary L. Davenport in her answer as amended February 6, 1907, is that she was injured by being immersed in water when the ferryboat sank, and that "her said injury, loss, and damage was occasioned and incurred by the petitioner." It is obvious that although the collision was not caused by any fault on the petitioner's part, it may nevertheless have been true, if Mrs. Davenport was immersed in water afterward, that the petitioner was responsible for this occurrence. If the petitioner's master and crew might, notwithstanding the collision, have prevented this passenger from injury after it occurred and negligently failed to do so, its liability for such negligence would be liability which it has the right to limit in these proceedings. The proceedings might properly embrace within their scope all loss, damage, or injury to any person or persons during the same trip, whether sustained at the same time or at different times, and whether due to one instance of negligence or to different instances. The City of Norwich, 118 U. S. 468, 491, 6 Sup. Ct. 1150, 30 L. Ed. 134.

There is no question that the collision caused the ferryboat to fill and sink within a short time afterward. But before she sank she was steered into shallow water by her master, so that when on the bottom the water was only about four feet deep on her main deck. With this part of the management of the boat after the collision no fault is found.

The evidence in support of Mrs. Davenport's claim, consisting principally of her own testimony, tends to show that she was on board as a passenger, sitting in the ladies' cabin; that the shock of collision produced excitement among the passengers there; that a man ran through the cabin followed by several other persons, shouting to the passengers to go on deck because the boat was sinking; that all the other passengers then left the cabin and she followed after them, that she lost sight of the others after leaving the cabin, and went by herself first into the men's cabin on the opposite side, and thence back into the passageway for horses between the two cabins; that, while there, a wave came over the deck striking her and causing her to fall down twice in the water; that she then got hold of an upright pole

and clung to it for from 20 to 30 minutes, during which time the water rose nearly to her waist; that a man at last came to where she was, took her arm, and led her to the stairway by which the upper deck was reached; that she was then taken into the pilot house where the other women passengers were, until they were all passed into a boat which landed them at the Chelsea Ferry slip. That nothing further was done to assist them; that she walked to Chelsea Square and thence to her place of destination, being her sister's house at 100 Broadway, arriving there wet through, and with her wet clothes partly frozen. That the wetting and exposure resulted in her serious illness and permanent loss of health. She testified that when the water first came over the main deck she saw no one else there, but that two men afterward appeared, and for a time clung also to the same pole to which she was clinging. There was no other witness, however, who saw her clinging to any pole, or who saw her on the lower deck at any time after the collision.

The petitioner's evidence tended to show that neither Mrs. Davenport nor any other woman could have been on the lower deck after the collision, that when she was taken ashore with the other passengers she gave her name, but said nothing about being wet or having been in the water, and that she was not wet when put into and landed from the boat which took her ashore.

That Mrs. Davenport was in fact wet through, and did in fact have her clothing partly frozen when she reached her sister's house, was confirmed by the testimony of her sister Mrs. Morris and a nephew Mr. Greene, who were at the house when she arrived. Unless it is sufficiently contradicted by the petitioner's evidence I see no reason why her account of what happened on board after the collision is not to be accepted as substantially true.

The crew of the ferryboat, besides the master, who was all the time in the pilot house and at the wheel, were four in number, an engineer and fireman in charge of the machinery below, and two men, Gaillac and Hiscock, who were accustomed to take turns in remaining on the main deck in order to keep lookout forward and look after the passengers. Gaillac was the man on the main deck at this time. Hiscock was in the pilot house with the master. He remained on the upper deck after the collision until after the ferryboat had grounded. Gaillac then joined him there as will presently be stated, and they together launched a small boat kept on board for such emergencies. It was not this boat however that was used in taking the passengers ashore, that work was done by a boat and men from the U. S. Life Saving Station near by, who at once came off and offered their assistance.

The entire duty of warning the passengers and getting them to the upper deck was performed by Gaillac alone. No part was taken in performing it by any other member of the ferryboat's crew, so far as appeared. Hiscock did not go to the main deck at all until after Gaillac, with all the passengers as he supposed, had reached the upper deck and the ferryboat had been resting for some time on the bottom. The engineer and fireman did not testify.

Gaillac's evidence was that he went through both cabins as soon as the boat was found to be sinking, warned the passengers out, saw them all out of the cabins and all on their way up the stairs which led to the upper deck, before he left the main deck himself. No passenger, according to his evidence, then remained on the main deck, nor did any water come there until they had all left that deck. The water did not begin to come there until after all the passengers that he knew of had gone above, and just as it began to come he went to the upper deck himself, and at once joined Hiscock in launching the small boat.

Gaillac, however, is shown to have been mistaken in believing that he had seen all the passengers on their way to the upper deck before he went there himself. However it may have been with Mrs. Davenport, there were two men who remained on the main deck after he left it, were there when the water came over the deck, remained there for some time in the water, and reached the deck above after Gaillac did, both of them more or less wet. One of these men came up very soon after Gaillac came. The other, who appeared to be somewhat intoxicated, clung to a post below until Gaillac got a ladder, went down to him and got him up also. Only one of the main deck lights was put out by the collision, the others were burning, it was not dark there, and Hiscock, looking down from above, discovered the man last mentioned some minutes after the boat had sunk. Gaillac and Hiscock say they never saw any woman at all on the main deck after the sinking, and are certain that they must have seen Mrs. Davenport if she had really been there. But it is clear that neither of them was looking there all the time, and that there was much else demanding their attention where they were. I am unable to regard their evidence and the other evidence tending to show that Mrs. Davenport was not wet when she was taken ashore as sufficient to contradict her testimony and call upon me to reject it entirely. I accept it as true in its main features, and find that she was left below when the other passengers, followed by Gaillac, went to the upper deck, that she did remain below in the water for some time, though probably for by no means so long a time as she thinks, until she was found and brought upstairs by some person not identified at the hearing.

Accepting her evidence as a substantially true account of what happened to her after the collision, has she proved negligence on the part of the ferryboat for which its owners are liable to her? Without fault in the ferryboat's management as I have held, that vessel was suddenly put in danger of sinking, and was caused to sink before the passengers on board could be landed. Most of them, including Mrs. Davenport, had sustained no direct injury by the collision, and notwithstanding it, those in charge of the ferryboat were bound to use the utmost exertions in their power to avert injury to them from the impending peril. Except as to injuries sustained notwithstanding all that such exertions could accomplish, the liability of the owners of the ferryboat as carriers of passengers continued until the passengers were safely landed, notwithstanding the disaster; just as the obligations of carriers of goods continue under similar circumstances. The Niagara v. Cordes,

21 How. 7, 27, 16 L. Ed. 41. But the degree of care and diligence required of carriers of passengers under any circumstances is not necessarily the utmost care and diligence which men are capable of exercising, it is "the utmost care consistent with the nature of the undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business." Dodge v. Boston & Bangor Steamship Co., 148 Mass. 218, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541. And when the circumstances are those of sudden emergency, the result is not the criterion by which what was done is to be judged. Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Holladay v. Kennard, 12 Wall. 254, 20 L. Ed. 390; The Styria, 186 U. S. 1, 10, 22 Sup. Ct. 731, 46 L. Ed. 1027. The principle is familar in maritime cases that error of judgment in an emergency is not necessarily negligence or fault. It is not contended that the persons in charge were not competent for the duties of their respective positions, and if competent, the owners did not contract for their infallibility nor that they should do in an emergency precisely what after the event others may think would have been best. Lawrence v. Minturn, 17 How. 100, 110, 15 L. Ed. 58. These are the general rules by which the conduct of the ferryboat's crew on this occasion is to be judged.

The first thing necessary after the collision was to ascertain its effect on the ferryboat, and this was done without loss of time. What became of most urgent importance upon finding her to be sinking was to prevent her from sinking in deep water. Fortunately shallow water was not far off, and she was at once headed for it at full speed. That no time might be lost in getting her there it was obviously necessary that the captain, engineer, and fireman at least should not leave their posts until she was safely grounded. Hiscock's presence in the pilot house as assistant to the captain could hardly have been dispensed with during the same interval. The duty of getting the passengers to the upper deck devolved of necessity upon Gaillac alone, and he set about it as soon as the boat's condition, which he helped to ascertain, was known. There were not many passengers on board, and under the circumstances there is no ground in the fact that no one was sent to help him get them upstairs, for charging the boat with negligence toward any of them.

After telling all the passengers in the cabin to come on deck because the boat was sinking, I think Gaillac had the right to expect them to make haste and to keep together. Mrs. Davenport was there and heard what he said, as she admits. After leading the way out of the cabin, and then waiting until as he supposed they had all followed him out, and had preceded him up the stairs, I do not see how he could reasonably have been expected to return to the cabin to make sure that no one had remained so far behind as not to be then in his sight. The foot of the stairs according to the evidence was over 70 feet from the place where they had come out of the cabin. He might well believe that he could better perform his duty to the passengers by hurrying to the upper deck, as he did, and helping launch the small boat, of which there might be urgent need if the ferryboat should not float long enough to reach shallow water.

Mrs. Davenport testified that she hesitated to join the other passengers when they left the cabin because she was afraid of getting trampled on. Conceding the reasonableness of such a fear, to hold Gaillac in fault for not anticipating that she would keep so far behind the others as not to be in sight at all when the last of them had started up the stairs; that she would then come out of the cabin by herself, go to the other cabin instead of the stairs, and thus lose her way entirely—still seems to me unreasonable. That Galliac left her behind when he went upstairs was not in my opinion the result of any failure on his part to do all that could be expected of him under the circumstances. As to the fact that her presence below was not discovered sooner, she did not claim to have called out or to have given any signal or to have made any effort to attract attention. She was evidently found and taken to the stairs before the presence below of the two men was discovered. The fact that no one discovered her predicament earlier does not, in my opinion, show negligence under the circumstances.

I am obliged to hold that no liability of the petitioners to Mrs. Davenport is established by the evidence. This finding involves the further conclusion that the claim made by her husband, Vernon B. Davenport, for expenses borne by him and the loss of her services and society, is also not sustained by the evidence.

On November 29, 1905, at the trial of a suit at law brought by Mrs. Davenport against this petitioner in the Massachusetts superior court for the county of Franklin to recover for her alleged injuries sustained at the time of this collision, a verdict was rendered in her favor for $2,600 damages. Reference was made to that suit in the opinion dated December 18, 1906, in the present case. The petitioner's exceptions, as defendant in that suit, were pending when the present petition was filed. It is urged on Mrs. Davenport's behalf that the verdict ought to be treated in this court as conclusive against the petitioner on the question of its liability to her and as to the amount of her damages, because it voluntarily submitted to the jurisdiction of the state court, and went to trial there before it filed its petition here. That the petitioner did not lose its right to proceed here by its participation in the state court proceedings has already been held in this case. See the opinion of December 18, 1906, above referred to. That the verdict of the jury should, under the circumstances, be allowed the effect contended for I should be inclined to hold, if the questions submitted to the jury had been the same as those now presented for my decision. In re Old Dominion S. S. Co. (D. C.) 115 Fed. 845. Those questions are, was Mrs. Davenport injured by the petitioner's negligence after the collision? and, if so, in what amount? But the questions at issue before the jury in Franklin county are shown by the record to have been, was the collision due to negligence on the petitioner's part? if so, did Mrs. Davenport sustain injuries because of it while exercising due care herself? if so, in what amount? The jury thus found the ferryboat in fault for the collision. To that finding this court cannot give effect, having itself decided to the contrary. There is nothing to show that the jury's verdict imports a finding that the petitioner was guilty of

negligence independent of the collision, or that the damages it assessed were damages for negligence of that kind.

My decision must be that neither of these respondents has established any claim against the petitioner for damages for loss of property or personal injuries occasioned or incurred by reason of, or caused by or arising out of, the collision described in the petition.

In re SMITH, THORNDYKE & BROWN CO.

(District Court, E. D. Wisconsin. February 17, 1908.)

1. BANKRUPTCY—CLAIMS—PRIORITIES—MONEY DEPOSIT.

The president of a bankrupt corporation was also treasurer of a grocers' association. At the time of his election as treasurer, it was arranged with the association's officers and directors that the funds of the association should be deposited by the treasurer with his corporation and that disbursements from the fund should be paid by its checks. *Held*, that the corporation merely became the debtor of the association to the extent of such general deposits, and that the association's assignee was therefore not entitled to priority over other general creditors of the corporation in the distribution of its assets in bankruptcy.

2. SAME—TRACING FUNDS.

Funds belonging to an association were deposited with a bankrupt; the account of the deposit prior to January, 1907, being kept on the bankrupt's cash book. After that date a new account was opened in a bank therefor, and no further moneys belonging to the association were received by the bankrupt. At the time bankruptcy intervened the balance owing by the bankrupt to the association had been reduced by checks drawn on the bankrupt's general bank balance, and the rest of the bankrupt's bank balance was appropriated by the bank under a banker's lien. *Held* that, as no part of the association's money ever passed into the hands of the bankrupt's trustee, the association's assignee was not entitled to a preference for the amount of such balance as against the bankrupt's general creditors.

In Bankruptcy.

This is a proceeding to review the order made by the referee in bankruptcy whereby the claim of Mrs. Emma G. Smith was allowed as a preferred claim. There is practically no dispute about the facts. In 1906 Ira B. Smith, then president of the Smith, Thorndyke & Brown Company, a trading corporation of Wisconsin, was elected treasurer of the National Wholesale Grocers' Association. At the time of his election it was arranged with the officers and directors of such Grocers' Association that the funds coming into his hands as treasurer should be deposited with the Smith, Thorndyke & Brown Company, and that disbursements from the fund should be paid by the checks of said company. Practically the arrangement was to use the Smith, Thorndyke & Brown Company as a bank for the Grocers' Association. It was supposed on all hands that the Smith, Thorndyke & Brown Company was solvent. Pursuant to such arrangement Mr. Smith indorsed over all checks and drafts received by him as treasurer of the Grocers' Association to the Smith, Thorndyke & Brown Company, and such moneys were mingled in the general bank account of Smith, Thorndyke & Brown Company. In January, 1907, the Smith, Thorndyke & Brown Company, temporarily embarrassed but supposed to be solvent, called in an attorney to look over their affairs, who found the account with Ira B. Smith, as treasurer, had been kept upon the cash book, and advised that such account be transferred to the ledger of Smith, Thorndyke & Brown Company under the title "Ira B. Smith, Trustee," which was done. Such account then showed a balance due the Grocers' Association of something over $4,000. The attorney testified that such sum was not then

paid over to the Grocers' Association because the company was at that time unable to make such payment. Pursuant to the advice of the attorney a new account was opened in the bank by Ira B. Smith as treasurer, and from that time on all moneys received by him from the Grocers' Association were deposited to that account. From February, 1907, down to May, 1907, certain disbursements were made upon the checks of Smith, Thorndyke & Brown which reduced the balance in that account to $2,156; but no sums were paid over to Smith, Thorndyke & Brown Company after February, 1907. June 10, 1907, bankruptcy proceedings were instituted against Smith, Thorndyke & Brown Company. The balance in the general account of Smith, Thorndyke & Brown Company with the National Exchange Bank was appropriated by the bank to satisfy a banker's lien, which action was ratified and approved by the court, and such bank balance never came into the possession of the trustee. Subsequent to the bankruptcy of the company, Mrs. Smith, the petitioner, who is the wife of Ira B. Smith, borrowed money from her sister to make good the balance due to the Grocers' Association, and took to herself an assignment of such claim. The petition of Mrs. Smith proceeds upon the theory that this indebtedness of $2,156, due the Grocers' Association, constituted a trust fund, so that she is entitled as assignee to payment in full out of the assets of the estate. The referee adopted this view, and directed the payment of the claim in full.

W. J. Turner, for claimant.
Bloodgood, Kemper & Bloodgood, for trustee.

QUARLES, District Judge (after stating the facts as above). It is sometimes profitable to lay aside elaborate briefs, burdened with a multitude of citations, and refer to an elementary principle, which is, after all, the pivot upon which the case must turn. Much has been said in the argument about trusts and trustees, trust moneys, etc. As applied to this case the word "trust" is little more than a figure of speech. It is called by the law writers a constructive trust. Mr. Pomeroy, in his work on Equitable Jurisprudence (section 1044), uses the term "trust in invitum," and the learned author well describes how and why the court of equity has resorted to this fiction to facilitate its peculiar jurisdiction and to work out justice in peculiar cases. It is elementary that, in every instance where the court creates this quasi trust relation, it must find either actual fraud or some unconscientious conduct. In such case the court will fasten upon the property in the hands of the offending party and will convert him into a trustee of the legal title. It may be nothing more than a breach of good faith, as a mingling by an agent of the funds of his principal with his own moneys, or the receipt of a deposit by the officers of a bank when they know the bank to be hopelessly insolvent. There are innumerable variations of tortious conduct which will warrant this interposition of a court of equity; but in every such case there must be at the bottom some unfair dealing or wrongdoing. In the instant case the evidence shows without contradiction that Smith, as treasurer of the Grocers' Association, was at liberty to deposit its funds with the Smith, Thorndyke & Brown Company, that such company were to use such funds, and that disbursements therefrom were to be made by checks upon such company; in other words, nothing has been done either by Smith, or the Smith, Thorndyke & Brown Company, which was not contemplated by the parties, and therefore there would appear to be no just occasion for the application of the trust doctrine.

It is true, as urged, that the trustee has stepped into the shoes of the bankrupt. It is equally true that Mrs. Smith, as the assignee of the Grocers' Association, has by virtue of the assignment acquired no higher or superior right than that possessed by her assignor. This being so, the case stands precisely as though the account had stood upon the books of the Smith, Thorndyke & Brown Company in the name of the Grocers' Association, and the contest were waged between such original parties. The question then would be: What was the legal relationship which these parties sustained to each other? The Grocers' Association had practically consented to employ Smith, Thorndyke & Brown Company as a bank. In Bank v. Millard, 10 Wall. 152, 19 L. Ed. 897, it was settled, so far as the federal courts are concerned, that a general deposit in a bank creates only the relation of debtor and creditor between the depositor and the bank. In Commercial Bank v. Armstrong, 148 U. S. 59, 13 Sup. Ct. 533, 37 L. Ed. 363, it was held that all deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor for his own convenience parts with the title to his money and loans it to the bank. Bank v. Latimer (C. C.) 67 Fed. 27, 29; Peters v. Bain, 133 U. S. 670, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; Bank v. Blackmore, 75 Fed. 771, 774, 21 C. C. A. 514; Metropolitan Bank v. Campbell (C. C.) 77 Fed. 705, 708. There is in the present case no semblance of bailment, because the deposit was general, not special All that was required of Smith, Thorndyke & Brown Company was to return on demand an equivalent sum. Can there be any doubt, therefore, that as between these original parties there subsisted the relation of debtor and recreditor? And, if so, Mrs. Smith by virtue of her assignment became a creditor, and must share pari passu with other creditors under the terms of the bankruptcy act.

There is another principle which would be equally fatal to the contention of the claimant. It appears that in February, 1907, the Smith, Thorndyke & Brown Company, being temporarily embarrassed, but supposed on all hands to be solvent, called in an attorney to look over its books, who found this account with Smith as treasurer appearing only upon the cash book, and showing a debit balance against the Smith, Thorndyke & Brown Company of about $4,000, which had not been paid because the company had not funds available to pay the same. The attorney advised that this account should be transferred to the general ledger of the company, and that Smith should at once open an account with the bank as treasurer of the Grocers' Association, and thereafter deposit all funds of the association with the bank, which course was pursued. Between that time and June 10, 1907, the date of the filing of the petition in bankruptcy, this balance of $4,000 was reduced to $2,156. Not a dollar of the association money came to the Smith, Thorndyke & Brown Company after February, 1907. The general bank balance of Smith, Thorndyke & Brown Company was appropriated by the bank under a banker's lien, which proceeding was sanctioned by the court, and no part of such money came to the hands of the trustee. Thus it appears that no part of the sum claimed ever

found its way into the assets of the estate. It had been spent and dissipated four months before the bankruptcy proceedings. Under such circumstances no equitable doctrine could be invoked to appropriate general assets of the estate belonging to general creditors to make good this antecedent deficit; no portion of the fund having been traced into the estate. Frelinghuysen v. Nugent (C. C.) 36 Fed. 229; Deere Plow Co. v. McDavid, 137 Fed. 811, 70 C. C. A. 422; Marquette Commissioners v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493, 498; Spokane v. Bank, 68 Fed. 979), 16 C. C. A. 81; In re Mulligan (D. C.) 116 Fed. 715, 718; Board of Commissioners v. Patterson, 149 Fed. 229, 236; Nonotuck Silk Co. v. Flanders, 87 Wis. 337, 58 N. W. 383; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96.

The fact that money lies in the hands of the persons proceeded against is an indispensable condition. In National Bank v. Insurance Co., 104 U. S. 68, 26 L. Ed. 693, the court employ the familiar illustration:

"For equity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity."

In such case it is certainly essential to show that the money sought to be recovered went into the bag. Under the evidence in this case it is not a question of tracing a trust fund which has been commingled with other assets of the estate, because the proofs show conclusively that the fund in question here has never come into possession of the trustee.

For these reasons, the order of the referee must be reversed. The record will be returned, with instructions to allow the claim of Mrs. Smith as an unsecured claim, without preference, and for further proceedings in accordance with this opinion.

SANDY et ux. v. SWIFT & CO.

(Circuit Court, E. D. Pennsylvania. February 7, 1908.)

No. 30.

1. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—NEGLIGENCE—SUDDEN PERIL.

Where defendant's servant, driving a heavy meat wagon, turned suddenly from one street into another in front of a lady as she was crossing the street, and she fell and was injured in an attempt to extricate herself from such sudden and unexpected peril arising from the servant's negligent driving, defendant was liable for the injury, though she was not struck by the horses or wagon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1226, 1227.]

2. SAME—FRIGHT.

Where defendant's servant turned a team suddenly into a street in front of a lady, so close that she could feel the horses' breath, and she fell and was injured in endeavoring to escape, the servant's negligence, and not the lady's fright, was the direct cause of the injury; the fright being produced as the natural result of the servant's negligence.

At Law. Motion for judgment non obstante veredicto.

Reilly, Hodge, Scott & Hare, for plaintiffs.

H. S. Sparhawk, for defendant.

HOLLAND, District Judge. Mrs. Sandy, a married woman, was injured by a fall alleged to be caused by the negligent action of the defendant's driver in suddenly turning off Germantown avenue west on Duval street in the city of Philadelphia. Suit was instituted both by herself and her husband, and under the Pennsylvania practice both actions were tried together, and a verdict rendered in favor of the plaintiffs. After both sides had closed the defendant requested binding instructions in its favor, which were refused by the court. Under the Pennsylvania act of 1905 (P. L. 286), which provides that, whenever a point requesting binding instructions has been declined, the party presenting it may move the court for judgment non obstante veredicto upon the whole record. Accordingly this motion was duly filed by the defendant.

The principal reason set up by the defendant why judgment should be rendered in its favor notwithstanding the verdict is that under the evidence no negligence was shown on the part of the defendant's driver but that Mrs. Sandy became frightened at the commonplace and ordinary circumstance of a team passing along the street, and fell and caused the injury of which she complained, and that fright and its results are not elements of damages in Pennsylvania. The defendant's driver, James Mattern, was driving a heavy meat wagon for the defendant company, and on this morning, February 18, 1907, at about 9:15 a. m., he was going north on Germantown avenue, on the left-hand side of that street, and about the time he arrived at Duval street Mrs. Sandy and her husband were crossing over from the north to the south side of Duval street on the west side of Germantown avenue, as they had a right to do. When they arrived at about two-thirds of the way across Duval street the defendant's team, according to her story, was "turned quickly off Germantown Road right up Duval street," and "loomed up in front of her"—"she could feel their breath." Mr. Sandy testified that the team "swung around the corner" into Duval street "so swiftly" and "so quickly" that if he "had not switched back—turned back—the end of the pole would have caught him"; that neither the horses nor wagon struck Mrs. Sandy but that she fell in endeavoring to extricate herself from the impending danger.

This testimony, if true, which was a question for the jury, would show that Mrs. Sandy was injured in an attempt to extricate herself from a sudden and unexpected peril, which arose from the defendant's negligent action, and for which it is liable. This evidence, if believed, establishes that Mr. and Mrs. Sandy had a right to be where they were at the time and to cross the street as they did, and had a right to assume that the driver would continue north on Germantown avenue, or at least had a right to expect him not to turn so suddenly as to put them in danger of personal injury. If the driver swung around on Duval street in such a way as to suddenly place the plaintiffs in danger, causing fright, and under the excitement of the fright, in attempting to extricate herself, she fell and was injured, the defendant would be liable. Foot v. American Produce Co., 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764, 78 Am. St. Rep. 806; Shaughnessy v. Consolidated Traction Co., 17 Pa. Super. Ct. 588. The reckless

driving was the cause of the fall. It may be she could have extricated herself from the danger into which the alleged sudden turn of the driver placed her without injury if she had not been under the exciting influence of fright; but if it be true the driver did turn, as stated, he put plaintiffs in danger, and he was the cause of the fright, which, of course, increased the danger, and rendered the plaintiff Mrs. Sandy less able to act with deliberation and judgment in her attempt to avoid it.

If Mrs. Sandy fell in a sudden effort to get away from a danger negligently thrust upon her by defendant by suddenly turning a team around a corner, as stated, so close she could feel the horses' breath, the negligent act would be the direct cause of the fall and injury, and that this situation would cause fright is to be expected; but as the expected and natural result was produced, and the plaintiff became frightened, it is no reason why the defendant should be relieved from liability, as urged by the defendant's counsel, upon the authority of Ewing v. P. & S. Railroad Co., 147 Pa. 44, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709, Linn v. Dequesne Borough, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800, and Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, wherein it is held that, in an action of trespass to recover damages for injury sustained by the negligent act of another, there can be no recovery of damages from fright or other merely mental suffering, unconnected with physical injury, because in the case at bar there was a physical injury of a very severe kind. Mrs. Sandy fractured both wrists when she fell.

Motion for judgment non obstante veredicto is overruled.

UNITED STATES v. GUTHMAN, SOLOMONS & CO.

SAME v. A. STEINHARDT & CO.

(Circuit Court, S. D. New York. November 13, 1907.)

Nos. 4,904, 4,905.

CUSTOMS DUTIES—CLASSIFICATION—BEADED LEATHER BAGS—"ARTICLES IN PART OF BEADS."

Ladies' hand bags in chief value of leather and ornamented with beads are dutiable as "articles * * * in part of beads," rather than as "manufactures of leather, finished or unfinished, * * * or of which [leather] is the component material of chief value," under Tariff Act, July 24, 1897, c. 11, § 1, Schedule N, pars. 408, 450, 30 Stat. 189, 193 [U. S. Comp. St. 1901, pp. 1673, 1678.]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. These two cases which present the same questions were argued together. The merchandise, which consisted of ladies' hand bags, the component material of chief value being leather,

and ornamented with beads, was assessed for duty by the collector of the port at 60 per cent. ad valorem under the provisions of paragraph 408 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. The importers, protested claiming said merchandise to be properly dutiable at 35 per cent. ad valorem under paragraph 450 of said act (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]). The Board of General Appraisers overruled the classification of the collector, sustaining the protests of the importers. From this decision the United States appeals.

The reading of paragraph 408, omitting provisions not applicable to the question here, is thus:

"408. Beads of all kinds, not threaded or strung, thirty-five per centum ad valorem; * * * articles not specially provided for in this act, composed wholly or in part of beads or spangles * * * sixty per centum ad valorem."

And paragraph 450 with like omissions reads as follows:

"450. Manufactures of leather, finished or unfinished, manufactures of fur, gelatin, * * * or of which these substances or either of them is the component material of chief value, not specially provided for in this act * * * thirty-five per centum ad valorem."

This paragraph so far as it applies to the case here evidently means articles made of leather, or of which leather is the component material of chief value. But the word "articles" or any word of like meaning seems to have been omitted. The question is which of these two paragraphs (408 or 450) is controlling in this case?

Counsel for the importers very forcibly and ably argued that the cases of Solomon v. Arthur, 102 U. S. 208, 26 L. Ed. 147, and Hartranft v. Meyer, 135 U. S. 237, 10 Sup. Ct. 751, 34 L. Ed. 110, are apt authority in support of the Board of General Appraisers in holding that the general clause "component material of chief value" in paragraph 450 is controlling of the question here presented. I do not concur in this conclusion. Observe the language of Justice Bradley in Solomon v. Arthur, supra:

"The plaintiffs insist that the term 'mixed materials,' or 'goods made of mixed materials,' is a specific and well-known commercial designation or name, which by usage covers the goods imported by them, and is not a descriptive phrase used merely to designate any class of goods answering to the description; and, therefore, although they may be embraced in the general description of the act of 1864, of goods 'in which silk is the component part of chief value,' such a general description is not sufficient to take them out of their places in the previous acts where they are designated by name. It may be conceded that if the goods in question had a specific name, such as that applied to 'reps,' 'tapestry,' 'galloons,' etc., and had been designated in the acts of 1861 and 1862 by such specific name, the argument of the plaintiffs would be well founded. It would be in accordance with the decision of this court in Movius v. Arthur, 95 U. S. 144, 24 L. Ed. 420. But are the terms relied on a name for goods? Are they not descriptive rather than denominative? We think it is very clear that they are merely descriptive. It may be true, as stated in the agreed case, that 'such goods are generally known in trade and commerce as goods made of mixed materials.' But the case also adds that 'each kind thereof is also known by its specific name.' The fact that certain goods belong to the class of mixed goods, or of goods made of mixed materials, does not stamp them with the name of mixed goods; for the same descrip-

tion is applicable to many other kinds of goods all having different names. It is not their name; it is merely their description."

And, further:

"At all events, the true construction of the law in its ultimate form is too obvious to admit of a reasonable doubt. The goods are aptly described by the general clause in the act of 1864, and are not otherwise provided for in that act, nor provided for by name in any previous act."

It will be readily observed that to apply the doctrine of that case to the case at bar we must hold that the language of paragraph 408 does not refer to beads by name. Such a construction would be rash indeed.

In the Hartranft-Meyer Case, supra, Justice Brewer states:

"In Schedule K it is 'made wholly or in part of wool,' thereby reaching to all manufactured articles of which any portion is wool, while in Schedule L it is narrower and more limited—'made of silk, or of which silk is the component material of chief value.' This is a special enumeration rather than the other."

From this it is argued that the Supreme Court gave a construction of like expressions in former tariff acts to those in paragraphs 408 and 450, as contended for by the importer, and as construed by the Board of General Appraisers. Yet, in this Hartranft-Meyer Case, the court simply sought to construe the intent of Congress, and in so doing called attention to the provisions of the law to the effect that articles made of different materials shall be dutiable at the highest rate at which any of its component materials shall be chargeable, although that provision related only to nonenumerated articles. Applying the same principle to the case at bar it occurs to me that Congress did not intend that articles composed wholly or in part of beads and spangles, specifically naming them, not containing wool, the duty should be 60 per cent. ad valorem, yet if leather is the component material of chief value, though ornamented by beads and spangles, it must be reduced to 35 per cent. ad valorem. On the contrary, following the line of reasoning in the cases cited, the use of beads and spangles on articles intended to be covered by paragraph 450 are excepted as having been more specifically provided for by paragraph 408. This was the view of the Circuit Court of Appeals in a case involving the construction of these same paragraphs. Metzger v. United States, 146 Fed. 132, 76 C. C. A. 558.

The decision of the Board of General Appraisers is reversed, and the action of the collector affirmed.

BAUMGARTEN et al. v. ALLIANCE ASSUR. CO.

(Circuit Court, N. D. California. January 27, 1908.)

No. 14,234.

1. DAMAGES—EXEMPLARY DAMAGES—MALICIOUS BREACH OF CONTRACT.

Civ. Code Cal. § 3294, provides that in an action for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, plaintiff may recover exemplary damages. *Held* that, under such section, exemplary damages

could not be recovered for willful or malicious breach of insurance contracts sued on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 193, 194, 203.]

2. INSURANCE—SETTLEMENT—DAMAGES IN ADDITION TO INTEREST.
Civ. Code Cal. § 3302, provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon. *Held* that, under such section, insured could not recover damages in addition to interest for the insurer's alleged willful and fraudulent refusal to settle the loss, except by payment of 50 per cent. thereof in full.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1498.

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.]

3. FRAUD—DECEIT—COMPLAINT.
A complaint in an action on an insurance policy alleging that defendant willfully and fraudulently, with intent to take advantage of plaintiffs' necessities, refused to pay more than 50 per cent. of its liability on plaintiffs' policies, whereby plaintiffs were greatly injured, etc., did not state a cause of action for fraud, deceit, undue influence, or duress, there being no allegation that defendant obtained anything of value by means of the acts complained of.

4. INSURANCE—PAYMENT—REFUSAL—WILLFUL BREACH OF CONTRACT.
Failure and refusal of an insurance company to settle the loss under plaintiffs' policies for more than 50 per cent. of the amount due thereon because of a willful desire on defendant's part to take advantage of plaintiffs' necessities for ready money wherewith to re-establish their business did not constitute a tort by reason of the fact that defendant's breach of contract was willful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1498.]

5. DAMAGES—BREACH OF CONTRACT—INTENT.
The measure of damages for a breach of contract is the same whether the breach be by mistake, accident, inability to perform, or be willful and malicious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 285, 286.]

6. INSURANCE—ACTION ON POLICY—PLEADING—COMPLAINT—NONPAYMENT.
In an action on certain policies, an allegation that defendant had refused to pay was not the equivalent of an allegation of nonpayment, and rendered the complaint defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1607.]

7. SAME—AMENDMENT.
Where an action on a policy alleged that defendant had refused to pay, instead of nonpayment, such defect could be cured by amendment which would be allowed on motion.

Bertin A. Weyl and Edward Lynch, for plaintiffs.
T. C. Van Ness, for defendant.

VAN FLEET, District Judge. The defendant moves to strike from the complaint certain paragraphs thereof as constituting redundant matter, and also demurs specially to the same matter as constituting no cause of action. The action is one to recover on certain policies of fire insurance, and, after making the averments usual in such an action, the complaint proceeds to set up the matter objected to, which, so far as material to be stated, is in substance that defendant refused to pay plaintiffs more than 50 per cent. on the dollar of their loss

under the policies sued on, and threatened that unless such payment was accepted within a certain time it would not pay anything on said loss, but that plaintiffs would be compelled to resort to the courts for relief, and that defendant intended to withdraw from the state and cease to do business therein; that defendant has, and at all times has had, property and available money sufficient to pay all of its obligations in full, including its liability to the plaintiffs, and that its refusal to pay the loss sustained by plaintiffs is not due to financial embarrassment nor to any other cause than the arbitrary decision of defendant not to pay more than 50 per cent. of such liability as hereinbefore stated; that plaintiffs were greatly injured financially by their loss in the destruction of their property, and by the acts of the defendant in so refusing to pay their loss under said policies, and "that the acts of defendant in refusing to pay said loss were willful and fraudulent, and were done solely with the desire to take advantage of the necessities" of plaintiffs "for ready money wherewith to re-establish their business." It is alleged that by reason of these facts plaintiffs were damaged in certain sums in addition to the amount of the policies.

It is somewhat difficult to understand the theory upon which the plaintiffs proceed in making the averments the substance of which is thus stated. If by the matter thus alleged it is sought or intended to recover exemplary damages for a willful or malicious breach of the contract sued on, such damages cannot be recovered, since the case is not one in which such relief may be had. Civ. Code Cal. § 3294. If it is intended thereby to lay a claim for damages for the mere nonpayment of money due under the contract, above or in addition to interest, such damages cannot be recovered. Civ. Code Cal. § 3302; New Orleans Ins. Co. v. Piaggio, 16 Wall. (U. S.) 378, 21 L. Ed. 358; Loudon v. Taxing Dist., 104 U. S. 771, 26 L. Ed. 923.

If the theory of the plaintiffs is that the facts alleged show circumstances entitling the plaintiffs to damages in addition to interest for the breach of the contract, they are obviously not such as are contemplated by the parties; nor are they the proximate result of the breach. Savings Bank, etc., v. Asbury, 117 Cal. 96, 48 Pac. 1081. There may be cases where damages in addition to interest may be recovered for the breach of an obligation to pay money where it appears that the parties contemplated that the payment was for a certain purpose. Thus it has been held that damages may be recovered for the failure of a bank to honor a depositor's check. Patterson v. Marine National Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 781; Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; Svendsen v. State Bank, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522. The reason of this is the breach of the implied obligation of the bank to keep the depositor's credit good, and the consequent damage to his credit by the breach thereof. In such cases the bank is not liable because it willfully broke its contract, but simply because it broke it. Except in cases where exemplary damages are allowed, the motive of the defendant in committing the breach is immaterial. If defendant is liable for damages suffered by plaintiffs in being unable to re-establish their business, it would be equally liable whether it failed or refused to pay the money in good faith or

made such refusal from a malicious motive. Failure to perform a duty prescribed by contract cannot be converted into a tort by reason of the motive of the party guilty of the breach. The rule is correctly stated in Brown v. Chicago, etc., Ry. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. St. Rep. 41, where it is said:

"In such cases the willfulness of the party in refusing to fulfill does not in any way change the rule of damages. The rule as to damages in actions upon contract is the same whether the breach be by mistake, pure accident, or inability to perform it, or whether it be willful and malicious; the motives of the party breaking the contract are not to be inquired into."

I am satisfied, therefore, that these allegations subserve no material purpose in the pleading, and the motion to strike out must therefore be granted.

Defendant has also demurred to the complaint upon the ground that it is insufficient in that it does not allege nonpayment, but only that the defendant has refused to pay. This objection likewise is well taken. Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Scroufe v. Clay, 71 Cal. 123, 11 Pac. 882. As this last objection, however, is susceptible of being cured by amendment, and the plaintiffs have asked leave to amend in that respect, such amendment will be allowed.

The motion to strike out is granted, and the demurrer sustained, with leave to the plaintiffs to file an amended complaint within 10 days.

AMERICAN UNION COAL CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 7, 1908.)

No. 82.

1. CARRIERS—RATES—DISCRIMINATION—INTERSTATE COMMERCE ACT—PLEADING.
Where a count in a complaint against an interstate carrier alleged a discrimination in rates against plaintiff, in that defendant charged plaintiff the full tariff rates and permitted plaintiff's competitors by a device to transport their similar products at a lower rate, it stated a cause of action for violating Interstate Commerce Act, Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155], prohibiting discrimination, and was therefore not demurrable, though it also insufficiently attempted to allege a combination or conspiracy, on defendant's part, with certain other railroads to restrain trade, and to recover treble damages under the Sherman Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

2. SAME—REASONABLENESS OF RATES.
Where an interstate carrier charged plaintiff the regular posted tariff rates, plaintiff could not maintain an action at law either under the Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or the Interstate Commerce Act, Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], for a readjustment of such rates on the ground that the same were unreasonable or unlawful, its remedy being by application to the Interstate Commerce Commission to have the schedule of tariffs adjusted on a reasonable and lawful basis.

J. W. M. Newlin, for plaintiff.
John Hampton Barnes, for defendant.

On Demurrer to Plaintiff's Statement.

HOLLAND, District Judge. In the first count in the statement the plaintiff has a good cause of action, upon the facts stated, under the interstate commerce act, for a violation of the second section of the interstate commerce act, as amended, for discriminating against plaintiff in charging it the full tariff rates and permitting its competitors, by a device, to transport their coal at a lower rate. The plaintiff, however, alleges a combination or conspiracy on the part of the defendant with certain other railroads to restrain trade, which combination, etc., is effected by charging the plaintiff the tariff rates and charging its competitors less than the tariff rates. This difference in charge per ton is laid as the damage suffered by plaintiff, and treble the amount is claimed under the Sherman Anti-Trust Act, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that is to say: The first count attempts to lay a cause of action under the Sherman anti-trust act by alleging a combination and conspiracy of the defendant with other railroads, but the facts averred in the statement do not set forth a combination or conspiracy to restrain trade, and the damage claimed is for an injury for which damage can be collected only under the Interstate Commerce Act, Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to wit, by unlawful discrimination against plaintiff in collecting tariff rates from it and by rebates and other devices permit its competitors to transport their coal for less per ton. The second count claims treble damages under the Sherman anti-trust act for an "excessive and unreasonable charge" of 55 cents per ton for certain number of tons of coal transported by the defendant company for the plaintiff at tariff rates. The third count is a claim for treble damages under the Sherman anti-trust act for a charge for the transportation of plaintiff's coal over the defendant's road in excess of the lawful charge for the carriage of said coal, the price charged being the amount specified in the defendant's tariff of rates posted and filed with the Interstate Commerce Commission.

The ground of demurrer is the same to each of the three counts, to wit, that there are no averments of fact in any of the three counts showing an injury to the plaintiff in its business or property within the provisions of the Sherman anti-trust act of July 2, 1890. In this we think the defendant is right. There is no combination and conspiracy set forth in the first count which would entitle the plaintiff to recover treble damages under the anti-trust act, but there is a cause of action under the Interstate Commerce Act, and the count will therefore be sustained under that act, and the matter therein contained, for the purpose of bringing it within the terms of the anti-trust act, can be regarded as surplusage.

The demurrer, however, is sustained as to the second and third counts, because it appears from the facts stated in both these counts that the amount charged by the defendant company was the tariff rates of the defendant company, which they had posted and filed with the Interstate Commerce Commission as required by law. If the plaintiff regarded these charges "unreasonable," as set forth in the second count, or "unlawful," as alleged in the third count, its remedy was to apply

to the Interstate Commerce Commission and have the schedule of tariffs adjusted on a "reasonable" and "lawful" basis. There is no right of action either under the anti-trust act or the interstate commerce act for a readjustment of tariff rates filed and posted other than through the Interstate Commerce Commission. A shipper cannot maintain an action at law for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission. Texas & Pacific R. R. Co. v. Abilene C. & O. Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; Clement v. Louisville & N. R. Co. (C. C.) 153 Fed. 979.

For the reasons stated, the demurrer to the first count is overruled, and the demurrer to the second and third counts in the statement is sustained.

On Discharging Rule for Amendment to Statement.

It is true the proposed amendment follows the wording of the Sherman anti-trust act and the language of the Supreme Court case, Loewe v. Lawler (decided February 3, 1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. ——, in alleging a contract and combination in the form of a trust and conspiracy in restraint of trade, but the facts in detail set out in the amendment, instead of showing a contract or combination in the form of a trust or conspiracy in restraint of trade, show a case prohibited by the commerce act; whereas, in the Loewe v. Lawler Case, supra, the facts show a clear conspiracy to restrain trade, prohibited by the anti-trust act. The alleged acts of defendant which caused the damage are those condemned by the commerce act, and the case cannot be brought within the purview of the anti-trust act by using the language of the latter to describe a cause of injury prohibited by the former.

In sustaining the amendment, it was held the first count stated a good cause of action under the commerce act and regarded the statements intended to bring it within the scope of the anti-trust act as surplusage. This amendment would simply restore the count to its original form. Holding still the view expressed upon the demurrer, the rule to show cause why the first count should not be amended is discharged.

In re MILNE, TURNBULL & CO.

(District Court, S. D. New York. February 19, 1908.)

1. BANKRUPTCY—ELECTION OF TRUSTEES—SECURED CLAIMS—RIGHT TO VOTE.
Where a referee in bankruptcy ascertained that the security held by a creditor of the bankrupt would be insufficient to satisfy the claim, and no exception was taken to the method of liquidation, which was unfavorable to the creditor, the referee did not err in permitting the creditor's trustee to vote in the selection of a trustee for the bankrupt to the amount of the deficit, without surrendering the collateral.

2. SAME—PREFERENCE.
The proof of claim against a bankrupt's estate negatived a preference, and, prior to determining the right of a creditor's trustee to vote for a

trustee for the bankrupt, the referee twice adjourned the election, and afforded objecting creditors an opportunity to examine the bankrupt in support of their objection. *Held*, that the referee, having found that the evidence was insufficient to show a preference, did not err in refusing to postpone the vote for trustee until the validity of a claim had been absolutely determined; it appearing that such determination would require an exhaustive examination of transactions between the bankrupt and the creditor extending over many months, if not for several years.

In Bankruptcy. On petition to review referee's order appointing a trustee upon failure of a majority of creditors (in number and value) to elect such officer.

Mr. Weil, for petitioner.
Mr. Ernst and Mr. Choate, for respondent.

HOUGH, District Judge. This proceeding is an instance of the truth of the remarks of Judge Thomas in Re Sumner (D. C.) 101 Fed. 224. A receiver being in charge of this estate, the election of a trustee has been prolonged through several sessions of the creditors' meeting in order to ascertain whether the proxies controlled by one firm of attorneys would or would not be sufficient to determine the selection of a trustee. It is obvious upon the record submitted that the real contest was not between creditors as to who should be the trustee, but between attorneys as to who should be the counsel for the trustee when elected or appointed. The referee finally held that the trustee in bankruptcy of the firm of Kessler & Co., who had filed a proof of claim for over $100,000, should be permitted to vote to the extent of some $14,000. This vote having been passed for the gentleman who was serving as receiver produced a majority in value for him, while the majority in number rested with the proxies controlled by one firm of lawyers. Thereupon the referee appointed as trustee the gentleman serving as receiver.

The questions raised by this petition are (a) whether the claim of Kessler & Co. should have been permitted to vote without surrender of the collateral held as security therefor; and (b) whether Kessler & Co. are preferred creditors, and as such incapable of voting without surrendering their preference. On the first question it is sufficient to say that the referee appears to me to have ascertained that there would certainly be a deficiency in Kessler & Co.'s security and to have permitted that claim to vote only to the amount of the deficit. No just exception is taken to the method of liquidation, which seems to have proceeded in a method distinctly unfavorable to Kessler's trustee.

On the second question it is to be remembered that some probative force is to be given the sworn proof of claim. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584. That proof negatived a preference, and the burden of proving a preference is therefore upon the creditors objecting on that ground to the voting power of the claim. To sustain that burden there was introduced in evidence an agreement long antedating the filing of the petition herein between this bankrupt firm and Kessler & Co., and the evidence of Mr. Milne, one of the bankrupts. The course of business suggested by this instrument and Milne's testimony is suggestive of the same questions

of law as were considered in Matthews v. Hardt, 9 Am. Bankr. Rep. 373, 80 N. Y. Supp. 462, and Ryttenberg v. Shefer (D. C.) 131 Fed. 313. The referee did not find "as matter of fact that Kessler & Co. had not received a preference, but merely that upon such evidence as was adduced * * * such preference had not been established," and, against the objection of the attorneys for certain creditors, refused to postpone the election until the final determination of this question of preference, and permitted Kessler's trustee to vote for the amount of his claim as liquidated by the trustee.

It is clear that as between the two candidates for trustee the vote of the Kessler claim was decisive, and it is therefore argued that since a prima facie case of preference in Kessler & Co. is said to be made out, and the vote of that claim would be decisive, it was the duty of the referee to postpone the vote until the validity of the claim could be determined. Collier (6th Ed.) p. 424, and cases cited. This argument raises the very vexed question as to how far the referee is bound to go in the liquidation and allowance of claims before proceeding to the election of a trustee. In this case he did proceed so far as to ascertain that the proofs left him in doubt as to whether the largest creditor of the bankrupt was a preferred creditor. The only decision in this district is In re Malino (D. C.) 8 Am. Bankr. Rep. 205, 118 Fed. 368, and it is there held that "in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected." This ruling is hardly consistent with that in Re Columbia Iron Works (D. C.) 142 Fed. 242. If such provisional allowances cannot be made by a referee in doubt after the objecting creditor has had an opportunity of examining the bankrupt (as is the case here), the only other possible course where the largest claim in the estate is attacked is to defer the election of a trustee until intricate questions both of fact and law have been settled before the referee and by the District Court. It seems to me that such practice would be intolerable, and the necessary evil of receiverships unnecessarily increased. In this case the burden was upon the objecting creditors to establish by a fair preponderance of testimony that Kessler & Co. were preferred creditors. They were unable to do this to the satisfaction either of the referee or myself after a prolonged hearing. They have only succeeded in suggesting a series of questions which will require for elucidation an exhaustive examination of transactions between the Milne firm and the Kessler firm extending over many months, if not several years; and I think the referee was right, after twice adjourning the election and then affording an opportunity to the objecting creditors to examine the bankrupt in support of their objection, in provisionally allowing the Kessler vote for an amount much smaller than the probable deficit in collateral, and in holding that because the objection of preference had not been sustained by a fair preponderance of evidence it should be provisionally overruled.

The election is confirmed, and the petition of review dismissed.

In re POLSSON.

(Circuit Court, N. D. California. February 27, 1908.)

No. 8.

1. ALIENS—NATURALIZATION—MINORS.
Rev. St. § 2167 [U. S. Comp. St. 1901, p. 1332], providing that an alien who had resided in the United States three years before attaining his majority, might, under specified conditions, be naturalized after reaching his majority, without previous declaration of intention, did not imply that an alien could in no instance make such declaration during minority.

2. STATUTES—FRANCHISES—CONSTRUCTION.
In construing a statute granting a right or privilege in the nature of a franchise, where an ambiguity arises, that construction must be indulged which is most favorable to the persons or class for whose benefit the grant is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 316.]

3. ALIENS—NATURALIZATION—MINORS.
Since at common law a minor could make any contract not expressly prohibited, and if ratified and confirmed by him at majority it became binding as of the date of its execution, and since while a declaration of intention to become a citizen initiates important rights and obligations, they are more or less inchoate, and the declarant is neither required nor permitted to ratify his act until after his majority, there is nothing in the nature of the declaration which on principle a minor should not be competent to make, if it appears that he is of sufficient age and understanding to appreciate the nature of the act.

4. SAME—DECLARATION OF INTENTION—NATURE.
A declaration of intention to become a citizen is in no sense a complete and binding act, and carries no full rights of citizenship before the final act of admission.

Thor Harold Polsson, in pro. per.
Carlos G. White, Asst. U. S. Atty.

VAN FLEET, District Judge (orally). Petitioner's application for admission to citizenship is based upon a declaration of intention made by him on September 9, 1901, while he was a minor, being but 19 years of age; and it is objected by the government that under the law as it then existed petitioner was not competent, by reason of nonage, to make such declaration, and that it is consequently void and affords no sufficient foundation for the granting of a final certificate. Petitioner being unrepresented by counsel, the United States Attorney has refrained from taking a strictly partisan attitude in the matter, and has offered no formal argument or brief in support of his contention, but has made certain general suggestions in a more or less tentative way, which will be noticed.

The question arises upon the construction to be given to section 2167 of the Revised Statutes [U. S. Comp. St. 1901, p. 1332], which was in force when the petitioner's declaration of intention was made, and read as follows:

"Sec. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States,

including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."

The construction of this section in the particular here involved has arisen heretofore in a number of instances, and has given rise to some diversity of judgment in the courts by which it has been considered, a number of courts, both state and federal, holding with the present contention of the government, and others taking a contrary view; but unfortunately the reasoning by which the conclusion of the court was reached in any of such instances is not available, owing to the fact, doubtless, that up to the adoption of the recent legislation by Congress revising our naturalization laws (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 419]) these applications have been uniformly regarded as in no sense adversary proceedings, but largely if not wholly ex parte matters, and judges have contented themselves with an oral expression of their views in a more or less informal way, and of which no written evidence has been kept. We are therefore without precedent in the nature of judicial expression, beyond the bald effect of the order entered in any particular case.

After a somewhat careful consideration, I am unable to regard section 2167 as necessarily demanding the construction contended for. It is not pretended that Congress has by its terms made any express declaration that a minor cannot be permitted to make the declaration in question, but the contention is, in effect, that in providing that an alien coming here a minor, may, under the particular conditions therein specified, be admitted without a declaration made previous to the time of his admission, it has by implication said that an alien shall in no instance be competent to take such step during minority. But to my mind it would be a strong thing to say that the first proposition is the equivalent of the last. It must be borne in mind that we are dealing with a statute which grants a right or privilege in the nature of a franchise, and it is a familiar rule that in construing such a grant, where an ambiguity arises, that construction is to be indulged which is most favorable to the persons or class for whose benefit the grant was made. The language employed to express the intention of Congress is admittedly ambiguous, and may have had one object or may have had another, but we are only concerned with the purpose to the extent of determining whether it was precisely what is here contended for. It is admitted that the provision would, by its terms, apply to one who was 50 years old at the time of final hearing equally with one just arrived at his majority. Why, therefore, the peculiar limitation found in the statute should have been employed it is difficult to say.

It is suggested that the construction contended for is in harmony with the rule at common law that a minor is not competent to enter into a contract; and that the declaration of intention is in the nature of a compact with the government under which reciprocal obligations of fidelity on the one part and protection on the other arise between the

parties, thus constituting a convention that should only be entered into by one in all respects sui juris. The answer to this is that at common law a minor could enter into any contract not expressly prohibited, and if ratified and confirmed by him at majority it became binding and obligatory and took effect as of the date of its execution. And while a declaration of intention initiates important rights and obligations, they are admittedly more or less inchoate in character, and the declarant is neither required nor permitted to ratify or confirm his act until after he has become of full age and understanding. It is simply a first step in the process required by the law, the purpose of which is, in view of the grave nature of the proposed change by the alien in his political relations, that the final step may be taken with due deliberation and consideration. It is in no sense a complete or binding act, and carries no full rights of citizenship before the final act of admission. Van Dyne on Citizenship, § 24. There is nothing, therefore, in the nature of the declaration which on principle a minor should not be competent to make, so long of course as it appears that he is of sufficient age and understanding at the time to appreciate the nature of the act; and Congress has itself distinctly recognized that there is no inherent reason or rule of policy which should render a minor incompetent to take such a step, by expressly providing that he may. See section 4 of the act above cited.

Counsel calls attention to an expression by Mr. Van Dyne (Van Dyne on Citizenship, § 40), taking the position now urged by the government; but the text shows that this view is merely an assumption of the author, the only authority for which is a reference to an incidental statement to that effect found in the official correspondence of the Department of State, referred to in 2 Wharton's International Law, § 173, where the question here was very evidently not the essential point under consideration, and where no reasons for the attitude taken by the Secretary of State are suggested. While an expression of opinion from so high a source is entitled to great respect, I am constrained to think that it should not be regarded as sufficient to countervail the considerations leading to the contrary view.

Reading the statute in the light of the suggestions made, my conclusion is that it should not be given a construction that would invalidate the declaration of intention made by petitioner; and I am at liberty to state that this view is concurred in by my associates in this district.

The evidence as to residence, character, and fitness being in all respects free from exception, and sufficient to satisfy the law as to petitioner's general qualifications, the application should be granted, and it is so ordered.

In re PEOPLES' DEPARTMENT STORE CO.

(District Court, W. D. New York. February 21, 1908.)

No. 2,601.

1. SALES—AGREEMENT AS TO PRICE—EVIDENCE—SUFFICIENCY.
Evidence on an objection to the allowance of a claim in bankruptcy for goods sold *held* insufficient to show that the creditor agreed to accept shares of stock in the bankrupt corporation in part payment.

2. BANKRUPTCY—REFEREE'S FINDINGS—REVIEW—EXCEPTIONS—NECESSITY FOR.
That no formal exceptions were filed to the decision and ruling of a referee on a creditor's claim does not prevent a review of the referee's findings, in the absence of a rule or order of the District Court requiring exceptions to be filed.

3. SAME—CONCLUSIVENESS OF FINDINGS.
The District Court is not bound by a referee's conclusions on a hearing before him, because the witnesses testified before him, where the evidence is not in serious conflict and the conclusions are principally based upon inferences to be drawn from a peculiar state of facts, and where the inferences drawn by the referee are not sufficiently supported by the evidence.

In Bankruptcy.

Raines & Raines, for claimant.

John Desmond and Samuel M. Havens, for trustee.

HAZEL, District Judge. The claim of George W. Pfohl of $2,003.60 for merchandise sold and delivered to the bankrupt was allowed by the referee for $3.60 only, on the ground that the claimant had received to apply thereon, pursuant to agreement, $2,000 in stock of the said bankrupt corporation. Claimant has petitioned for a review of said order.

The specific contention before the referee was whether, on or about October 8, 1906, the debt or balance in question was paid in part by delivering to the claimant or his agent 200 shares of preferred stock of the corporation in question. The position of the trustee is that the creditor, at the time he sold the goods to the bankrupt, agreed to accept in part payment such shares, of the par value of $2,000. On the other hand, the objecting creditor claims that he did not so agree, that the stock was not delivered to him, and that one Dingens, who was claimed by the bankrupt to have negotiated the sale and to whom the stock was delivered, was not in fact his agent. The referee decided in favor of the trustee. His conclusions were doubtless influenced by the typewritten notation on the invoice; i. e., "Terms, 200 shares stock; balance 30 days from date"—which was mailed to the bankrupt about two weeks after delivery of the goods. The evidence indisputably shows, however, that in conversations, prior to the delivery of the merchandise, between Pfohl, Dingens, and Cavanaugh, the former repeatedly stated that he would not accept stock in part payment, which statement he reiterated on several occasions after such delivery. The testimony of Cavanaugh and Dingens, witnesses for the trustee, upon material features of the transaction and the terms of the contract of sale is wholly unsatisfactory, and certainly leaves vague and indefinite the intention of the parties

as to whether part payment in stock should be made as claimed. The explanation by Pfohl of the notation on the invoice is not inconsistent with his version of the transaction, namely, that Dingens, who was employed by the bankrupt, was to sell within a short time stock of sufficient amount and apply the proceeds in part payment of the goods. It is not pretended that in any of the preliminary conversations there was an express agreement to take the stock in part payment; nor, indeed, is there any evidence indicating that the creditor, subsequently to the sale, assented, or did any act confirmatory of the impression evidently created by the invoice. After careful consideration of the testimony in all its aspects, and the inferences which may fairly be drawn therefrom, I do not agree that the objecting creditor parted with his goods in the understanding, express or implied, that he was to receive and accept shares of stock in part payment. Because of the peculiar indefiniteness of the testimony introduced by the trustee, it would not, I think, in view of the explanation of Pfohl, be justifiable to put controlling weight upon the words on the invoice hereinbefore quoted. The presumption from all the evidence is warranted that the reference to stock on the invoice related to the asserted arrangement between Pfohl and Dingens that the latter would sell shares of stock within 30 days and thereupon transmit the proceeds to the claimant to apply on the purchase.

Counsel for the trustee contend that, as no formal exceptions were filed to the decision and ruling of the referee, his findings of fact should not be disturbed. In the absence of a rule or order of this court requiring exceptions to be filed, such filing was not essential. The petition for review sufficiently indicates the single disputed question which is assigned for error. Nor is the court bound by the conclusions of the referee because the witnesses appeared before him and gave testimony. The evidence is not in serious conflict, and the conclusions are principally based upon inferences to be drawn from a peculiar state of facts. The inferences drawn by the referee are not thought to be sufficiently supported by the evidence, and therefore there can be no valid objection to a decision based upon the facts and circumstances according to the judgment of this court. In re Swift (D. C.) 118 Fed. 348.

The claim should be allowed in the sum of $2,003.60.

CHARLES MORNINGSTAR & CO. v. UNITED STATES (two cases).

(Circuit Court, S. D. New York. November 23, 1907.)

Nos. 3,896, 4,907.

CUSTOMS DUTIES—CLASSIFICATION—WHITE "DEXTRINE."

White dextrine, produced by the chemical treatment of starch, while not a dextrine, technically speaking, is classible as "dextrine," because it is commercially so known, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 286, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653].

On Application for Review of Decisions by the Board of United States General Appraisers.

For decisions below, see G. A. 5,912 (T. D. 26,011) and G. A. 6,576 (T. D. 28,073), affirming the assessment of duty by the collector of customs at the port of New York on importations of so-called "white dextrine."

Everit Brown, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in both suits is the same. It is made by treating starch with an acid vapor in such way that the granules are disintegrated, and the mass becomes more gelatinous.

Paragraph 285 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653]) relates to starch. Paragraph 286 covers "Dextrine, burnt starch, gum substitute, or British gum." The higher rate is on the dextrines. When starch has become sufficiently gummy by treatment, it was deemed best that it should pay the higher rate. The importer thinks it had not reached that stage, and was not, in fact, dextrine. Technically speaking, the merchandise in dispute is neither starch nor dextrine, but why need we be concerned with the question whether it has been carried far enough away from starch to entitle it to classification among the dextrines?

Mr. Morningstar has been the sole importer of this particular article for a great many years, extending back far beyond the present tariff act. He has imported it until lately as dextrine, and paid duty under paragraph 286. The burden of proof is, of course, upon the government to prove a commercial designation which should govern the rate. I think this burden has been sustained, and, upon the entire record, it is plain that the merchandise was definitely, generally, and uniformly known in the trade of this country as "dextrine" when the act of 1897 was passed. The importer himself says in flat terms that it was so known, but he insists that such designation was erroneous, and cannot be borne out scientifically. As the sole importer of this special brand he helped to fasten the trade-name upon it; as a selling point he may have supplemented the general name with some special mark or stamp, but the general name by which it was known still remained uniform and definite. In truth, even as a selling point, one at least of his fancy names seems to have failed of efficacy.

This being so, the Congress must have concluded to have this specific article included within the terms of paragraph 286. This leaves no basis for any of the alternative grounds of protest to rest upon.

The action of the board was manifestly right in both cases, and is affirmed.

A. A. VANTINE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 14, 1907.)

No. 4,889.

CUSTOMS DUTIES—CLASSIFICATION—GRANITE LANTERNS—"DRESSED GRANITE"—"COMPLETED MANUFACTURED ARTICLES."

Imports in the form of pieces of granite dressed, cut, and bored, ready to be assembled as ornamental garden lanterns, are not "dressed granite" under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 118, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], but should be classified as "completed manufactured articles," and as such are dutiable as unenumerated manufactured articles under section 6 (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers, on the authority of a former board decision, G. A. 5,835 (T. D. 25,743), affirmed the assessment of duty by the collector of customs at the port of New York on imported merchandise invoiced as stone lanterns. These articles are described as follows in the opinion of the Board: The testimony shows that the "stone lanterns" when set up are from 2½ feet to 5 feet high, varying in width from 1 foot to 3 feet, made of granite and other stone. Photographs introduced in evidence show the pieces to have been cut and dressed, consisting of bases, dies, and caps, the top dies having holes or openings bored or cut through the ends, also one or more holes bored or cut through the sides thereof, through which artificial light may be projected. The photographs also respresent the pieces assembled in the form of monuments; and it also appears from the evidence that these pieces are put together and set up in parks or graveyards.

Walden & Webster (Henry J. Webster, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

MARTIN, District Judge. The merchandise herein was assessed for duty by the collector of the port at the rate of 50 per cent. ad valorem as "dressed granite" under the provisions of paragraph 118 of the Tariff Act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]). The importers protested, claiming said merchandise to be dutiable at 25 per cent. or 40 per cent. ad valorem under paragraph 94, or, alternatively, at 35 per cent. or 45 per cent. ad valorem, under paragraph 97 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]) relating to earthy or mineral substances, or at 20 per cent. ad valorem under section 6 of said Act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as unenumerated manufactured articles. The Board of General Appraisers sustained the assessment of duty by the collector, from which decision the importers appeal to this court.

From an examination of the photographs representing the merchandise and of the undisputed facts it seems to me apparent that they can only be classified as completed manufactured articles, that the component parts cannot be deemed "hewn, dressed, or polished stone for building or monumental purposes," but as stones that are parts of completed manufactured articles, called lanterns. These articles were formerly used in Japan as ornamental garden lanterns. They

are brought here as curios. Counsel for the government contends that if they are not dutiable as hewn, dressed, or polished granite under said paragraph 118, then they should be classified under either paragraph 95 or 96. It was not claimed on argument that paragraph 97 was applicable, as they are not articles to be decorated. In order to be classified under either paragraph 95 or paragraph 96 they must be treated as bisque or earthen articles. I hold that they are neither. I find no paragraph specifically covering these manufactured articles, and they therefore should be classified under section 6 at 20 per cent. as unenumerated manufactured articles.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. O. G. HEMPSTEAD & SON.

(Circuit Court, E. D. Pennsylvania. February 25, 1908.)

No. 83 (1,976).

1. CUSTOMS DUTIES—CLASSIFICATION—DECALCOMANIA—"SURFACE-COATED PAPER."

Decalcomania paper is not dutiable, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 400, 403, 30 Stat. 188, 189 [U. S. Comp. St. 1901, pp. 1672, 1673], as lithographic prints or printed matter, being commercially a distinct article from either, but falls under the provision for "surface-coated papers * * * printed," under paragraph 398, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671].

2. SAME—APPEAL—ADDITIONAL EVIDENCE.

The procedure in customs appeals from decisions of the Board of United States General Appraisers, under Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], is faulty, in that it permits parties to partially present their case before the Board, and then, after losing it there, producing in the Circuit Court the evidence which could have as easily been submitted to the Board.

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,630 (T. D. 28,277), reversing the assessment of duty by the collector of customs at the port of Philadelphia. The government brought these proceedings for review as prescribed in Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], and under the provisions of this section introduced in the Circuit Court much evidence additional to that taken by the Board of General Appraisers.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for the United States.

HOLLAND, District Judge. This is an appeal by the collector of customs from a decision of the Board of General Appraisers, reversing the decision of the collector, and classifying certain commercial decalcomania paper at 20 cents per pound at lithographic prints under paragraph 400 of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], against the contention of the collector that the same should be classified at a rate of 3 cents

per pound and 20 per cent. ad valorem as "surface-coated papers, * * * printed," under paragraph 398, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671].

This case is another illustration of the faulty procedure in this class of cases in permitting the parties objecting to partially present their case before the Board of General Appraisers, and, after losing it there, then wakening up to the necessity of properly presenting it, and producing the evidence before the court which could have as easily been submitted to the Board of General Appraisers. If this case had been presented to the Board upon the evidence submitted here, and the classification urged under paragraph 398 of the tariff act of 1897 as surface-coated paper printed, "dutiable at three cents per pound and twenty per centum ad valorem," the Board in all probability would have sustained the collector; but the contention was made that decalcomania was not properly assessed under paragraph 398 or paragraph 400 as claimed by the importer, but that it was dutiable at the rate of 45 per cent. ad valorem as manufactures in chief value of metal under the provisions of paragraph 193 of the tariff act. This proposition, as stated in the opinion of the Board, "is utterly groundless, and upon principle must be rejected." It was rejected by the Board; and decalcomania was held to be dutiable under paragraph 400 as "printed matter," whether it could be regarded as lithographic prints or not. The additional testimony, subsequently taken and now before the court, however, clearly establishes that decalcomania is an entirely different article of merchandise from lithographic prints or printed matter. It is a distinct article of commerce, differing from lithographic prints and printed matter both in manufacture and use.

Decalcomania is defined by the Century Dictionary as the practice or process of transferring pictures on marble, porcelain, glass, wood, and the like. The Standard Dictionary defines it to be a process of transferring prints from paper, and making them adhere to glass, porcelain, or the like. Lithography is the art of making a picture, design, or writing upon stone in such a manner that ink impressions can be taken from the work, and of producing such impressions by a process analogous to ordinary printing. As stated by one of the witnesses, the difference between the two processes lies chiefly in this, that the decalcomania process largely begins where the lithographic process leaves off, and that the real process is in effect a hand application of color, whereas the lithographic process is entirely by press. In the former the print is not of a color but is of a size print, which is on a coating of gum and albumen. This latter is on a coating of starch, so that, as claimed, there are two surface coatings between the surface and the paper. The cost in producing decalcomania sheets is from three to fifteen times greater than that of lithographing, depending upon the designs, sizes, sheets, and conditions. After the sizing, impression is made by running the sheet through a lithographic press, all the colors are put on the paper by hand-brush work, and the sheet must be put through the press for sizing impressions as many times as there are different colors in the design or figure upon the finished surface. In making decalcomania, the artist's design or work on the

stone is made "right," while the same work on a stone for lithographing is made "backwards."

As stated by the Board in G. A. 5,168 (T. D. 23,849), "lithographic prints consist of complete articles of the character of pictures * * * ready for use in mounting, binding or framing," etc., and printed matter is used either for the purpose of conveying information or for ornamentation, but the importation in question is "a surface-coated paper * * * wholly or partially covered with metal or its solution," and used for the purpose of transferring colored or printed objects, which it contains, to marble, porcelain, glass, wood, and the like.

The evidence, we conclude, clearly establishes that decalcomania is a "surface-coated paper," wholly or partly covered with metal or its solution, and is properly dutiable under paragraph 398 as such at the rate of 3 cents per pound and 20 per cent. ad valorem.

The decision of the Board of General Appraisers is reversed, and the collector directed to assess the duty in accordance with this opinion.

DE LONG HOOK & EYE CO. v. FRANCIS HOOK & EYE & FASTENER CO.

(Circuit Court, W. D. New York. February 6, 1908.)

No. 174.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—SIMULATION OF DRESS.

The fact that a manufacturer has modified the dress by which its goods had become known to the public, does not justify a rival manufacturer in adopting or simulating the earlier dress, nor relieve it from liability for unfair competition where it has done so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 81.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. SAME—SUIT FOR UNFAIR COMPETITION—CONCLUSIVENESS OF INTERLOCUTORY DECREE.

Where by an interlocutory decree on the merits it was adjudged that a defendant was chargeable with unfair competition in simulating the dress of complainant's goods, and a reference was directed to take an accounting of profits recoverable, the question of defendant's liability is concluded, and cannot be reopened before the master.

In Equity. On exceptions to master's report.

See 139 Fed. 146; 150 Fed. 597.

Stern & Rushmore (Charles E. Rushmore and William C. Strawbridge, of counsel), for complainant.

Edmund Wetmore and J. William Ellis, for defendant.

HAZEL, District Judge. This is a hearing on exceptions to the report of the master who found that the complainant, the De Long Hook & Eye Company was entitled to recover from the defendant, Francis Hook & Eye & Fastener Company, the sum of $5,010, for gains and profits realized by the latter in the manufacture and sale of cards containing hooks and eyes known as the "Adelaide," "Waldorf," and "As-

toria," in imitation of complainant's cards, Exhibits 4 and 5. Complainant does not claim to be entitled to recover additional compensation in the nature of damages, and no evidence was given to show that it had sustained any damages. The defendant offered to prove that cards like Complainant's Exhibits 4 and 5 were abandoned by complainant's predecessor in about the spring of 1898, and since then no such cards of hooks and eyes have been manufactured, sold, or used in the business of complainant. The master sustained the objection to the proposed evidence of the defendant, to which ruling exception has been filed.

The defendant, conceding that it was properly enjoined from imitating the cards of the complainant, insists that as such cards (Exhibits 4 and 5) were not on the market, and were not actually used or sold, at the time the complainant succeeded to the business of its predecessor, there can be no recovery for gains and profits. The proofs show that the exhibit cards containing hooks and eyes had been manufactured and sold by the complainant in its business and were extensively known to the purchasing public, but that in the year 1898 the complainant modified the cards by pasting a narrow label on its face between the rows of hooks and eyes. (For statement of facts, see 139 Fed. 146.) Such modification, however, did not in my estimation give the defendant the right to imitate the earlier cards. The claim of the defendant that because the complainant modified its cards in the manner stated, and ceased to use or distribute the earlier cards, there could be no unfair competition, is not tenable, since such issues were heretofore decided adversely to the defendant in this action.

The interlocutory decree, which, as to Exhibits 4 and 5, was affirmed by the Circuit Court of Appeals, provided that the complainant was entitled to the profits made by the defendant by reason of the fraudulent manufacture and sale of its carded hooks and eyes. Such adjudication was upon the merits, and cannot now be reopened for the purpose of allowing defendant to prove that the cards in question had been intentionally abandoned by the complainant. In re Potts, 166 U. S. 266, 17 Sup. Ct. 520, 41 L. Ed. 994; Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; Chicago Wooden Ware Co. v. Miller Ladder Co., 133 Fed. 544, 66 C. C. A. 517. Even if the complainant had abandoned the said cards, the defendant could not lawfully imitate them to palm off its goods for those of complainant. Saxlehner v. Eisner, 179 U. S. 31, 21 Sup. Ct. 7, 45 L. Ed. 60. The recent ruling of Judge Lacombe in Baglin v. Cusenier Co. (C. C.) 156 Fed. 1015, was to a similar effect. There it was claimed that the defendant had the right to use a trade-mark which had been abandoned by the owner.

The exception is overruled, and the report of the master is confirmed.

BARUCH v. UNITED STATES.

(Circuit Court, S. D. New York. November 23, 1907.)

No. 4,419.

CUSTOMS DUTIES—CLASSIFICATION—FEATHERSTITCH "BRAIDS."

Articles commercially designated as "featherstitch braids," though produced by a weaving rather than a braiding process, are by reason of such designation dutiable as "braids" under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662.]

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 856.]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on imports of Leopold Baruch, this ruling being on the authority of a previous board decision, G. A. 6,404 (T. D. 27,506), affirmed in Vom Baur v. United States (C. C.) 141 Fed. 439, and of In re Dieckerhoff (C. C.) 54 Fed. 161.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

J. Osgood Nichols, Asst. U. S. Atty.

PLATT, District Judge. The articles in dispute (Collective Exhibits A, B, and C) are woven on a loom. Tapes and bindings are made that way. Braids are usually made on a machine. The manner of making, therefore, leads us towards tapes and bindings in paragraph 320, Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]; but a thing is not necessarily one or another for tariff purposes, because it is made in a certain way. When we come to look at the uses to which they are put, we find that they have a dual function. They serve to cover and unite the raw edges, and in that sense are perhaps tapes or bindings; but they also look pretty, and in that sense are ejusdem generis with "embroideries and all trimmings, including braids," in paragraph 339. Did or did not Congress have these things in mind when the tariff act of 1897 was passed?

To answer that question properly it seems right to look at the Dieckerhoff Case. In that case the government tried to classify similar articles as cotton trimmings at 60 per cent., but the importers insisted upon their classification as cotton braids at 35 per cent. This was established by proving the commercial designation. The manner of making and use was substantially the same as in the present case. In 54 Fed. 161 (C. C. 1893), Judge Coxe sustained the importers' contention. The government acquiesced, and the ruling of that case prevailed until the passage of the act of 1897.

It is unthinkable that the parties who had succeeded in getting a low rate of duty, based upon commercial usage, would have taken any steps to obstruct the generality, uniformity, and definiteness of such usage whilst they were benefiting thereby. Prior to the 1897

tariff act, articles like those now at issue had many subsidiary names just as these articles have, but the ruling was that the goods came under the general trade designation of "featherstitch braids" and must therefore pay duty as braids. The importers prepared for themselves the bed in which they rest, and they ought to be the last persons to complain of irregularities while occupying it. I cannot avoid the conclusion that when Congress included braids among trimmings it had the Dieckerhoff Case in mind. The decision of the Circuit Court of Appeals in Hiller v. U. S., 106 Fed. 73, 45 C. C. A. 229, leads me to think that the same opinion ruled there in the mind of the dissenting judge.

The board found that these goods were known generally in the trade as "featherstitch braids" prior to 1897. The further testimony taken in court does not tend to weaken that conclusion; in truth it serves to strengthen it. At the hearing the importers acquiesced in the board's decision in so far as it related to Collective Exhibit C, and were more or less faint-hearted in their attack upon Collective Exhibit B. If they can divest themselves for a moment of the influence which self-interest furnishes, they will see that the logic of the situation sweeps Collective Exhibit A into the same net.

The decision of the board is affirmed.

In re WEISS.

(District Court, S. D. New York. February 19, 1908.)

BANKRUPTCY—PREFERRED CLAIMS—UNITED STATES TAXES—COMMISSIONS—ATTORNEY'S FEES.

A claim due the United States for taxes is entitled to priority over the trustee's commissions and reasonable charges of the trustee's attorney; and this, though before the claim for taxes was presented the fund originally in the trustee's hands had been reduced by some administration expenses expressly authorized by order of the referee.

In Bankruptcy. Petition to review order of referee denying the petition of the United States to have awarded to it certain funds in the hands of the trustee in bankruptcy in partial payment of taxes.

Thomas D. Thacher, Asst. U. S. Atty., for petitioner.

Meyers & Goldsmith, opposed.

HOUGH, District Judge. The United States is a creditor of this bankrupt for a sum exceeding the amount in the hands of the trustee at the time of presenting such claim. The commissions of the trustee are unpaid, as also the reasonable charges of his attorney. The question presented on this review is whether a claim for taxes is entitled to priority of payment, to the exclusion of all reasonable expenses of administration.

Before this claim for taxes was presented the fund originally in the trustee's hands had been reduced by some administration expenses explicitly authorized by referee's order. Whether the trustee is or can be made responsible for the expenses so paid prior to presentation of the government's claim is a question not before this court, but it is

necessary to decide whether taxes have priority (a) over trustee's commissions, and (b) the reasonable charges of the trustee's attorney.

Trustee's commissions are necessary costs of preserving the estate, and fall under section 64b (1) (Act July, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). The reasonable fees of the trustee's attorney fall under the same subdivision, if they were necessary; and it may be assumed for the purposes of this discussion that such services were necessary. With the justice or fairness of the government's contention in this case I think the court is not concerned. If the statute is clear it must be obeyed, and the very matters here presented were necessarily decided in Re Prince and Walter (D. C.) 131 Fed. 546. It is suggested that the proposition there advanced, viz., that taxes as a class are put at the head "of everything, even above the expenses of preserving the estate or the costs of administering it," is a dictum. I do not think so. The court could not have come to the conclusion it did without necessarily holding the doctrine contended for here by the government. This decision was cited with approval in City of Chattanooga v. Hill, 139 Fed. 600, 71 C. C. A. 584, and followed by the form of the order entered in Re Cramond (D. C.) 17 Am. Bankr. Rep. 40, 145 Fed. 966; and this case especially I feel bound to follow, as being in this circuit.

The order of the referee is reversed, and the trustee directed to pay the fund actually in his hands to the United States.

UNITED STATES v. NEW YORK HERALD CO.

(Circuit Court, S. D. New York. January 21, 1907.)

1. POST OFFICE—NONMAILABLE MATTER—CORPORATIONS.

A corporation has capacity to commit the crime of mailing obscene, nonmailable matter, prohibited by Rev. St. § 3893, as amended [U. S. Comp. St. 1901, p. 2658].

[Ed. Note.—Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

2. SAME—KNOWLEDGE.

Rev. St. § 3893, as amended [U. S. Comp. St. 1901, p. 2658], describes certain nonmailable matter, and provides that any person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by the section to be nonmailable, shall for each offense be fined, on conviction, or imprisoned at hard labor or both, etc. *Held*, that such section was applicable to a corporation organized for the purpose of publishing a newspaper, and that proof of the mailing by such corporation of its newspaper, containing obnoxious matter, was sufficient to show that the corporation had knowledge thereof.

At Law. On demurrer to indictment of defendant corporation under Rev. St. § 3893, as amended [U. S. Comp. St. 1901, p. 2658].

Mr. Rand, for demurrer.
Mr. Wise, opposed.

HOUGH, District Judge. 1. As to the capacity of a corporation to commit the crime alleged in this indictment, I see no reason to de-

part from United States v. MacAndrews & Forbes Company (C. C.) 149 Fed. 823.

2. Under Rev. St. § 3893, as amended [U. S. Comp. St. 1901, p. 2658], the indictment alleges that the corporation defendant "did knowingly deposit and cause to be deposited" in the United States mail certain unmailable matter, and that when such deposit was made the corporation "well knew the contents of the same." The question presented on demurrer is not whether the corporation did as matter of fact "knowingly" deposit the publication in the mail, or as matter of fact "well know" the contents of the same, but whether it can knowingly deposit, and well know the contents of, an obscene newspaper. Reading the act under which this indictment is brought in conjunction with the statutory construction law (Rev. St. U. S. § 1 [U. S. Comp. St. 1901, p. 3]), and observing that the act in question was passed subsequent to February 25, 1871, I have no doubt that it was the intention of Congress to make section 3893 applicable to corporations.

Taking as the measure of the knowledge required in cases like this the decisions in Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, and Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, it is not to be doubted that, if by corporate act (e. g., a vote of the board of directors) the obnoxious publication was directed to be placed in the mail, knowledge of its contents and knowledge of the character thereof would be chargeable against the corporation, even though there was a concensus of opinion on the part of the directors that the paper was not of the forbidden character (the Rosen Case); it being enough that said directors in their official capacity were aware of the insertion in the newspaper of matter obnoxious (in the opinion of court and jury) to the statute (the Dunlop Case). To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant. If a corporation can corporately know that an engineer is a habitual drunkard (Cleghorn v. N. Y. Central, etc., R. R. Co., 56 N. Y. 44, 15 Am. Rep. 375), it can even more surely know the ordinary contents of a newspaper the publication of which is its sole reason for existence.

Of course, the capacity for knowledge and the fact of knowledge are quite different things. The first is a question of law, and must decide this demurrer. The second is a mixed question of law and fact, and, as applied to this case, its answer will depend upon the authority and corporate importance of the human beings responsible to the corporation for the reception, publication, and mailing of the advertisements here complained of as unmailable under the statute.

Let the demurrer be overruled.

In re RANDALL.

(District Court, E. D. Pennsylvania. February 19, 1908.)

No. 2,776.

1. BANKRUPTCY—DISCHARGE—SPECIFICATIONS OF OBJECTION—DISPOSAL.
A motion for a bankrupt's discharge cannot be granted until specifications of objection have been disposed of.

2. SAME—REFERENCE—CERTIFICATE OF CONFORMITY.
Since a referee in bankruptcy has no power to decide any question relating to the bankrupt's discharge until that subject has been referred to him by the judge, a certificate of conformity issued by a referee before specifications of objection to the bankrupt's discharge had been disposed of was without authority and would be disregarded.

3. SAME—SPECIFICATIONS OF OBJECTION—SUFFICIENCY.
Specifications of objection to a bankrupt's discharge, alleging that the bankrupt had concealed or failed to have kept books of account or records from which his financial condition might be ascertained, and that while under examination under oath before the referee he failed to show what he had done with money borrowed from his sister-in-law, were sufficiently specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 714.]

4. SAME—VERIFICATION—CREDITOR'S ATTORNEY.
Specifications of objection to a bankrupt's discharge should be verified by the objecting creditor, and not by his counsel, unless some reason is given why the oath is not taken by the creditor.

In Bankruptcy. On motion for discharge and objections thereto.

Yerkes, Ross & Ross, for bankrupt.
Henry A. James, for objecting creditor.

J. B. McPHERSON, District Judge. The hearing upon the bankrupt's petition for a discharge was fixed by the court for December 31, 1907, and upon that day a creditor appeared and filed several specifications of objection. While they were pending, and also within 10 days after December 31st—that period after the return day being always permitted to elapse in this district before further action on the petition is taken—the referee, probably at the bankrupt's request, granted a certificate of conformity, which is now presented as the ground for asking that the discharge should be immediately allowed. This motion cannot be granted until the specifications of objection have been disposed of, and this has not yet been done. Moreover, the certificate of conformity was without authority and must be disregarded. A referee has no power to decide any question relating to the bankrupt's discharge until that subject has been referred to him by the judge, and no such order has been made in the case now pending.

The court is asked also to dismiss the objections as too general, and I think the motion should prevail as to the third and fourth specifications, and the concluding clause of the second. The first specification, however, and part of the second, are precise enough to call for examination by the referee:

"(1) That said bankrupt concealed or failed to have kept books of account or records from which his financial condition might be ascertained." Godshalk v. Sterling, 129 Fed. 580, 64 C. C. A. 148.

"(2) That, while under examination under oath before the referee, he failed to show what he did or had done with money which he alleged to have borrowed from his sister-in-law, Anna Rodrock Randall. * * *"

The referee is therefore directed to hear the objections thus quoted, and report thereon at his early convenience.

I note, also, that the specifications are verified, not by the objecting creditor himself, but by his counsel, without explanation of the reason why the oath is not taken by the party directly in interest. This is contrary to our practice (Re Milgraum & Ost [D. C.] 129 Fed. 828); but, as the bankrupt is apparently content to meet the specifications in their present form, I shall pass the matter by, merely adding that the inaction of the court must not be regarded as equivalent to approval.

In re WOLF.

(District Court, E. D. Pennsylvania. February 20, 1908.)

No. 2,945.

BANKRUPTCY—DISCHARGE—OBJECTIONS—LARCENY BY BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427] prescribing the grounds on which a bankrupt's discharge may be denied, a creditor cannot procure such denial, because of the alleged offense of larceny or larceny as bailee committed by the bankrupt against the objecting creditor more than a year before the petition was filed.

In Bankruptcy. On motion to dismiss specifications of objection to discharge.

Weaver & Drake, for bankrupt.

A. E. Peterson, for objecting creditor.

J. B. McPHERSON, District Judge. The specifications in question are as follows:

"(1) That the said Martin L. Wolf, on the 11th day of December, 1899, was in possession as bailee of 10 barrels of Rosemont whisky belonging to the undersigned, which was to be delivered on demand: the same having been purchased on that date by him from the said Martin L. Wolf for the sum of $1,007.

"(2) That demand was made upon the said Martin L. Wolf, bankrupt, for the said 10 barrels of Rosemont whisky March 15, 1904, February 21, 1906, March 8, 1906, and August 18, 1906, and at divers other times since, and many times before, said first-mentioned date; but the said Martin L. Wolf has always failed and refused, and does still fail and refuse, to deliver the same or any part thereof.

"(3) That protestant has been informed and believes that the said Martin L. Wolf has converted the said 10 barrels of Rosemont whisky to his own use, for which an indictment is now pending in the court of quarter sessions of the peace for the county of Philadelphia, of October sessions, 1906, No. 391."

In these specifications the objecting creditor charges the bankrupt with the offense of larceny as bailee, committed at some time between March, 1904, and August 18, 1906. Inspection of the indictment re-

ferred to shows that the charge therein is larceny; but for present purposes the variance is immaterial.

The dilemma that confronts the creditor is this: Either (1) his claim will not be affected by a discharge, because the debt was created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting * * * in any fiduciary capacity" (Act July, 1, 1898, c. 541, § 17a (4), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), and if this is the situation, and the debt will not be affected, he has evidently no interest in the proceeding, and therefore no standing to file objections; or (2) his debt will be extinguished by the discharge, and in that event, while he has a right to file such specifications as he may see proper, he must take care to present some objection that is recognized by section 14 as a valid reason for refusing the discharge. That section requires the court to grant the bankrupt's application unless one or more of six specified grounds for refusal shall be made to appear; and an examination of these statutory grounds will show plainly that none of them includes the offense of larceny, or larceny as bailee, committed by a bankrupt against an objecting creditor more than a year before the petition was filed.

The specifications must therefore be dismissed as insufficient.

In re UNITED STATES GRAPHITE CO.

(District Court, E. D. Pennsylvania. February 10, 1908.)

No. 2,865.

BANKRUPTCY—ADMINISTRATION OF ESTATE—BOOKS OF THIRD PERSON—EXAMINATION.

Where the P. Co. was a party to an inquiry before a referee in bankruptcy concerning an alleged fraud between the P. Co. and the bankrupt's estate, the P. Co., in response to a subpœna for that purpose, was required to produce its minute book, which probably contained entries with reference to the question under investigation and to permit an examination thereof by counsel for the adverse party.

In Bankruptcy. On certified question of referee.

I, George M. Rupert, referee as aforesaid, do hereby certify that in the course of proceedings had before me in the above-stated matter the following question arose pertinent to the proceeding: "Whether or not the minute book of the Pennsylvania Graphite Company should be directed to be put in the hands of James G. Gordon, Esq., for examination thereof." And the said question is certified to the judge for his opinion thereon.

James Gay Gordon, for creditors.

Alexander Simpson and Charles H. Edmunds, for Pennsylvania Graphite Co.

HOLLAND, District Judge. This is a question certified to the court by George M. Rupert, Esq., referee in the above-mentioned matter. The question is whether or not the minute book of the Pennsylvania Graphite Company should be directed to be put in the hands of James G. Gordon, Esq., for an examination thereof. The referee is engaged in making inquiry as to an alleged fraud between the Pennsylvania

Graphite Company, whose minute book is required, and the bankrupt estate, and, further, the corporation—the owner of the minute book—is also interested in having an order made for security for payment of rent. So that in these two questions under investigation, if not in the others, the Pennsylvania Graphite Company is a party to this litigation, and is required, in response to a subpœna for that purpose, to produce such specified books and papers as bear upon the questions investigated. When the book has been produced before the referee, of course, counsel, intending to establish certain facts from this minute book, is entitled to see it and to examine its contents for the purpose of ascertaining what it contains in relation to the questions at issue. An indiscriminate call for a book or paper, which upon its face could in all probability have no bearing upon the questions investigated, would be improper, and an objection to its examination by counsel for an adverse party would be sustained; but, where it appears that the book or paper called for is so obviously the document containing the truthful information concerning the questions investigated, it is clearly the right of counsel to examine the book or paper to see what it discloses as to the matters at issue.

In answer to the question certified by the referee, the court directs that the minute book of the Pennsylvania Graphite Company be produced before the referee, and that counsel interested for or against the petition of sale be permitted to examine the same.

OSBORNE v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 13, 1908.)

No. 48.

1. COSTS—NONRESIDENTS—RULE FOR COSTS—AFFIDAVIT—NECESSITY FOR.

   Under a United States Circuit Court rule providing that where plaintiff is not a resident of the district when suit is brought, or, being so, afterwards removes from the district, and that in every other case where a defendant makes affidavit that he believes the costs could not be recovered of plaintiff by attachment or execution, a rule for security for costs may be entered, etc., a rule for costs on a nonresident plaintiff, or one who has removed from the district after bringing suit, need not be founded on an affidavit.

2. SAME—NONRESIDENT TRUSTEE IN BANKRUPTCY—LIABILITY TO GIVE SECURITY.

   A nonresident trustee in bankruptcy may be required to give security for costs under a rule providing for the entry of a rule for costs on nonresident plaintiffs.

Rule on Nonresident for Costs.

Horace M. Rumsey, for plaintiff.
John Hampton Barnes, for defendant.

HOLLAND, District Judge. This is a rule for costs on a nonresident plaintiff. He is a trustee in bankruptcy residing in the state of New Jersey. Two matters of defense to the rule are set up: (1) The rule was not founded on an affidavit; and (2) the plaintiff is a trustee

acting for the creditors of the bankrupt estate, and is not required to give security. Rule 9 in the district provides:

"In every action in which the plaintiff or complainant is not at the time of suit brought a resident of the Eastern district of Pennsylvania, or, being so, afterwards removes from the district, and in every other case where a defendant, or other person for him, shall make affidavit that he believes the costs could not be recovered of the plaintiff by attachment or execution, a rule for security for costs may be entered, upon due notice, and in default of such security being given at a time designated by the court, judgment of nonsuit shall be entered on motion."

It will be seen by the language of the rule that, while an affidavit is required in "all other cases," none is required where the plaintiff is a nonresident or has removed from the district after bringing suit, unless it may be said that by general practice all rules to show cause should be supported by affidavit. Mitchell on Motions and Rules (2d Ed.) p. 18, states the rule to be that:

"Where any duty is made imperative on the other party by statute or rule of court, or the settled course of legal procedure, or where upon the status of the proceedings, as shown by the record, the party claims to be entitled of right to the relief sought, a rule to show cause may be entered of course by the attorney without an allocatur, and in all other cases the rule should be founded upon an affidavit and allowed by the court."

In the case at bar, upon the face of the proceeding "as shown by the record," the plaintiff is a nonresident, and, if required by defendant, must give security for costs. The cases of In re Baird (D. C.) 112 Fed. 960, and In re Barrett (D. C.) 132 Fed. 362, were both cases where suits were being instituted in the district in which the trustee resided, and raised an entirely different question in each case from the one presented here. Pacific Bank v. Mixter, 114 U. S. 463, 5 Sup. Ct. 944, 29 L. Ed. 221, was a case where a receiver of an insolvent national bank had been directed to take an appeal to the Supreme Court by the Comptroller of the Currency, and it was held he was exempted from giving security for costs under the provisions of section 1001 of the Revised Statutes [U. S. Comp. St. 1901, p. 713]. In case of an adverse decision in such cases, this section directs the costs to be paid out of the contingent fund of the department under whose direction the prosecutions were instituted. Where a receiver of a national bank brings a suit against stockholders out of his district, it does not appear such costs can be paid out of the contingent fund, and the receiver must give security. Platt v. Adriance (C. C.) 90 Fed. 772.

Notwithstanding the fact that the plaintiff is acting in the capacity of a trustee for creditors in bankruptcy, there has been no good reason shown why he should not be required to enter costs. Rule absolute, and the plaintiff is directed to enter security for costs in the sum of $250.

PATTERSON & CO. v. ROBINSON BROS.

(Circuit Court, M. D. Pennsylvania. February 3, 1908.)

No. 33, October Term, 1905.

1. ARBITRATION AND AWARD—ACTS OF PARTIES—INEFFECTIVE ARBITRATION.
Where, as part of a sale of clay works, defendants agreed to take manufactured pipe on hand at specified prices according to certain grades, and, in case of a disagreement as to the grades, arbitrators were to be appointed to determine the matter, any material interference with or disposition of the pipe by defendants by which an arbitration was rendered ineffective would relieve plaintiffs from the necessity of attempting an arbitration as a condition precedent to their right to sue.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 30.]

2. SAME—QUESTION FOR JURY.
Where the evidence of defendants' acts was not such that the court could declare as a matter of law that they absolved the plaintiff from the duty to have the grades of certain sewer pipe in question determined by arbitration, and there was no request that the court should determine such question as a matter of law, whether such acts were such as to render any arbitration attempted ineffective was properly submitted to the jury.

3. SAME—DESTRUCTION OF PIPE—QUANTITY.
Where a contract for the sale of sewer pipe in connection with a clay works plant provided for an arbitration to determine the grade of the pipe, plaintiff, while entitled to have the pipe kept intact and undisturbed as it lay at the works, if it was to be appraised by the arbitrators, was not relieved of the duty to participate in such arbitration by the fact that defendants destroyed an immaterial part of the pipe which by no possibility would have come up to the required grades.

4. SAME.
Where, in a suit on a contract for the sale of certain clay works and sewer pipe, defendants relied on provisions for arbitration as to grades of the pipe with which plaintiffs had not complied, as a defense, the court did not err in modifying a request to charge that the burden was on defendants to show that the failure to choose arbitrators was "entirely" the fault of the plaintiffs and not in any way the fault of the defendants, by striking the word "entirely."

5. CORPORATIONS—CONTRACT BEFORE INCORPORATION—ACTIONS—INSTRUCTIONS.
Where, after the sale of clay works and manufactured sewer pipe under a contract providing for arbitration as to the grade of the pipe, defendants transferred the plant to a corporation organized by them to operate it, and thereafter certain of the correspondence between the parties was signed by the corporation, and the plaintiff never objected to dealing with the corporation instead of the defendants until at the trial, the court properly charged that the jury should regard the notices signed by the corporation the same as if they were signed by the defendants.

6. NEW TRIAL—OBJECTIONS NOT RAISED AT TRIAL.
Where, in a suit on a contract for the sale of clay works and sewer pipe, defendants urged as a defense that plaintiff had failed to perform an arbitration agreement to determine the grades of the pipe, and plaintiff at the trial insisted that a transfer of the works by defendants to a corporation did not relieve defendants from the provisions of the contract with reference to arbitration, but that plaintiff had been relieved by defendants' acts in destroying and disposing of certain of the pipe, plaintiff was not entitled to assert for the first time on an application for a new trial that defendants' transfer of the works put it out of their power to have the pipe appraised, and therefore relieved plaintiff from the arbitration agreement.

At Law. Rule for a new trial.

T. C. Hipple, for the rule.
C. La Rue Munson, opposed.

ARCHBALD, District Judge. Incident to a sale made by the plaintiffs to the defendants of the Lock Haven Clay Works, it was agreed by the defendants that they would take all the manufactured pipe on hand, paying a certain price for No. 1. and another price for No. 2, which is of less value. These are two well-established grades of sewer pipe, and cover everything in that line which is considered marketable; pipe which is neither No. 1 nor No. 2, while sometimes used for farm drains and the like, having no commercial rating. This suit is for the price of the pipe so claimed to have been sold. The defense is that there was none of either of the grades called for; and that whether there was or not, in case of a disagreement, was to be left to arbitrators; as to which it was specifically provided in the contract of sale that, upon a disagreement between the parties as to the grade of the pipe, it should be settled, by each party selecting an arbitrator, and the two so chosen appointing a third, whose decision should be final. The works were sold in December, 1901, and, the defendants having assumed possession, the preliminary steps were taken to determine to what extent the pipe came up to the standard, but it never got beyond that. Each party promptly named one of their own number to represent them, who almost immediately fell apart as to the quality of the pipe, and were equally unable subsequently to agree upon an umpire. A number of names were suggested, and one man, Mr. C. M. Bechtel, was acceptable to both sides, but unfortunately he declined to act, not being willing to be drawn into the controversy, and they did not get together upon any one afterwards. The jury were instructed that, as a condition precedent to a recovery, it was necessary that the pipe should be appraised in the manner provided by the contract, if it was reasonably possible to accomplish it, and that only in case the plaintiffs made a proper effort to bring this about, and the failure to secure it was not chargeable to them but to the defendants, could they maintain this action. The verdict was in favor of the defendants, the jury putting it upon the specific ground that these requirements had not been complied with. It is now urged, in avoidance of this conclusion, that as an appraisement involved a physical inspection, by breaking up as well as disposing of a large quantity of pipe, as it is said they did, the defendants dispensed with the necessity for it, and made themselves liable without reference to it.

It is no doubt true that any material interference with or disposition of the pipe in the way suggested, by which an arbitration was rendered ineffective, would relieve the plaintiffs from the necessity of attempting it. Astrich v. Insurance Co. (C. C.) 128 Fed. 477; Id., 131 Fed. 13, 65 C. C. A. 251. And there was evidence as to this from which the jury could have found in the plaintiffs' favor. But it was not undisputed, nor was it so preponderating that the court could declare them absolved as a matter of law. Nor was there indeed a request that the court should do so. As was thus recognized, the ques-

tion was therefore for the jury under proper instructions, and the only thing to be considered now is the correctness, in this respect, of the charge which was given.

It is to be observed, as to this, that not only was the jury told in the general charge that if a material part of the pipe was broken up or taken away, which would possibly grade up to the required standard, the plaintiffs would be relieved from the necessity for an arbitration; but also, in answer to the plaintiffs' second point, it was specifically declared that, if the defendants intended to rely on the stipulation for an arbitration contained in the contract, they had no right to break, sell, or otherwise dispose of or remove, the pipe and fittings, or at least any material part of them, which by any possibility could be regarded as within the two grades mentioned, before the same had been duly appraised and graded, and the quantity of each grade ascertained by the arbitrators provided for; and that, if they did so break or dispose of the pipe, they could not avail themselves of the provision for an arbitration, at this time, but were liable for as much No. 1 or No. 2 pipe as was in the yard at the time of the consummation of the sale, as shown by the evidence. While then, on the one hand, the jury were told that an arbitration was necessary, as called for by the contract, and that the plaintiffs could not recover unless the provision for it failed without fault of theirs; they were also advised, with equal explicitness, if not to the full extent asked for, that this was not required, if there was a breaking up or disposal by the defendants of any material part of the pipe, which by any possibility would grade up to the standard specified.

It is said, however, that the plaintiffs' point should have been squarely affirmed, without any qualification, a material part of the pipe having to be broken up, according to the charge, in order to relieve the plaintiffs from the effect of the stipulation; whereas they were entitled to have the pipe kept absolutely intact and undisturbed, as it lay at the works, if the provision for an appraisement was to be insisted on. This is no doubt true, but the destruction of an immaterial part of it would surely be of no consequence, which is the sense of the instruction, putting it in the alternative. And the same is to be said of the breaking or disposal of pipe that by no possibility would come up to the grades in question. The extreme character of these qualifications is not to be lost sight of. It may be that they were unnecessary, and that the point could have been well affirmed without them. But they served to caution the jury, as they were intended, that the breaking up or disposal of an inconsiderable portion of the pipe, or of such of it as under no circumstances could be of any consequence, was not enough to avoid the express stipulation for an appraisement. As the whole character of the pipe at the works was left open by reason of there being no appraisement, it cannot be said that the plaintiffs were prejudiced by what was so said. Nor was it a begging of the question, nor a making of the defendants judges in their own cause, as it is charged, even though it may have been for the arbitrators to declare, after an inspection of the pipe, as to the character of each and every part of it which the breaking or disposal of any of it to such extent prevented. That some pipe had been broken up and some removed—although not

by the defendants—was not disputed. But material provisions of a contract are not to be avoided by inconsequentials, and unless we are prepared to hold that the breaking up or removal of any of the pipe, whether material in character or quantity, absolved the plaintiffs from the necessity for an appraisement of it, there can be no just criticism of the caution introduced in these instructions.

But complaint is also made that the plaintiffs' third point was unduly qualified. "Defendants having set up the stipulation for arbitration * * * as a defense," as the point suggests, "the burden of proof is on them to show by competent evidence, to the satisfaction of the jury, that the failure to choose arbitrators was entirely the fault of the plaintiffs, and not in any way the fault of the defendants." Striking out the word "entirely," as possibly too strong an expression, this was declared by the court to be a correct statement of the law. It may be that it would have been just as well to have affirmed the point as it stood. But even if that be so, the change could not have worked any detriment. With this word eliminated, the jury were still instructed that, in order to avail themselves of the stipulation in question, the defendants were bound to prove that the failure to choose arbitrators was not only the fault of the plaintiffs, but not in any way the fault of the defendants, which was equally effective. It got before the jury in full force that the fault must not be mutual, but be attributable to the plaintiffs to the entire absolution of the defendants, which is all that was or could be asked, or that is now contended for.

Nor am I persuaded that any mistake was made as to the instructions given with regard to the transfer of the plant by the defendants to the Lock Haven Sewer Pipe Co., which was organized by the defendants to run it, and by whom one or two of the communications were signed, which passed between the parties. The jury were advised that the dedendants could not shift their responsibility, or avoid the stipulation with regard to an appraisement, in any such way; which is of course not objected to. But complaint is made of the suggestion to the jury, in answer to the plaintiffs' fourth point, that they should regard the notices signed by the Lock Haven Sewer Pipe Co. the same as if they had been signed by the defendants. That they were so intended and understood, there can be no question. Nor were the plaintiffs in any respect misled by them. The only one of any importance in this connection is that of March 7, 1902, in which certain parties were nominated to act as the third arbitrator. Neither of them was apparently acceptable to the plaintiffs, but, in declining to agree to them and suggesting others, no question was made that the communication did not come from the proper source. Nor, indeed, as to either of the papers referred to was it ever objected, except at the trial, that they were signed by the Sewer Pipe Co. rather than by the defendants, it being clearly understood by everybody that the one was the representative of the other on the ground.

It is said, however, that by the transfer of the works to the Sewer Pipe Co. the defendants put it out of their power to have the pipe appraised, thus doing away with the necessity for it. But this is evidently a mere afterthought. No such contention was made by the plaintiffs at the time, and the efforts, such as they were, to agree upon a third

arbitrator, show that they had no such idea of it. Nor was this position indeed taken at the trial, the only point made being, as just stated, that the transfer did not relieve the defendants from the provisions of the contract with regard to an arbitration, which is altogether different from holding that it was thereby entirely abrogated.

This is all that needs to be said in disposing of the present rule. The jury having based their verdict on the failure of the plaintiffs to make a proper effort to agree on a third arbitrator, all other questions were thereby eliminated, and the rulings of the court with regard to them, whether correct or otherwise, become immaterial. Finding no occasion, therefore, for disturbing the verdict, the rule for a new trial is discharged.

SIMONS v. CITY OF EUGENE et al.

(Circuit Court, D. Oregon. February 24, 1908.)

No. 3,077.

1. MUNICIPAL CORPORATIONS—CONTRACTS — PAYMENT FOR SERVICES — CITY'S DEBT LIMIT.

   Where a city's charter authorized a bond issue for the construction of a power plant and lighting system, and the city contracted for engineer's services payable out of the proceeds of an authorized issue of bonds for such purpose, it was no objection to the validity of such a contract that the city's general indebtedness already exceeded the charter limit.

   [Ed. Note.—Constitutional and statutory limitation of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.]

2. SAME—FAILURE TO PROVIDE FUNDS—GENERAL LIABILITY.

   A city having express authority to issue bonds to defray the cost of a lighting and power plant, pursuant to a vote of the taxpayers, employed certain engineers to make permanent surveys and to complete plans and specifications for the plant, their services to be paid for out of the moneys to be raised by sale of the bonds. The bonds were issued, but were not sold, for want of bidders, whereupon the city resubmitted the question of bond issue to the voters without providing for the payment of the engineers' services, and, the vote being in the negative, warrants were issued to the engineers payable out of the city's general fund. *Held*, that the city was at fault in not pursuing the sale of the bonds under its rightful authority acquired by the first vote until it had satisfied the demand of the engineers, and was therefore liable for payment of such demand out of the general fund.

In Equity.

At a special election duly authorized, and held in the city of Eugene on September 11, 1905, the question whether the city should be empowered to issue city bonds in the amount of $100,000 with which to pay the costs and expenses in the purchase or construction and equipment of a complete electric light and power plant and system for the city was submitted to the qualified voters of the municipality, and it was determined by a majority vote in favor of the issuance of such bonds. Later, on October 11, 1905, the city council determined by resolution, regularly adopted, to construct an electric light and power plant for the city, and thereupon directed and authorized its committee on fire and water "to cause permanent surveys to be made of a proper canal and power plant therefor, and a right of way for a transmission line from such power plant to the city of Eugene; and to

cause complete plans and specifications of said canal, power plant, and transmission line to be made in detail as a basis upon which to call for bids for the construction and building thereof, * * * to employ an engineer or engineers to make said surveys, plans, and specifications, and to expend such sums of money therefor as might be necessary and proper to complete the same." Pursuant to the authority conferred by virtue of said resolutions, the committee on fire and water, in behalf of the city, entered into a contract with the defendants, Kelsey and Young, whereby the latter agreed to make permanent surveys, and complete and detailed working plans and specifications, for an entire electric light and power plant, including transmission line, for the consideration of $2,900, which said sum the city agreed to pay to Kelsey and Young, less the sum of $450 which had been paid them prior to the consummation of the formal contract. It was further agreed that payment should be made when sufficient funds were realized for the purpose from the sale of bonds; it being understood that the city would proceed with all reasonable dispatch with the issuance of said bonds and the sale and disposal thereof. In due time Kelsey and Young performed all the conditions of the contract agreed to be performed upon their part, and in recognition thereof, and in payment for such services, the city, on May 14, 1906, issued to Kelsey and Young its certain warrants drawn against the general fund of the city, aggregating the amount of the agreed consideration, namely, $2,450. The contract was entered into in good faith by both parties. Subsequently, to wit, on October 30, 1905, the city advertised the sale of bonds so authorized to be issued by vote of the qualified electors of the municipality, to bear interest at the rate of 4 per cent., but without success—no bids being made therefor. Later, on June 2, 1906, the city again submitted to the qualified voters the question of whether bonds should issue for the contemplated improvement, which failed to receive a majority vote. Kelsey and Young did not at any time assent to the rate of interest affixed to the bonds sought to be sold; nor did they consent to the second submission of the question of issuing such bonds to the voters. Further than these efforts, the city has made no attempt to dispose of bonds for the purpose of obtaining funds with which to meet its obligation to Kelsey and Young. At all times while the transactions between the city and Kelsey and Young were taking place, the city was indebted in excess of $3,000.

John M. Pipes and George A. Pipes, for complainant.
Williams, Wood & Linthicum, for Kelsey and Young.

WOLVERTON, District Judge (after stating the facts as above). In view of the facts set out in the foregoing statement, the complainant has sued to enjoin the city of Eugene from paying the warrants issued, and the defendants Kelsey and Young from pressing payment thereof, on the ground that at the time of entering into said contract the indebtedness of the city of Eugene was in excess of $3,000.

It may be premised, as the fact is, that the city and the defendants, Kelsey and Young, entered into the contract in question in entire good faith, both parties fully supposing that money would be realized in due time from bonds issued under the authority that the city had acquired through the vote of the qualified electors of the city, and the obligation of the city fully met in that way. It may be further premised that the contract, when entered into, was perfectly valid, for it contemplated that payment should be made out of the special fund to be provided for that purpose, and it could make no difference as to this whether the city was indebted beyond its charter limit or not. So it must result, if the payment of the warrants is to be enjoined, that Kelsey and Young, without any fault whatever upon their part, will lose

the entire consideration for their services rendered the city. It should be a plain case, well grounded upon sound legal principles and rules, to warrant the court in visiting such an injustice upon innocent parties.

Section 37 of the charter of the city of Eugene inhibits the council from in any way creating or contracting an indebtedness which shall singly or in the aggregate exceed the sum of $3,000, but with the proviso, "except as in this act otherwise specially provided." Section 95 empowers the city to purchase or construct an electric lighting system for lighting the streets and public buildings; and section 108 authorizes it to issue bonds for the purpose of raising money with which to defray the costs and expenses of the purchase or construction of such system. But it is made a condition that no such bonds shall be issued until the question of their issue, specifying the amount, shall be submitted to a vote of the qualified electors of the city, and a majority of the vote be cast in favor thereof. These are all the provisions of the charter affecting the present controversy that need be referred to. The city, as I must assume from the record, had proceeded in due accord with the requirements of the charter in providing the proper fund for meeting the costs and expenses of the contemplated improvements up to the time of entering into the contract with Kelsey and Young. It had been duly authorized by a "majority of the qualified electors to issue the appropriate amount of bonds," so that the fund, to all intents and purposes, had really been provided, and the city was fully and duly authorized to enter into the contract with Kelsey and Young set out in the statement. The bonds never issued, however, and the money was never forthcoming, so that the city finally issued the warrants in controversy against the general fund, and the question is, are these warrants valid or void? If void, their payment should be enjoined. Otherwise, they should be paid in due course.

It appears that the city, in the first place, was unable to dispose of the bonds authorized; for what especial reason does not appear—possibly because the interest they were to bear was too low. At any rate, they were not salable. This may not have been a fault of the city. In the second place, the city resubmitted the question of bond issue for the contemplated improvement to the vote of the electors. There is no explanation as to why it did this. It is not averred, nor is it claimed, that the previous authorization was invalid for any purpose. Perhaps it was thought that it was good policy so to do. If so, the city council should have been sure that the obligations and indebtedness theretofore incurred with reference to the proposed fund should be paid, before relinquishing its previously acquired authority. It owed this plain duty at least to Kelsey and Young, having solemnly contracted to pay them out of that fund. When, however, the second vote was taken, and resulted as it did, the council was shorn of all authority further to issue bonds with a view to raising money in that way. The case, I am impressed, falls within the principle of North Pacific Lumbering and Manufacturing Co. v. East Portland, 14 Or. 3, 12 Pac. 4, Little v. City of Portland, 26 Or. 235, 37 Pac. 911, and Jones v. City of Portland, 35 Or. 512, 58 Pac. 657. In the latter case it is said, the court speaking through Mr. Justice Bean:

"Whatever confusion there may be in the authorities elsewhere, the holdof this court is that, where the expense of improving a street in a city is to be paid from a special fund to be raised by an assessment on the abutting property, a failure of the municipality to comply with any of the requirements of the charter essential to supply such fund, * * * or any unreasonable delay in enforcing such provisions or collecting and paying over the money, * * * gives the contractor a right of action ex delicto against the corporation for damages, in which he is entitled to recover the amount due under the contract, with interest, notwithstanding a provision in the contract that he shall look for payment only to the special fund, and that he will not require the municipality, by any legal process or otherwise, to pay for the same out of any other fund."

The cases cited bear a very close analogy to this one, and are controlling, as this court is constrained to adopt the doctrine of the state, it having been long in vogue.

The city of Eugene in the present controversy was most assuredly at fault in not pursuing the sale of bonds under its rightful authority acquired by the first vote of the electors of the city until it had at least satisfied the demand of Kelsey and Young. Having satisfied that, it would have been at full liberty to adopt another policy, as it saw fit, and no detriment or hurt could have come to the claimants. There was therefore a dereliction of duty on the part of the city as it pertains to Kelsey and Young, which rendered their demand actionable and the city liable, so that it must render account out of its general fund.

The decree of the court will therefore be that the complainant's bill be dismissed.

UNITED STATES v. WILLIAMS.

(District Court, N. D. Alabama, S. D. March 14, 1908.)

1. CRIMINAL LAW—AIDING AND ABETTING—COMMON LAW.

A person not falling within the class described in a penal statute, may nevertheless, under the rules of the common law, be charged with aiding and abetting another person, embraced in the statute, in the commission of the crime.

2. STATUES—PENAL STATUTES—HOW CONSTRUED.

While it is true that it is a well-settled rule of law that penal statutes must be strictly construed, and that before a case can be held to fall within a penal statute it must come within the letter and spirit of the statute, yet if it comes within the spirit, and also within one reasonable interpretation of the letter, of the statute, it is sufficient, even though there may be a literal interpretation that might be put upon the statute which would not include the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

3. CARRIERS—INTERSTATE FREE PASS OR TRANSPORTATION — IMPROPER USE —WHEN STATUTE AGAINST USING IS VIOLATED—AIDING AND ABETTING.

Where a common carrier issued an interstate free pass to one of its employés, and said employé delivers said interstate free pass to a person not authorized by the statute to receive or use said pass, and the said party does use the same on an interstate journey, he violates Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]; and the employé delivering to said person such pass is guilty of aiding and abetting in said violation.

(Syllabus by the Court.)

On Motion to Strike Information.

O. D. Street, U. S. Atty.
H. L. Black and D. D. Trimble, for defendant.

HUNDLEY, District Judge. The defendant is charged, on an information filed by the United States attorney, with aiding and abetting one Dan Pounds unlawfully to use and travel on an interstate free pass over and upon the St. Louis & San Francisco Railroad, a corporation, between Memphis, in the state of Tennessee, and Birmingham, in the state of Alabama. Counsel for defendant moves that the information be stricken from the files of this court, and that the defendant be released, on the grounds that the information charges no offense against the laws of the United States. There are other grounds stated in the motion, but this one ground is sufficient to raise any and all questions presented. The constitutionality of the act is not drawn in question by this motion.

The facts as stated in the information as describing the offense are that the defendant, Tom Williams, who was an employé of the said railroad company and entitled to receive a pass from said company as such employé, did receive the same, which he delivered to the said Dan Pounds, who was not entitled under the law to use or receive the said pass, but who did use the same by traveling thereon over the said railroad between Memphis, in the state of Tennessee, and Birmingham, in the state of Alabama, and that this act of Dan Pounds was in violation of section 1 of an act to regulate commerce, approved June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]), prohibiting the use of free transportation by any one over common carriers except certain persons enumerated in the act, and that this defendant by his said acts aided and abetted said Pounds in the commission of the offense designated by the statute.

The first question presented is that the defendant, Tom Williams, being an employé of the said railroad company, and being for that reason exempt by the terms of the statute from punishment for using a free pass or transportation for passengers, is not liable to be proceeded against as set out in the information; that the pass was legally issued to him, and he could dispose of it as he pleased without violating the statute; in fine, that he does not fall within the purview of the statute. A person not falling within the class described in a penal statute may nevertheless, under the rules of the common law, be charged, provided (a) he was present, actually or constructively, and aided or abetted another person in the commission of the crime; (b) or, being absent, counseled or procured or caused that person to commit the crime; (c) or aided him after he had committed the offense, for example, to escape. If the crime is a misdemeanor, the aider or abettor in any one of the three cases above named would be a principal, and should be charged as such. If the crime is a felony, an aider or abettor would be a principal in the second degree, if he was actually or constructively present when another committed the offense, or he would be an accessory before the fact, or after the fact, according as the case fell within subdivisions "b" or "c" above.

U. S. v. Van Schaick (C. C.) 134 Fed. 592. The crime in this case being a misdemeanor, the defendant is therefore properly charged as a principal with the offense of aiding and abetting in the commission of the crime denominated in the statute.

It is contended, further, for the defendant, that, it being uncontroverted that the pass was legally issued to one entitled to receive it, it was no offense for another not entitled thereto to use it; in other words, that it is no offense for a person to use a pass issued to another, provided it was legally issued to that other person. That portion of the act referred to on which this prosecution is filed is as follows:

"No common carrier subject to the provisions of this act, shall after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents," etc. "Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

As I understand it, the argument on behalf of the motion to strike is this: The act prohibits the issuance of interstate free tickets or free transportation for passengers to any but employés, etc., and makes it an offense for the carrier to issue passes to a person not entitled thereto, and provides, further, that "any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty"; and it is further argued that the word "such" in this provision relates to a pass that may have been illegally issued, and since the pass upon which Dan Pounds traveled was legally issued to the defendant, and only used by Pounds, no offense under the statute was committed. The question at issue then resolves itself into the following proposition: If Pounds was guilty of a violation of the statute by using the pass delivered to him by the defendant, Williams, for transportation between Memphis and Birmingham, then Williams would be guilty of aiding and abetting Pounds in the commission of the offense. If, on the other hand, Pounds did not violate the law in the use of the pass, then it follows, of course, that Williams cannot be convicted of aiding and abetting Pounds in the commission of any offense. To decide this question it becomes necessary to construe the statute in question. Act June 29, 1906, c. 3591, 34 Stat. 584. This statute has not been construed, so far, by any court.

It is contended by counsel for the defendant that it is a well-settled rule of law that penal statutes are to be construed strictly, and, so construing the act in question, there is no offense alleged in the information. Numerous authorities are cited to sustain this contention. I do not question the correctness of this proposition as a general rule; but it is, however, the object of the construction of penal as well as all other statutes to ascertain the true legislative intent; and while the courts will not, on the one hand, apply such statutes to cases which are not within the obvious meaning of the language employed by

the legislatiye body, even though they be within the mischief intended to be remedied, they will not, on the other hand, apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent of the statute. 26 A. & E. Encyc. of L. (2d Ed.) 659. The intention of the legislative body 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 legislative intent. United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; United States v. Morris, 14 Pet. 464, 10 L. Ed. 543; Am. Fur Co. v. United States, 2 Pet. 358, 367, 7 L. Ed. 450; United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080. The intention of the legislative body constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed. Telegraph Company v. Eyser, 19 Wall. 419, 427, 22 L. Ed. 43; Ex parte Yarborough, 110 U. S. 651, 658, 4 Sup. Ct. 152, 28 L. Ed. 274; McHenry v. Alford, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614; Great Northern Ry. Co. v. United States (C. C. A.) 155 Fed. 945.

After a full consideration of these authorities, I am of the opinion that while it is true that, before a case can be held to fall within a penal statute, the case must come within the letter and spirit of the statute, yet if it comes within the spirit, and also within one reasonable interpretation of the letter, of the statute, it is sufficient, although there may be a literal construction that might be put upon the statute which would not include the case. It is a well-settled rule that courts should so construe statutes "as to meet the mischief and advance the remedy." What was the mischief to be met by this enactment? What is the spirit and intention of the statute, and what is one reasonable interpretation of the letter of the statute? It will not be denied, I take it, that the mischief sought to be remedied by the statute is the indiscriminate use of free passes or free transportation for passengers over common carriers. I take it, also, that it will not be denied that the spirit and intention of the statute is to punish those common carriers who grant free passes or free transportation for passengers over their lines in violation of the statute, and also to punish those who use any free passes or transportation, except those included within the exceptions provided by the statute.

It will be noted that the statute inhibits the issuing or giving "directly or indirectly" of any interstate free ticket, free pass, or free transportation for passengers, and the penalty applies with equal force to the doing of the act by indirection as it does to a direct violation. The statute also makes it a crime for any person, other than the persons excepted by the statute, to use any such interstate free ticket, free pass, or free transportation as prescribed by the statute, and hence applies with the same force to any person who indirectly makes use of free transportation in violation of the statute. To say that the inhibition of the statute applies only to a free pass or transportation that has been illegally issued is manifestly too narrow and technical, and not even in accord with the rules of good grammar. "Such," as here used, means free "transportation for passengers,"

as well as a free pass, and is not necessarily limited to an illegally issued free pass. The statute necessarily means, and in fact states, by any reasonable construction, that all persons who make use of any interstate free ticket, free pass, or free transportation in common carriers, either "directly or indirectly," shall be liable to the penalty prescribed by the statute, unless they are excepted by the terms thereof. The evident intention of the statute is to prevent common carriers from transporting certain passengers over their lines from one state to another without the payment of the usual fare, and also to prevent persons traveling on said common carriers from one state to another without paying the usual fare. To give this statute the construction contended for by counsel for the defendant would practically be, to all intents and purposes, to nullify the force and effect thereof. If a pass or free ticket may be used ad libitum by any one, into whose hands it may be placed, provided it was originally issued to a person authorized to receive the same, this would open the door to an endless violation of the very spirit and letter of the statute. Persons desiring to be transported by common carriers free of charge would have only to secure the intermediary of an employé thereof, to whom a pass could be issued, and then have this employé turn it over to them. I cannot assent to such an unreasonable construction of this statute.

I am of the opinion, therefore, that when the party, Pounds, used the pass and traveled over the St. Louis & San Francisco Railroad from Birmingham, Ala., to Memphis, Tenn., for which he had not made legal payment, not being exempt from the operation of the law by being among the number included therein, he violated the statute, and therefore the defendant, Williams, if the facts stated in the information are proven to be true, would be guilty of aiding and abetting the said Pounds in a violation of the law.

The motion to strike from the files of this court the information filed in this cause is therefore overruled. It is so ordered.

NOTE.—After this ruling by the court, the defendant entered a plea of guilty.

UNITED STATES v. LEIGH.

(Circuit Court, D. Massachusetts. January 7, 1908.)

No. 227 (1,920).

1. CUSTOMS DUTIES—CLASSIFICATION — ENTIRETY — CARD CLOTHING PACKED SEPARATELY FROM MACHINE.

In an importation of carding machines some of the clothing was packed separately; this clothing was so made as to fit the different parts of the machines, except that a certain amount of cutting, stretching, etc., would be necessary in the final adjustment; it would have been impracticable to import the machines with all the clothing attached, and it was customary to pack this part of the clothing separately. *Held*, that this clothing was not dutiable separately from the rest of the machines, but that the whole apparatus was dutiable as an entirety at the same rate.

2. SAME—IMPORTATION IN SEPARATE PACKAGES.
A machine may be dutiable as an entirety though imported in separate packages and requiring labor and adjustment to be assembled; but if, under the name of adjustment a considerable part of the manufacture of a machine takes place, so that the component parts when imported are related to the machine as a raw material, the raw material is dutiable accordingly.

3. SAME—APPEAL FROM GENERAL APPRAISERS—WEIGHT GIVEN OPINIONS OF GENERAL APPRAISERS.
The opinions of experts like General Appraisers, who are especially familiar with such controversies, should in close cases be given considerable weight by the courts in reviewing decisions of the Board of General Appraisers, upon controversies like that above stated.

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,490 (T. D. 27,760), reversing the assessment of duty by the collector of customs at the port of Boston on importations by Evan Arthur Leigh.

W. K. Richardson (Asa P. French, U. S. Atty., on the brief), for the United States.

Everit Brown, for the importer.

LOWELL, Circuit Judge. This is an appeal from the decision of the Board of General Appraisers holding certain card clothing dutiable under paragraph 193 of the schedule rather than under paragraph 146. The paragraphs are as follows:

"146. Card-clothing manufactured from tempered steel wire, forty-five cents per square foot; all other, twenty cents per square foot." Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640].

"193. Articles or wares not specially provided for in this act composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal and whether partly or wholly manufactured, forty five per centum ad valorem."

For the history of these provisions, see Act March 3, 1883, c. 121, Schedule N, 22 Stat. 511, 501; Act Oct. 1, 1890, c. 1244, Schedule C, pars. 159, 215, 26 Stat. 578, 582; Act Aug. 27, 1894, c. 349, Schedule C, pars. 132, 177, 28 Stat. 518, 520; Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 162, 167 [U. S. Comp. St. 1901, pp. 1640, 1645].

The United States contends that the importation was dutiable as card clothing under paragraph 146; the importers contend that it was an integral part of the carding machines. These machines, as both parties agree, are dutiable under paragraph 193 as articles not specially provided for composed wholly or in part of iron or steel.

Leigh imported by the same steamer four carding machines made of metal and wood, and some card clothing. A part of the latter was intended for the cylinders and doffers of the four machines, and a part for uses unconnected with these machines. Separated parts of the machines, other than the importation in question, were imported in separate packages. Each entire machine (except the card clothing here in question) had been assembled in England before shipping. With the exception of the card clothing the machines were made by the same manufacturer. The clothing was made by another concern; a part of

it was cut in Europe, and was there attached to the rollers or flats of the carding machines, and was imported in this condition. As both parties admit, this part of the clothing of the machines was dutiable as part of the machine itself under paragraph 193. The clothing here in question, intended for use on the cylinders and doffers of the same machines, was made in strips having the same width throughout; the strips were made long enough to cover the cylinders and doffers respectively. The strips were packed in tin boxes, each of which held clothing sufficient for the cylinders and doffers of several machines. The importer's order for the whole machine, and for all its card clothing, was given at the same time. Sometimes he ordered the card clothing directly from its manufacturer, and sometimes through the manufacturer of the machine. The clothing used on the cylinder was not precisely like that used on the doffer. In order to make either the card clothing or the carding machines available for use in manufacture, the clothing for the cylinders and doffers must be unrolled from the boxes which hold it; it must be stretched and wound spirally upon the cylinders and doffers, and must be attached thereto. In order to fit the clothing accurately to a cylinder or doffer, so that the spiral winding shall cover every part of its surface and no more, the clothing must be cut, though the waste is small. The government admits that, if the clothing here in question had been attached to the cylinders and doffers before importation, and had been imported thus attached, such clothing would be dutiable under paragraph 193, according to the contention of the importer. This arrangement would tend to injure the clothing by the pressure and jarring of the heavy cylinder during transportation. Carding machines and their clothing are commonly shipped from place to place in this country in separate packages, substantially as in this importation. On the other hand, the importer concedes that card clothing imported like that here in question, unaccompanied by the machines on which it is to be placed, is dutiable under paragraph 146, as contended by the government.

In support of its contention, the United States urges: (1) That the clothing was not made by the manufacturer of the rest of the machine. But all the clothing was the product of the same manufacturer, and there is no dispute that the part of it which was attached in Europe to the rollers and flats is dutiable as part of the machine. (2) That the clothing was imported in a separate package. This is true of the parts of the machine generally. Yet these parts, though separated in importation, are admitted to be dutiable as parts of a complete machine. (3) That the card clothing might have been used upon another machine rather than upon that imported with it. But this argument applies to the nuts and bolts and some of the simpler parts of a machine which is dutiable as an entity. (4) That card clothing like this importation is kept in stock by this importer, and is sold by him without reference to the importation of any machine. The argument has weight, but is not conclusive. (5) That a decision against the United States would open the door to fraud, although fraud is not suggested in the case at bar. But the argument works both ways. If the rate of duty on a completed machine is higher than that upon card clothing, as appears

sometimes to be the case, the United States would be the gainer by the opinion from which it has here appealed. (6) That a considerable amount of adjustment, including a cutting of the fabric, must be accomplished in this country before the card clothing is attached to the cylinder and doffer fit for use. The question is one of degree, and here it is a close one. A machine which is dutiable as a whole may yet be imported in separate packages. To assemble the machine after importation requires some labor and adjustment. If the adjustment is small, the need of it does not make the several parts of the machine dutiable separately rather than as integral parts of a finished machine. But if, under the name of adjustment, a considerable part of the manufacture of the machine takes place in this country, so that the component parts, when imported, are related to the completed machine as raw material, that raw material is dutiable accordingly.

The Circuit Court sits to review the decisions of the Board of General Appraisers. It is vested with authority to reverse the decision of the board if, in the opinion of the court, the board has erred in law or in fact. Where the case is a close one, and the decision of it depends upon the difference between the adjustment of a machine already finished and the last stages in the manufacture of the same machine, considerable weight should be attached by this court to the opinion of experts like the General Appraisers, who are especially familiar with this kind of controversy. Upon the whole, I am not disposed to overrule the board by holding that the card clothing imported after attachment to the flats and rollers of a carding machine is part of a machine finished abroad, while the card clothing imported in lengths cut to suit the cylinders and doffers of the same machine, but unattached thereto, forms no part of the machine, but is dutiable as an independent article.

The decision of the Board of United States General Appraisers is affirmed.

In re VOGT.

(District Court, E. D. New York. February 5, 1908.)

BANKRUPTCY—FUNDS IN THE HANDS OF RECEIVER—PAYMENT TO TRUSTEE.

It being impossible, on a motion by a trustee for an order directing a receiver in bankruptcy to pay over money in his hands, to determine the validity of certain mortgages or to pass on the question whether any claims have been proved before the referee, either as general or secured claims, with reference to the fund, on affidavits, or to settle questions of title, if any were raised, the trustee being required to participate in further litigation with reference to such mortgages, the fund may be permitted to remain in the hands of the receiver until further proceedings show what conditions should be attached to any disposition of the fund.

Francis R. Mullin, for trustee.
Roger Foster, for Franks.

CHATFIELD, District Judge. Certain moneys are in the hands of the receiver in bankruptcy, and the trustee has made a motion to have these moneys turned over to him, inasmuch as litigation with reference

to a $8,500 chattel mortgage, which was claimed as a lien upon these funds, has been terminated. Without attempting to interpret the language of the order under which these funds were deposited, it would seem that they should be now transferred to the trustee, if anything were to be gained by the change of the custody of these funds. It is impossible upon a motion and upon affidavits to determine the validity of the $3,800 and $2,000 mortgages, or to pass upon the question whether any claims have been proven before the referee, either as general or secured claims, with reference to the fund, or to settle questions of title, if such are raised.

It is apparently shown by the papers that the $2,000 mortgage has been satisfied of record. The trustee must either bring the appropriate action to set aside the $3,800 mortgage, and the necessary litigation with reference to the $2,000 mortgage must be instituted by the creditor, if the validity of that mortgage can be restored, or else the matter of these claims must be brought into this court by some proceeding under the bankruptcy law on behalf of the creditors who claim them. A determination of the validity of these liens would raise issues which cannot be determined on a motion of this character, and until a claim is put forward in some guise provided by the bankruptcy law no motion to expunge it can be made. The referee in bankruptcy to whom the case was originally referred is long since deceased, and no order appears upon the record referring the matter to any other referee. Without definitely passing upon this motion, it would seem that the custody of the fund might as well remain in its present condition until further proceedings can be had.

The motion will therefore be denied, without prejudice to renewal, or to further application to this court in any way that either party may be advised.

LOOSE et al. v. HARTFORD PULP PLASTER CORPORATION et al.

(Circuit Court, D. Connecticut. February 1, 1908.)

No. 1,247.

1. CONTRACTS—ACTIONS TO ENFORCE—EQUITY—ADEQUATE REMEDY AT LAW.
An action at law cannot be maintained to charge a defendant with liability because of his assumption of a contract to which he was not a party, and a suit to enforce such liability is cognizable in equity.

2. COURTS—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.
A federal court has jurisdiction on the ground of diversity of citizenship where the parties designated in the bill as plaintiffs and defendants are respectively citizens of different states, and nothing appears from the bill which requires their rearrangement.

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

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

In Equity. On demurrer to bill.

Robinson & Robinson, for plaintiffs.

H. E. Hart and E. L. Smith, for defendants.

NOYES, Circuit Judge. While the first ground of the demurrer is very broad, the question raised under it is whether the plaintiffs have an adequate remedy at law and so cannot resort to equity. The bill is apparently framed upon different theories of liability. There is an evident desire to hold the defendant corporation in one way if it should not be liable in another. Still, considering the allegations as a whole, I think they should be treated as stating a cause of action based upon an agreement by the defendant corporation to assume the obligations of the defendants Hills and Jackson under their contract with the plaintiffs. The plaintiffs could not obtain the benefit of this agreement at law, but they could in equity. Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300; Dancel v. Goodyear Shoe Machinery Co., 144 Fed. 679, 75 C. C. A. 481.

The second ground of demurrer is want of the necessary diversity of citizenship. The parties designated as plaintiffs and defendants in the record are, however, respectively citizens of different states, and nothing is shown in the bill which requires the court to rearrange them and oust itself of jurisdiction.

The third ground of demurrer is based upon the statute of frauds. But it does not appear that the promise referred to was not in writing.

The demurrer to the bill is overruled.

BUFFALO MILLING CO. v. LEWISBURG DAIRY CO.

(District Court, M. D. Pennsylvania. February 21, 1908.)

No. 975.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PARTNERSHIP.
   To sustain proceedings in involuntary bankruptcy against one as partner, a partnership in fact must be shown.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 51-53.]

2. SAME—INSOLVENCY—QUESTION FOR JURY.
   As respondent in proceedings in involuntary bankruptcy is entitled to go to the jury upon everything affecting the question of his solvency, where a determination of an issue whether he was a partner as charged decides the question of his solvency, such issue must be submitted to a jury.

Philip B. Linn and George B. Riemensnyder, for petitioner.
Andrew A. Leiser, for W. H. Coldren.

ARCHBALD, District Judge. It is denied by W. H. Coldren, the respondent, that he ever was a partner in the Lewisburg Dairy Company as charged, on the strength of which, also, he asserts his solvency and demands a jury trial. A partnership in fact, must of course, be shown. In re Beckwith & Co., 12 Am. Bankr. Rep. 453, 130 Fed. 475. But the evidence on the part of the petitioners, while disputed, is sufficient to establish it, if believed; and if the case was to rest here I should be compelled to find in their favor. But, if the respondent was a partner, it is admittedly decisive of the question of his solvency, and,

as he is entitled to go to the jury upon everything which affects or enters into that, the question of partnership must be kept open for their consideration. Schloss v. Strellow (C. C. A.) 156 Fed. 662. It is true that this does not put the parties exactly on an equality; the petitioners being concluded if it should be found that he was not a partner, but the respondent not being reciprocally bound by its being decided that he was. But that is the law as laid down in the case just cited, and there is nothing to be done, therefore, at this time, but to refuse to dismiss the proceedings on the issue made by the denial of the respondent that he was a partner and thereupon send the case to a jury on the question of his insolvency.

And it is so ordered.

JOHN A. PATERSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 29, 1907.)

No. 5,029.

CUSTOMS DUTIES—CLASSIFICATION—HORSEHAIR BRAIDS—SIMILITUDE—"SILK BRAIDS."

Horsehair braids are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], as "silk braids" by similitude.

On Application for Review of a Decision by the Board of United States General Appraisers.

Everit Brown, for the importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. The importations in question consisting of horsehair braids were classified for duty by the collector of the port as "silk braids" by similitude under paragraph 390 and section 7, Tariff Act July 24, 1897, 30 Stat. 187, 205 [U. S. Comp. St. 1901, pp 1670, 1693], and are claimed by the importers to be dutiable by similitude under paragraph 409, relating to hat braids composed of straw, chip, grass, etc., and said section 7, or, alternatively, dutiable under section 6 as unenumerated manufactured articles.

It was stated in argument that this case was made up under an arrangement between the importer and the collector to the effect that the question involved herein should be settled by the Circuit Court of Appeals to govern the future action of the collector. Hence I affirm the decision of the Board of General Appraisers without special consideration of the case.

BYRNE v. JONES et al.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1908.)

No. 2,586.

1. TRUSTS—TRUSTEE MAY PURCHASE DIRECTLY OF THE CESTUI QUE TRUST UPON FULL DISCLOSURE.

A trustee or an agent may purchase the trust property directly from his cestui que trust sui juris, or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 331.]

2. SAME—TRUSTEE'S PURCHASE OF CESTUI QUE TRUST VOIDABLE FOR OMISSION TO DISCLOSE MATERIAL FACT.

But the foregoing condition is inexorable.

Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee, any material misrepresentation, concealment, or other disregard of the condition renders the sale and the contract for it voidable, at the election of the cestui que trust or principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 331.]

3. SAME—FACTS—CONCLUSIONS.

A trustee, residing in Arkansas to hold and sell land situated in that state and in Texas for himself and a cestui que trust residing in Massachusetts, sold a right of way to a railroad company for $725, and without disclosing these facts bought the interest of his cestui que trust for $7,500.

Held: The contract of sale was voidable at the election of the cestui que trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 331.]

4. EQUITY—PRACTICE—SETTLEMENT OF ACCOUNT BEFORE DECREE OF SALE PREFERRED.

Where an accounting and a sale of property are required, a settlement of the account and a determination of the extent of the rights of the parties in the property under an interlocutory decree before the final decree of sale is made is preferable in ordinary cases to a decree of sale before the accounting, because in that way parties may have the benefit of a knowledge of the extent of their interests before the sale, and because this course permits the review by a single appeal of questions which two appeals are necessary to challenge when the decree of sale precedes the settlement of the accounting.

5. SAME—A COURT OF EQUITY HAS POWER TO SELL AND CONVEY LAND BEYOND ITS JURISDICTION, TO EXECUTE A TRUST OR ENFORCE A CONTRACT.

A court of chancery has plenary power to affect the title to real estate beyond its jurisdiction by a sale and conveyance thereof by its master in suits to execute trusts, to undo frauds and to enforce contracts regarding such real estate, whenever it has acquired jurisdiction of the persons of the parties interested in the real estate, because equity acts through the person.

(Syllabus by the Court.)

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

For opinion below, see 149 Fed. 457.

L. A. Byrne, pro se (W. H. Arnold, on the brief), for appellant.
Wm. V. Tompkins (Thos. C. McRae, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On June 2, 1892, Erastus Jones of Worcester county, Mass., made a contract with L. A. Byrne, of Texarkana in the state of Arkansas, concerning a tract of about 2,600 acres of land situated in the states of Arkansas and Texas, to the effect that Byrne, who was an attorney at law, and who held defective titles to the land upon which Jones had vendors' liens for $6,117.42, should, without charge for his services, clear the titles to the land, prepare it for market, sell it as opportunity offered, apply the proceeds first to the payment of the expenses of clearing the title and preparing the property for market, second, to the payment of the amount owing Jones, and that the remainder of the land, or of its proceeds, should be owned by them equally. The larger part of the lands were in Arkansas, the titles of Byrne and Jones to the Arkansas land were tax titles, and they owned only an undivided interest in the lands in Texas. Under this agreement Byrne conducted about 15 lawsuits, purchased some outstanding claims, placed some tenants on the land to acquire title thereto by possession under the two years' statute of limitations of Arkansas, erected some small houses, cleared and fenced some of the land, paid some taxes, sold a right of way over some of the land for $725, and 220 acres of the real estate for $880, between June 2, 1892, and March 28, 1905. On the latter day he accepted an offer made by Jones to sell to him his interest in the lands for $7,500, and on the same day, or within two or three days thereafter, he made a contract with the defendants Heilbron, Wade, and Stribling to sell them about 1,600 acres of the real estate in consideration that they would furnish the $7,500 to purchase the interest of Jones. Within a few days after this contract was made Jones exhibited his bill in the court below to set aside these contracts on the ground that Byrne had induced him to make his offer to sell for $7,500 by withholding material information, which he had acquired while he was acting in a fiduciary capacity, relative to the management, condition, and value of the land. The defendants Heilbron, Wade, and Stribling answered that they made their alleged contract of purchase from Byrne in good faith, that they agreed to pay the full value of the land, that they had rescinded that agreement because they did not care to incur expense in defending it, and they disclaimed all interest in the property. Byrne denied that he had withheld any information to which Jones was entitled, and averred that he had tendered the $7,500, and that his contract of purchase was valid, and he filed a cross-bill to enforce specific performance of it. After the evidence had been taken and a final hearing had been had, the court rendered a decree by which it dismissed the cross-bill, dismissed without prejudice the suit so far as it related to the land in Texas, directed an immediate sale of the land in Arkansas and the return of the proceeds thereof to the court, and appointed a master to take and state an account of the expenses incurred and the moneys received under the contract of 1892, and Byrne appealed.

The first question is, was Byrne entitled to a specific performance of his contract of purchase of March, 1905? for an affirmative answer to that question avoids all others. The answer to it is conditioned by the relation of the parties to each other under the contract of 1892, and by the nature of the disclosure which Byrne made to Jones of the management, condition, and value of the property before that contract was made. For wise reasons of public policy, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning, or interest in, the property or the business of his correlate, to use that knowledge or interest, or to take advantage of his correlate's ignorance in the matter, to the detriment of the latter, or for his own benefit. Trice v. Comstock, 57 C. C. A. 646, 649, 121 Fed. 620, 623, and cases there cited. A trustee or an agent may purchase the trust property directly from his cestui que trust sui juris, or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open. Michoud v. Girod, 4 How. 555, 11 L. Ed. 1076; Brown v. Cowell, 116 Mass. 461, 465; Mills v. Mills (C. C.) 63 Fed. 511; Steinbeck v. Bon Homme Mining Co., 81 C. C. A. 441, 447, 152 Fed. 333, 339. But the condition is inexorable. Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee or agent, any material misrepresentation, concealment, or other disregard of this condition, renders the sale and the contract for it voidable at the election of the cestui que trust or principal. Beach on Trusts and Trustees, § 518; Saunders v. Richard, 35 Fla. 28, 16 South. 679; Cornish v. Johns, 74 Ark. 231, 240, 85 S. W. 764; Thweatt v. Freeman, 73 Ark. 575, 580, 84 S. W. 720; Coles v. Trecothick, 9 Vesey, Jr., 234, 246; 2 Pomeroy's Equity Jurisprudence, § 958.

In 1899 Byrne collected $725 for a railroad right of way over some of these lands, and in answer to a request from Jones for a statement of his transactions he made an account, probably about May, 1903, in which he set forth a sale of 80 acres for $240, a collection of $122.45 rent, the expenditure of $451 for improvements on the land, and showed a balance due him of $123.55, but he did not charge himself with the $725, which would have changed the balance of this account from $123.55 in his favor to $651.45 against him. On December 6, 1904, he had offered $5,000 for Jones' interest in the property, and Bemis, the agent of Jones, had asked him for a statement in detail of the expenses and receipts on account of the land "before going any further in the matter." In answer to this request Byrne sent a statement of account in a letter of that date which opens with these words:

"Enclosed you will find a statement of expenditures and receipts on the Byrne-Jones land as expended by me, which statement was requested in your letter of recent date."

This statement, which purported to set forth the expenditures and receipts from 1892 to December 6, 1904, with the exception of the taxes from 1892 to 1899 which had been paid by Jones, shows a balance in favor of Byrne of $487.09, but contains no mention of the $725 which would have changed the result to a balance of $237.91 against him. On December 24, 1904, Byrne wrote that he knew that this statement was correct. He never disclosed, and Jones and his agent Bemis were ignorant until after this suit was commenced, that he had sold this right of way or that he had collected anything on account of it. The sale of the right of way and the collection of the compensation for it were facts material to a determination of the interest of Jones in the property, because they entitled him to at least $362.50 and interest more in cash than would have been due him in the absence of these facts, and their effect otherwise upon the value of the land could only be determined by an examination of its condition in the light of a knowledge of them. The right of way might have depreciated, and it might have enhanced the value of the property, and the cestui que trust was entitled to know of its existence and to estimate for himself its effect before he made this contract of sale of his interest in the land. Byrne's omission to disclose these facts in the statement of account demanded and furnished as the basis of a contemplated sale of the interest of Jones reduced the proof of his good faith far below that uberrima fides which is requisite to sustain a purchase of the trust property by a trustee from his cestui que trust. It was fatal to the contract of 1905, and there was no error in the dismissal of the cross-bill that was filed to enforce it.

The appellant contends that the decree for the sale of the land by the master and for the distribution of its proceeds is erroneous, because the contract of 1892 provided that Byrne should sell it, and because Jones and Byrne were joint owners or tenants in common of the real estate, and he contends that the property of tenants in common may be partitioned but may not be sold. But this is a suit to execute a trust created by the agreement of 1892. A court of equity is not required to permit a faithless trustee to continue to act according to the terms of the deed or contract which creates the trust, and where a sale of the property of joint owners, or of tenants in common, is requisite or convenient to enforce a violated trust, a court of chancery has ample power to decree it. A court may appoint its own master as trustee, and may direct him to carry out the terms of the trust agreement, or to make such a sale of the trust property and such a distribution of the proceeds as it deems just and equitable. Quinton v. Neville, 81 C. C. A. 673, 679, 680, 152 Fed. 879, 885, 886.

The court below charged the land with interest at the rate of 10 per cent. per annum upon the original amount of the liens of Jones, less the payments made thereon, from December 27, 1889, to the date of the decree, and this charge of interest after June 2, 1892, the date of the contract, is specified as error. When the contract was made, the vendor's liens were represented by 10 promissory notes which originally evidenced a debt of $5,250. Some payments had been made thereon, and the amount then owing was $6,117.42. A part of these

liens was secured upon the land in Arkansas, and a part of them upon the land in Texas. One of the effects of the agreement of 1892 was to charge all the land in both states in solido with the entire claim for $6,117.42, for that contract required all the proceeds of all the lands to be applied to the payment of this claim before any of it remaining unsold was released from this charge, and to give to the trustee Byrne plenary power to sell and convey any of this real estate free from all the liens of Jones. Byrne had taken the title to these lands subject to these liens to secure himself for about $5,000 which he had become liable to pay on account of his indorsements of the obligations of others. The contract provides that the legal title to this property shall remain in the name of Byrne; that he is empowered to make all sales thereof, "and in case of sale Erastus Jones will relinquish his vendor's lien on that of the land sold"; that out of the proceeds of the sale the expense of clearing the titles and preparing the land for market shall first be paid, "2nd: the proceeds arising from the sale of said lands shall next be applied to the payment of the balance of the purchase money now due Erastus Jones until all of said purchase money is paid"; that the remainder of the land, or the proceeds thereof, shall be owned by Byrne and Jones equally, and that if Byrne shall take notes for the purchase price of lands sold they shall be assigned to Jones, and the latter shall waive and relinquish his vendor's lien under the original notes to the part of the land so sold. These stipulations about the release and exchange of liens are invoked in argument to persuade that the liens of the original notes, and therefore the interest at 10 per cent. per annum specified therein, continued after this contract of 1892, was made as it did before. It was, however, within the competency of these parties to release this property from the charge of continuing interest from the date of the contract and at the same time to preserve the vendor's liens upon the respective tracts they charged, or to consolidate them into a single lien upon all the property. They agreed to consolidate them into a single lien, and a contract to relieve the property of the continuing interest was not less reasonable. The lands with their defective titles were of little value to Jones, who lived 1,500 miles distant and seems never to have seen them, unless the titles could be perfected and the lands could be sold without much expense. The perfection of the titles was the work of an attorney at law, and the service required was expensive. Byrne was a lawyer, and he held the titles. What was more natural than that Jones should set the interest to accrue on his claim against the legal services which Byrne was to render to perfect the titles and prepare the property for sale? The writing contains persuasive evidence that this was the agreement of the parties. It contains a stipulation that, after the expenses of clearing the titles and preparing the land for market are paid, the proceeds of the sales of it shall next be applied, not to the payment of the balance of the purchase money and interest, not to the payment of the balance of the purchase money that shall then be due, but "to the payment of the balance of the purchase money now due Erastus Jones," and that the remainder in land, or in money, shall be divided equally between

Jones and Byrne. The balance of the purchase money then due Erastus Jones was $6,117.42, and that sum, with interest thereon at 6 per cent. per annum from the commencement of this suit, is the limit of the amount charged against this property on account of the purchase money due Jones under the contract of 1892. The objection of the appellant to the interest upon this claim from June 2, 1892, until April 5, 1905, is sustained.

The court directs the master to give Byrne no credit for the expenses which he incurred in clearing and fencing about 140 acres of the land and in building and repairing three houses thereon, and to charge him with none of the rents which he derived from the property, and this ruling is specified as error.' Byrne testified that it was necessary, in order to perfect the tax titles, to take pedal possession of the land by tenants and to hold it until the statute of limitations of Arkansas, which was two years, ran against other claimants, and that for this purpose, and also for the purpose of improving the land and obtaining some income from it, he expended, according to his final statement, which is found at pages 115 to 119 of the printed transcript of the record herein, about $1,100 in clearing and fencing the land and erecting and maintaining buildings thereon, and also about $500 more than he received back in furnishing teams, tools, and provisions to tenants who agreed to repay this money from the land, and that he collected $400 rent, so that he expended for all these purposes about $1,200 more than he received from the rents. The court below disallowed this portion of the account, and charged Byrne with the moneys which he had received from the sales of the land and had expended in this way, because it found the fact that Jones never knew that Byrne was using and never consented to his use of the proceeds of the sales for these purposes. This finding of fact is also challenged, but the evidence upon the issue is conflicting, there is no clear preponderance against it, and, under the familiar rule that the chancellor's finding of fact prevails unless the record clearly discloses a mistake therein, it must be affirmed.

There is, however, another consideration which bears with much force upon the question of the allowance of this portion of the account. It is that these improvements may have enhanced the value of the property, and, although Jones was not aware of them and did not consent to them, yet as he has applied for relief to a court of equity, the court below may well condition its grant of his prayer by the requirement that he who seeks equity shall do equity. If the market value of this property has been enhanced by these improvements, it is just and equitable that he who made them shall be reimbursed to the amount of that increase in value. In the light of this rule the master should inquire whether or not the improvements made by Byrne have increased the market value of the land, and, if they have done so, should allow to the defendant, as of the date of his report, the amount of that increase, not exceeding the difference between the amounts expended by Byrne for these purposes and the amount of the rents he received therefrom. He should also allow to the defendant the other items charged by him in his statement of account above

mentioned which he incurred or paid subsequent to June 2, 1892, and interest upon each item at 6 per cent. per annum from the time of its payment until the date of the master's report, and he should charge him with the amounts he collected for the right of way and from the sales of the land, with like interest to the same time. If the balance of Byrne's operating account when it is thus stated is in favor of Byrne, it should be paid to him out of the proceeds of the sales before the $6,117.42 and interest are paid. If that balance is against Byrne, it should be paid to the complainants out of the balance of the proceeds of the sales, if any, after the $6,117.42 and interest have been paid. If the proceeds of the sales are insufficient to pay the $6,117.42 and interest, the complainants should recover of Byrne the balance of the operating account against him, not exceeding an amount sufficient to complete the payment to them of the $6,117.42 and interest and one-half the unpaid balance, if any, of this operating account after the completion of that payment. The master should allow to the complainants the amounts paid by Jones for taxes and the other expenses of clearing the titles and preparing the land for market subsequent to June 2, 1892, which appear from the record to have been about $400, with interest on the respective items thereof from the dates of their payments to the date of his report, and this amount should be paid to the complainants out of the proceeds of the sales before the $6,117.42 and interest are paid. These suggestions regarding the account are made out of an abundance of caution, to avoid, if possible, another hearing of this case in this court.

The decree below directs the master to make an immediate sale of the land in Arkansas and to bring the money into court, and the inference is that he is to make this sale before the respective rights and interests of the parties can be adjudicated by the decision upon the exceptions, if any, to the master's report of the accounting. A court of chancery has the power to direct a sale of property before the accounting in cases which require both, and it is customary to do so in winding up insolvent estates and in other cases where the claimants to the proceeds are numerous, or for other reasons an early sale is especially desirable. But in the foreclosure of ordinary mortgages, the enforcement of private trusts, and the liquidation of claims to real estate, where the parties in interest are few and are all before the court, the usual and the preferable practice is to enter an interlocutory decree for the accounting, and to withhold the decree of sale until the respective interests of the parties have been fixed by the decision of the court upon the master's account. The latter practice is approved because it is beneficial to parties litigant, and they generally desire to know what their respective claims upon and interests in the property are before the sale, to the end that they may intelligently bid to protect them, and because the opposite practice requires two appeals to review questions which may, under this method, be reviewed by one. A decree for a sale of specific real estate before an accounting is a final decree and a subsequent decree of settlement of account is another, while a decree for an accounting to be completed before the decree of sale is an interlocutory decree which may be reviewed by an appeal from the

final decree of sale which embodies and follows it. Chase v. Driver, 34 C. C. A. 668, 672, 92 Fed. 780, 784, and cases there cited.

The court below was of the opinion that it had no jurisdiction to decree a sale of the land in Texas, and it dismissed the bill so far as it related to that property, on the authority of Boyce's Executors v. Grundy, 9 Pet. (U. S.) 275, 288, 9 L. Ed. 127. But this is a suit against a faithless trustee brought by a cestui que trust to execute the trust. That was a suit brought in Tennessee by a vendee against his vendor to rescind a contract concerning lands in Mississippi. The court rescinded the agreement. After this rescission it rendered a personal judgment for $2,100 against Robert Boyce, to whom the lands in Mississippi had been devised by the vendor in the rescinded contract, adjudged the decree for this $2,100 to be a lien upon those lands, and that they should be sold by its master to discharge that lien. The Supreme Court reversed the decree fixing this lien upon the Mississippi lands, and directing their sale upon the ground that neither a court of chancery nor a court of law may by its own power fix liens for the mere personal judgments it renders upon lands beyond its jurisdiction, or subject them to sales to satisfy such judgments.

But a court of chancery has plenary power to affect the title to real estate beyond its jurisdiction by a sale and conveyance thereof by its master or otherwise by its decree in suits to execute trusts, to undo frauds, and to enforce contracts regarding such real estate, whenever it has acquired jurisdiction of the persons of the parties interested therein, for the reason that equity acts through the person. In Boyce v. Grundy the Supreme Court well said that the court below had no jurisdiction to decree a sale to be made of land lying in another state "by a master acting under its own authority." But a master directed by the court below to sell the land in Texas in the suit in hand will act, not by the authority of that court alone, but by the authority of the trust agreement of 1892. That agreement vested in the trustee, Byrne, the power to sell and convey the Texas land, and to apply the proceeds according to its terms, and when Byrne became faithless the court below had plenary power to substitute its master for him as trustee and to direct him to exercise all the powers originally vested in Byrne. Byrne is within the jurisdiction of that court, and it may lawfully require him to make the sale and conveyance as trustee, or it may appoint its master in his place who will be trustee pro hac vice. It may direct him to make the sale and conveyance requisite to completely execute the trust, and may require all the parties to this suit to confirm the title of the purchaser by subsequent deed. In cases of this nature the court is invested with all the powers of the parties to the agreement of trust of whom it has acquired jurisdiction, and it may by its decree effect any sale or conveyance of lands beyond its jurisdiction which the parties to the suit could make. In Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419, it was held that if a trustee live in England the Chancellor may enforce the trust although the lands lie in Ireland. In Toller v. Carteret, 2 Vern. 495, the defendant pleaded to a bill to foreclose a mortgage that the court was

without jurisdiction, because the mortgaged lands were a part of the duchy of Normandy and were under the jurisdiction of Guernsey, but the court overruled the plea, said that the defendant was served with process in England, and that equity acts in personam. In Penn v. Lord Baltimore, 1 Vesey, 444, specific performance of a contract for lands in North America was decreed in England. In Massie v. Watts, 6 Cranch (U. S.) 148, 157, 159, 3 L. Ed. 181, Watts brought a suit in Kentucky to enforce a trust in lands in Ohio, which had been created by an agreement made by Massie to locate the lands for the complainant's grantor and by his fraudulent location of them for himself. Chief Justice Marshall said:

"Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In Muller v. Dows, 94 U. S. 444, 450, 24 L. Ed. 207, and McElrath v. Pittsburg & Steubenville R. R. Co., 55 Pa. 189, a foreclosure and sale in one district of a railroad which extended into another was sustained. In the former case the Supreme Court said:

"The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

In Riverdale Mills v. Manufacturing Company, 198 U. S. 188, 194, 197, 25 Sup. Ct. 629, 49 L. Ed. 1008, in a suit in the Northern District of Georgia, a sale and conveyance of real estate, the larger part of which was situated in Alabama, was made under a decree of foreclosure of a trust deed thereon. The title under the decree to the property in Alabama was subsequently assailed by a suit in chancery in a state court in which the complainant alleged that this property was not advertised in the state of Alabama, nor was any sale or pretense of sale thereof conducted in that state. The United States Circuit Court enjoined the prosecution of that suit in the state court. The United States Circuit Court of Appeals reversed the order for the injunction. The Supreme Court said:

"It must also be remembered that the trust deed described the property conveyed as situated partly in Georgia and partly in Alabama. The federal court sitting in Georgia had jurisdiction to foreclose the trust deed,"—cited Muller v. Dows, supra, and affirmed the order for the injunction.

The contract which created the trust and specified its terms in the case in hand described the trust property as situated partly in Arkansas and partly in Texas, and the court below, which had jurisdiction of all the parties to that contract and of the trust it created,

is endowed with ample power to enforce the agreement and to execute the trust by a sale and conveyance of the property in Texas by the hands of its master and by requiring the parties to this suit to confirm the title of the purchaser by proper deeds of further assurance.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court with instructions to enter a decree avoiding the two contracts of 1905, dismissing the cross-bill, appointing a master and directing him to hear evidence, to state and report speedily the account regarding the receipts and expenditures of the parties on account of the trust property upon a basis not inconsistent with that indicated in this opinion, and after the exceptions, if any, to that report have been ruled, then to enter a decree of sale of all the lands described in the contract of 1892 which have not been sold or lost to the parties, either in one tract, or in such smaller tracts as to the court shall seem fit, and to require the complainants and the defendant by that decree to make deeds to the purchaser or purchasers in confirmation of the master's conveyance or conveyances.

NEW YORK CENT. & H. R. R. CO. v. PRICE.

(Circuit Court of Appeals, First Circuit. January 15, 1908.)

No. 651.

1. COURTS—RULES OF DECISION—"DICTUM."

Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the court's ruling in respect thereto can in no sense be regarded as mere "dictum."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 335.

For other definitions, see Words and Phrases, vol. 3, pp. 2051, 2052.

Dicta of courts, see note to Union Pac. R. Co. v. Mason City & Ft. D. R. Co., 64 C. C. A. 361.]

2. RAILROADS—FENCES—STATE STATUTES—CONSTRUCTION.

Rev. Laws Mass. c. 111, § 120, requires railroads to erect and maintain suitable fences on both sides of the entire length of the railroad except at crossings of a public way or any places where the convenient use of the road would be thereby obstructed, that the corporation shall also construct and maintain sufficient barriers where it is necessary and practicable to do so to prevent the entrance of cattle on the road, and in case of its neglect shall forfeit not more than $200 for every month during which the neglect continues, and that the Supreme Judicial Court shall have jurisdiction in equity to compel the corporation to comply with the provisions, and to prohibit the crossing of highways, or the use of any land until the provisions are complied with. *Held* that, since the construction of such section is a local question, a federal court sitting in Massachusetts would accept the construction placed thereon by the Supreme Judicial Court of the state that the duty imposed exists only in favor of adjoining owners and occupants, and therefore imposed no liability for failure to fence against children who might be playing near the right of way, and thoughtlessly run on the tracks and be injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 956, 957.]

3. SAME—DUTY TO EXCLUDE TRESPASSERS—CHILDREN—FENCES.

Where a child ran quickly on defendant's railroad track, and was struck and killed without negligence on the part of the railroad company in the operation of the train, the railroad was not negligent in failing to

fence its track to keep the child off its premises and prevent it from becoming a trespasser, there being no duty, in the absence of statute, on the part of the railroad company to build a fence or erect barriers at places other than crossings to exclude persons, whether children or adults, from its tracks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1246.]

4. SAME—STATUTES—NATURE AND EFFECT.

Statutes requiring railroads to fence their tracks are not declaratory of an existing and recognized legal duty, but impose new and further duties essential or important to the safety of the public, the security of passengers and employés, or the protection of the property of adjoining owners, such legislation being justified as an exercise of the state's police power.

Aldrich, District Judge, dissenting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 762.]

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

George L. Mayberry and George P. Furber, for plaintiff in error.

Grenville S. MacFarland (John P. Feeney, on the brief), for defendant in error.

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

BROWN, District Judge. This is a writ of error brought by the railroad company to review the rulings of the Circuit Court in an action of tort. The plaintiff's intestate, a boy 6½ years old, was playing upon an open lot in East Boston. The lot adjoined the defendant's railroad and was unfenced. The boy struck a plaything so that it fell on or near the track, and ran after it upon the defendant's land, where he was struck by a freight train, receiving injuries from which, after conscious suffering, he died in four or five hours. The declaration charged:

"That the defendant negligently failed to maintain a suitable fence along its tracks as required by the laws of Massachusetts. That said railroad tracks at said place ran at grade by a lot of land where were situated the homes of many young children, and where the children were accustomed to play. That the said tracks were in other respects so situated with regard to said land on which children were accustomed to play that the defendant knew, or ought to have known, that they were a source of peculiar danger and inducement to young children in the absence of such a fence as was required by law."

The Massachusetts statute relating to the fencing of railroads is found in Revised Laws of Massachusetts, c. 111, § 120:

"Every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad, except at the crossings of a public way or in places where the convenient use of the road would be thereby obstructed, and except at places where, and so long as, it is specially exempted from the duty of so doing by the board. Such an exemption granted prior to the first day of August in the year eighteen hundred and eighty-two shall not be revoked except upon new proceedings had under the provisions of this section, notice of which shall be given to the corporation interested, and published once in each of three successive weeks in a newspaper published in each county in which the land is situated. The corporation shall also construct and maintain sufficient barriers, where it is necessary and practicable so to do, to prevent the entrance of cattle upon the road. A corporation which unrea-

sonably neglects to comply with the provisions of this and the following section shall, for every such neglect, forfeit not more than two hundred dollars for every month during which the neglect continues; and the Supreme Judicial Court shall have jurisdiction in equity to compel the corporation to comply with such provisions, and, upon such neglect, to restrain and prohibit it from crossing a highway or town way, or from using any land, until such provisions shall have been complied with."

The railroad company, now plaintiff in error, contends that this statute imposed upon the railroad company no duty to the plaintiff's intestate, and that such duty as is imposed upon the railroad company exists only in favor of adjoining owners and occupants. It relies upon Byrnes v. Boston & Maine Railroad, 181 Mass. 322, 324, 63 N. E. 897, 898, in which it was said:

"But the omission to fence does not render a railroad liable except as against adjoining owners; and if a horse escapes from the highway on to an unfenced lot, and thence to the railroad where it is injured, the owner cannot recover unless there was reckless or wanton misconduct on the part of those in charge of the train." Maynard v. Boston & Maine Railroad, 115 Mass. 458, 15 Am. Rep. 119; McDonnell v. Pittsfield & North Adams Railroad, 115 Mass. 564; Darling v. Boston & Albany Railroad Company, 121 Mass. 118.

It was also said:

"The object of the statute is expressed to be to 'prevent the entrance of cattle upon the road,' and cases that have arisen under it are all cases of this kind."

The plaintiff in error also cites Morrissey v. Eastern Railroad Company, 126 Mass. 377, 30 Am. Rep. 686; Sullivan v. Boston & Albany Railroad Company, 156 Mass. 378, 31 N. E. 128; Gay v. Essex Electric Street Railway Company, 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. Rep. 415; Daniels v. New York & New England Railroad Company, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; Dalin v. Worcester Consolidated Street Railway Company, 188 Mass. 344, 74 N. E. 597.

We cannot escape the force of the case of Byrnes v. Boston & Maine Railroad, 181 Mass. 322, 63 N. E. 897, by disregarding as dictum the expression "the omission to fence does not render a railroad company liable except as against adjoining owners." Assuming that the facts were such that no obligation to fence existed under the terms of the Massachusetts statute, and that the case so held, nevertheless, as an additional reason for its decision, the court construed the statute, and held that the obligations imposed by it were solely in favor of adjoining owners.

Decisions of the Supreme Court declare the rule:

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." Union Pacific Company v. Mason City Company, 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. Ed. 134; Railroad Companies v. Schutte, 103 U. S. 118, 26 L. Ed. 327.

In Smiley v. Kansas, 196 U. S. 447, 455, 25 Sup. Ct. 289, 290, 49 L. Ed. 546, it was said:

"It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We ac-

cept the construction given to a state statute by that court. St. Louis, Iron Mountain & St. Paul Railway Company v. Paul, 173 U. S. 404, 408, 19 Sup. Ct. 419, 43 L. Ed. 746; Missouri, Kansas & Texas Railway Company v. McCann, 174 U. S. 580, 586, 19 Sup. Ct. 755, 43 L. Ed. 1093; Tullis v. Lake Erie & Western Railroad Company, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize."

It may be conceded that there is ground for doubt whether the construction placed upon this statute by the Massachusetts court is not narrower than its terms require. It would be a reasonable construction to say that fences are required not only for the exclusion of cattle and for the benefit of adjoining owners, but for a notice and signal of danger, and as an obstacle and preventive of harm in urban districts frequented by children. One of the learned justices in Williams v. Great Western Railway Company, L. R. 9 Excheq. 157, said of a statute imposing a general duty of this character:

"It is not for us to speculate on what was the precise intention of the Legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment. * * * Then can it be inferred with reasonable probability that the accident occurred by reason of that negligence so as to make that a question for the jury?"

See, also, Hayes v. Michigan Central Railroad Company, 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. Ed. 410; Baltimore & Potomac Railroad Company v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447; Atchison, T. & S. F. R. R. Co. v. Reesman, 60 Fed. 370, 373, 9 C. C. A. 20, 23 L. R. A. 768.

Nevertheless there is a considerable conflict of decision as to the proper construction of statutes of this kind, and there are in other states decisions supporting the views of the Massachusetts court. We find it unnecessary to review these decisions, however, since we are of the opinion that the construction of the Massachusetts statute is a local question upon which we accept the decision of the local court.

The defendant in error also contends that, even if not required by statute to maintain a fence, the defendant below was, upon common-law principles, negligent in failing to do so under the conditions proved in this case. The contention is that, because children were accustomed to play in the vicinity of the railroad tracks, "the defendant was bound to anticipate that children will be children," and to take precautions to prevent them from thoughtlessly running upon its tracks.

We think it doubtful if the testimony in this case was sufficient to show that the lot upon which the boy was playing, and from which he ran upon the tracks, was a playground or a place on which numbers of children were accustomed to play. There was evidence that children in considerable numbers were in the habit of playing on the railroad property and along the tracks; but examination of the record does not show that the testimony was directed to the specific proposition that considerable numbers of children were in the habit of playing on the unfenced lot, and of coming upon the tracks from this lot, so that the railroad company had special reason to regard this unfenced lot as an accustomed place of ingress for children thoughtlessly trespassing up-

on its tracks. Assuming, however, for the present, the sufficiency of the proof to establish the fact that this unfenced lot was a playground from which thoughtless children were in the habit of going upon the tracks, we have still an important question: Did this cast upon the railroad company the legal duty of erecting a fence to exclude such trespassers from its tracks, and does a failure to erect a fence make the railroad company guilty of negligence?

It is conceded by the defendant in error that "the Massachusetts rule appears to be that a railroad owes no duty to a trespasser, even though he be guilty only of a technical trespass, save not to injure him by wanton, willful recklessness."

It is contended, however, that the degree of care which the railroad company must exercise towards trespassers upon its right of way is a question to be settled upon general principles of law, and that this court will apply its own rules and not what may appear to be the Massachusetts rule. But as we view this case, there was no ground for holding that the railroad company was negligent in the operation of the freight train, or in a failure to discover and avoid the child after he came upon the track. The child ran quickly upon the track, and there is no contention that he could have been seen and avoided. The substance of the claim is that the railroad company was negligent in not keeping the child off its premises and preventing it from becoming a trespasser.

The defendant in error has cited no case, nor has any case come to our attention, which holds a railroad company liable for injuries upon the ground that it was its duty, in the absence of a statute, to build a fence or erect barriers, at places other than crossings, to exclude persons, whether children or adults, from its tracks. It may be true that in urban districts there is such danger to children as to justify legislation for their protection, imposing special burdens on railroad corporations, and to justify a court in construing a statute which in general terms requires a fence as intended for the protection of persons as well as cattle. In the absence of legislation, however, there is difficulty in assigning legal grounds for casting upon the railroad company, rather than upon parents or the public, the duty of safeguarding children.

The question of the duty to anticipate the presence of youthful trespassers, and to guard against accident to them, was before the Circuit Court in McCabe v. American Woolen Co., 124 Fed. 283, affirmed by this court 132 Fed. 1006, 65 C. C. A. 59. The defendant was charged with negligence in not fencing a mill trench on its lands, for the reason that children were known to be in the habit of frequenting the banks of the trench. The learned judge observed (page 287 of 124 Fed.):

"We think, therefore, that this canal was an object of such a character that both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done," and held that the action could not be maintained.

Dangers attend the operation of many other enterprises, and there are many places where the intrusion of a thoughtless child is a possibility. This general subject has received careful consideration from

the Honorable Jeremiah Smith, in 11 Harvard Law Review, 349–473, 434–448; and the legal difficulties of charging landowners with greater duties to children than to adults are well set forth in his article on "Liability of Landowners to Children Entering Without Permission."

As we understand the decisions, statutes requiring railroads to fence are not treated as declaratory of an existing and recognized legal duty, but as imposing upon the railroads new and further duties deemed essential or important for the safety of the public, the security of passengers and employés, or the protection of the property of adjoining owners. Legislation imposing such duties is justified as an exercise of the police powers of the state. Minneapolis & St. Louis Railway Company v. Emmons, 149 U. S. 364, 367, 13 Sup. Ct. 870, 37 L. Ed. 769. The creation of special duties of landowners, additional to those recognized at common law, is a matter for the Legislature in the exercise of its police powers, and not a matter for a jury. The proposition that because a landowner may have grounds for thinking that children may come upon his premises, and run into danger, he is thereby charged with the duty to fence his lands for their exclusion, cannot be regarded either as an established principle of general law to be applied by the federal courts, or as a rule which may or may not be applied at the discretion of a jury of a federal court sitting in a district where the state law is otherwise. To impose upon landowners duties in derogation of ordinary right, there must be the justification of the interests of the public generally, and the discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. Lawton v. Steele, 152 U. S. 133, 136, 14 Sup. Ct. 499, 38 L. Ed. 385.

In Missouri Pacific Railway Co. v. Humes, 115 U. S. 512, 522, 6 Sup. Ct. 110, 113, 29 L. Ed. 463, it was said of a statute of Missouri requiring railroad corporations to erect fences:

"Authority for enacting it is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations."

In Minneapolis Railway Company v. Beckwith, 129 U. S. 26, 34, 9 Sup. Ct. 207, 32 L. Ed. 585, it was observed by Mr. Justice Field:

"It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known."

Apparently the Massachusetts court has taken the view that the duty does not exist under the principles of common law, and exists only so far as it is imposed by statute, and to those persons who are within the purview of the statute. The decision of the Supreme Court of Massachusetts in Morrissey v. Eastern Railroad Company, 126 Mass. 377, 30 Am. Rep. 686, is closely in point, and adverse to the contention that, independently of statute requirement, the railroad company was negligent in respect to a duty owed plaintiff's intestate. Due weight must be given to this decision of the state court, as well as to the decisions construing the statute of Massachusetts.

In Berlin Mills Co. v. Croteau, 88 Fed. 860, 32 C. C. A. 126, this court referred to the "broad and indefinite general proposition that, so far as there exist reasonable grounds for apprehending danger, a corresponding duty arises to take precautions," saying:

"The cases furnish much more specific rules to aid owners to understand their obligations. These specific rules are not inconsistent with, but are narrower than, that broad proposition."

The only principle of general law, so called, upon which the plaintiff relies, is the indefinite rule above referred to; but the decisions of Massachusetts courts upon the question before us furnish much more specific rules for the guidance of owners of land situated in Massachusetts. Cases may be conceived, of course, where it would be gross and wanton negligence for a railroad company to run its trains in the ordinary way, when its servants had knowledge that persons would probably be upon its tracks and would be injured; but the case before us is not of that character. The negligence charged is the failure to erect a fence to provide against a possible accident through the thoughtless act of a child in coming suddenly upon its tracks.

The opinion in McCabe v. American Woolen Co. shows that the decisions of the Supreme Court in Railroad Company v. Stout, 17 Wall. 657, 21 L. Ed. 745, and Union Pacific Railway Company v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, relate to cases which on many grounds are distinguishable from the case before us. Furthermore, the element of "inducement" or "attraction" is entirely absent in this case.

As it is practically conceded that, under the Massachusetts decisions, the plaintiff could not recover, and as it has not been made to appear that the Massachusetts cases are inconsistent with any rule of the common law or of general law, or with the general trend of authority, we find no reason for applying in this case rules of law different from those applied by the state court. For the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement with the state courts if the question seems to them balanced with doubt. In Randolph v. Quidnick Company, 135 U. S. 457, 463, 10 Sup. Ct. 655, 657, 34 L. Ed. 200, it was said:

"As to the construction of a state statute, we generally follow the rulings of the highest court of the state, Bacon v. Northwestern Life Insurance Co., 131 U. S. 258, 9 Sup. Ct. 787, 33 L. Ed. 128, and cases cited in opinion; and, as to other matters, we lean towards an agreement of views with the state courts, Burgess v. Seligman, 107 U. S. 20, 34, 2 Sup. Ct. 10, 27 L. Ed. 359."

See, also, Clark v. Bever, 139 U. S. 96, 117, 11 Sup. Ct. 468, 35 L. Ed. 88.

We are of the opinion that the Circuit Court erred in refusing to instruct the jury as requested by the defendant:

"Upon all the evidence in this case, the plaintiff is not entitled to recover upon the first count in the declaration."

The judgment of the Circuit Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs in this court.

ALDRICH, District Judge (dissenting). Quite independent of the Massachusetts statute, which requires suitable fences upon both sides of the entire length of every railway operating in Massachusetts, except at crossings of a public way, etc., with a proviso that the corporation shall also construct and maintain sufficient barriers to prevent the entrance of cattle upon the road, which seems to have been held by the Massachusetts courts to be a statute for the protection of cattle and not children, I query whether the obligation does not rest upon railroads, under the common law, to reasonably safeguard the public, by fence or other suitable barrier, against hazards incident to the exercise of dangerous agencies in a public place like that shown by the allegations and proofs. Is it not a question of fact whether a railroad is in the exercise of due care in running fast trains over tracks situated in compact parts of cities, at the modern rapid rate of speed, with its tracks situated like those in question?

The rights of adjoining owners and the rights of railroads are, of course, relative, each right existing with reference to the other. The highest degree of care on the part of parents could not keep children always away from unguarded tracks, exposed, as these were, and accessible through narrow passageways between buildings in the compact parts of cities. The usual high fence, in similar situations, which safeguards railroads and the public, would have doubtless saved this child. I query whether the statutory right to build and operate a railroad is so absolute as to entitle it to run its fast trains through compactly settled communities without reasonably safeguarding the public by suitable barriers at such an approach as the one in question. Is it not a question of fact whether the right is being reasonably exercised under such circumstances and with such disregard of the requirements of public safety?

The right to do a thing may be granted by legislative act, but, whether the grant regulates the manner of its exercise or not, the common law, under general principles, would not permit its exercise in utter disregard of the requirements of public safety. Under familiar and fundamental principles, whether it is an individual or corporation using dangerous and deadly agencies, whatever their nature, at times and in places where the public are likely to be, the obligation is upon them, as well as upon members of the public, to exercise due care in a given situation.

Should we look at railroads exercising quasi public rights under public grants for quasi public purposes, which are exercising the dangerous agency of running fast trains through compact parts of cities, in the same sense that we would look at landowners when it is sought to charge them with duty and obligation to the public in respect to the management of their private property on their private ground?

Is a rule of law which would require all the time of parents to keep their children from playing beyond an unguarded line between railroad ground and private property in passageways between buildings in compact parts of cities, when a few dollars' expenditure on the

part of railroads would erect a barrier which would make conditions reasonably safe, a reasonable rule of law?

Is not a determination of the rights of this child of tender years upon the ground that he was negligent, or that he was a trespasser, or upon the ground that the railroad was under no statutory obligation to fence, or common-law obligation to safeguard, the approach to its tracks, contrary to the humane spirit, the reasoning, and the authority of Union Pacific Railroad Company v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, where the child walked into an unguarded slack pit, and where the Supreme Court held that the failure to erect the statutory fence was something to be considered on the question of negligence; and where it is said that the misconduct of the child bears no proportion to that of the defendant, that the duty of the defendant in respect to the safeguard, or the statutory fence, is a duty, not to the city as a municipal body, but to the public considered as composed of individual persons, and that each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery? See, also, Williams v. Great Western Railway Company, L. R. 9 Exchcq. 157.

What might have been due and reasonable care in the exercise of the right to operate trains in such a situation in former days, when railroad trains were operated slowly through cities, might not be due care now, with respect to trains running over unguarded tracks through thickly-settled communities at the high rate of modern speed.

Is the fact that there is no reported decision based upon the common law, holding railroads to the exercise of due care under the circumstances in question, any reason why this case should not be governed by the general principles of a system which exists for the protection of the public, as well as for the protection of private or corporate rights to operate dangerous agencies?

In the case at bar the judge at the trial expressly instructed the jury that the absence of a fence was not, in and of itself, evidence of negligence on the part of the railroad. This would seem to be a sufficient compliance with the Massachusetts cases which hold that the statute was not for the protection of children but cattle.

The case was submitted to the jury distinctly and broadly on common-law grounds, and in accordance with the theory of Union Pacific Railroad Company v. McDonald, supra. The learned judge said:

"But in this case, gentlemen, I instruct you that you may consider the absence of a fence at this place in connection with all the circumstances as you find them established by the evidence here, upon the question whether or not the railroad used reasonable care in guarding against this accident. If you find, upon all the circumstances, that the defendant did not provide proper protection against accidents of this kind at that place, such protection as a reasonable person would provide under the circumstances as you find them, and if you find that the defendant was negligent under all those circumstances in that particular, then it will be proper for you to find that the defendant was negligent with regard to this matter."

Thus the question of liability was not determined upon the ground of a lack of a statutory fence, or upon mere lack of a fence, but under instructions upon the theory of a common-law obligation, where the question of negligence was to be determined by the jury in view of

the facts that children used this narrow approach as a playground, that it was in a compact part of the city where children were liable to be, that fast trains were run, and upon consideration of the question whether, under all the circumstances, the defendant in the exercise of its dangerous agency provided, not a statutory fence, but, such reasonable safeguards and protection against accident as a reasonable person would provide under the circumstances.

THOMAS et al. v. GREEN COUNTY.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1908.)

No. 1,483.

1. COURTS—FEDERAL COURTS—JURISDICTIONAL AMOUNT.

Where county bonds were owned by the holders jointly, they were entitled to join as plaintiffs in a suit thereon in the federal courts, and the whole sum sued for, and not the value of the interest of each party, constituted the amount in controversy for the purpose of determining the court's jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890–896.

Jurisdiction of Circuit Courts as determined by the 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. JOINT TENANCY—PERSONAL PROPERTY—CORPORATIONS—RIGHT TO SUE—JOINDER OF PARTIES—"JOINT."

Burns' Ann. St. 1894, § 8136, provides that the survivor of persons holding personal property in joint tenancy shall have the same right only as the survivors of tenants in common unless otherwise expressed in the instrument. *Held*, that a corporation may be one of several joint indorsees or bearers of a negotiable instrument using the term "joint" in its general sense, and not in its restricted sense, as when applied to a tenancy of real property, and hence may sue thereon as one of several co-obligees joined as plaintiffs.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3813, 3814.]

3. PARTIES—JOINT OBLIGEES—JOINDER—DEATH OF CO-OBLIGEE—SURVIVORS.

On the death of a joint obligee of certain negotiable bonds, the right to maintain an action thereon survives to his co-obligee, and all such survivors must join in an action thereon; the personal representative of the deceased being an improper party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 19.]

4. ABATEMENT AND REVIVAL—DEATH OF CO-OBLIGEE.

If one of several co-obligees of negotiable bonds dies, pending an action thereon, the action may be continued in the name of the survivor, and, if he recovers, he is entitled to the whole sum due on the obligation, and thereupon holds the part of the recovery representing the interest of his deceased co-obligee in trust for those entitled thereto; the obligor having no interest in the distribution of the recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 315–319.]

5. WRIT OF ERROR—PARTIES—ERRONEOUS JOINDER—HARMLESS ERROR.

Since the survivor of several co-obligees of negotiable bonds may maintain an action thereon without joining the representatives of a deceased co-obligee, the presence of the personal representatives of such deceased co-obligees as parties, though erroneous, was harmless.

6. ABATEMENT AND REVIVAL—DEATH OF COPLAINTIFF—REVIVOR—STATUTES.

Civ. Code Prac. Ky. § 500, provides that, if the right of action survive to or against the remaining parties after the death of one, the action may proceed without revivor after statement on the record of such death or cessation of power. Section 507 declares that an order to revive an action in the name of the representative or a successor or the plaintiff may be made forthwith, but shall not be made without the defendant's consent after one year from the time the order might have been made. *Held*, that the last section applied to the death of a sole plaintiff, while the former was applicable to the death of one of several coplaintiffs, being substantially identical with Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], and hence, in the case of the death of one of several coplaintiffs, no revivor was necessary, a statement on the record being sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 358–376.]

7. SAME—JURISDICTION—WAIVER.

While state statutes with reference to revival of actions on death of parties are applicable to actions in the federal courts, except when Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], relating to such subject applies, a failure to observe such state statutes in a case where there is a surviving plaintiff does not defeat the court's jurisdiction, and if the defendant permits the suit to go on without a formal entry of revivor and secures a judgment in its favor on the merits, it cannot object that the order of revivor has not been made for the purpose of sustaining such judgment.

8. SAME—TIME.

Neither Civ. Code Prac. Ky. § 500, nor Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], providing for revival of an action after the death of one of several coplaintiffs, requires that such revival take place within a year as required by Civ. Code, Prac. Ky. § 507, relating to revival in case of the death of a sole plaintiff only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 429–444.]

9. SAME—STATUTES—COMPLIANCE—SUGGESTION OF DEATH.

A suggestion on the record either by plaintiffs or defendants that some of the plaintiffs were dead constituted a substantial compliance with Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], providing for revival in case of the death of one or more coplaintiffs.

10. WRIT OF ERROR—ORDER OF REVIVAL—CORRECTION OF RECORD IN TRIAL COURT.

Where, on the death of one or more coplaintiffs in an action which survived and could be continued to termination by the surviving plaintiffs, the personal representatives of certain of the deceased plaintiffs were erroneously joined, and, though no formal order of revivor was made, defendants permitted the suit to proceed to judgment in its favor, the defect not being jurisdictional, the Court of Appeals could order the making of the proper suggestion and the striking out of the names of such personal representatives to correct the record on remand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3823–3825.]

11. ADMINISTRATORS—FOREIGN ADMINISTRATORS—ACTIONS—BONDS — WAIVER — STATE LAW.

Under the law of Kentucky, the statutory bond required of a foreign personal representative of a deceased person, to entitle him to sue in the Kentucky courts, is waived by the defendant's failure to demand it.

Lurton, Circuit Judge, dissenting in part.

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

See 146 Fed. 969.

A. P. Humphrey and E. F. Trabue, for plaintiffs in error.
E. Macpherson, for defendant in error.
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action against Green county, Ky., brought by other parties upon other bonds and coupons of the same issue as those which were the subject of the suit in Quinlan v. Green County (recently decided by this court) 157 Fed. 33. The cause was tried by the court without a jury, and the findings of fact and of law were the same in all material respects as in the other case. And unless there are some fatal defects in the procedure peculiar to this case and of which we are bound to take notice, the same judgment would be due.

The plaintiffs in the court below as well as the plaintiffs in this writ of error were and are quite numerous. They all claimed to be jointly interested in the bonds and coupons sued upon. In their amended petition they allege "that they are jointly the holders and owners of all the bonds and coupons" therein specified. If they were, they might properly join as plaintiffs in the suit, and the whole sum sued for would be the test of jurisdiction, and not the value of the interest of each. The rule is stated by Mr. Justice Bradley in Clay v. Field, 138 U. S. 464, 479, 11 Sup. Ct. 419, 34 L. Ed. 1044. Some of the original plaintiffs were representatives of deceased persons who had formerly been owners of some interest in the bonds and coupons, and some have died pending the suit, and the suit has not been revived in the names of their representatives, if any have been appointed. And as to such plaintiffs, the defendant contends that the suit has abated. The facts of their deaths appear in the record. The original plaintiffs who have survived continued to be parties, and, although at first not plaintiffs in this writ of error, have been made such by amendment; and the finding of the court below was that at the beginning of this suit "the plaintiffs were then the bona fide holders for value of the bonds and coupons sued on, and were fully entitled to sue the defendant thereon in this court." In answer to the contention that the suit became defective and abated, it is urged that the plaintiffs were joint owners and holders of the title to the bonds and coupons, and that therefore upon the death of any of them the right of action devolved upon the survivors, and, further, that the presence of the names of the deceased persons in the record was wholly indifferent matter and is harmless. In respect to this last proposition, we so held on a motion to dismiss this writ, to be mentioned later.

Although the fact of the death of those plaintiffs was apparent upon the record, there was no formal suggestion of it. Before the case came on for hearing in this court the defendant made a motion to dismiss the writ of error. The second and third grounds of the motion were "because certain persons named as plaintiffs in error were not parties below," and "because one of the parties named as a plaintiff in error died more than a year before the judgment complained of, and that the action was never revived by her representa-

tive." The plaintiffs in error made a counter motion for leave to amend the writ by inserting the names of the omitted plaintiffs below, and to strike out the names of those plaintiffs in error who were not plaintiffs below. This motion was supported by affidavits showing that these mistakes were the result of accident. We denied the motion to dismiss the writ, and granted the motion to amend it for reasons stated in an opinion then handed down. 146 Fed. 971, 77 C. C. A. 487. In the course of that opinion we said:

"If in fact the plaintiffs were joint owners of the bonds and coupons in suit, it would seem, under section 956, Rev. St., that the suit might proceed in the name of the survivors upon the suggestion of the death upon the record, and that the suit would not abate. The question as to whether they were such joint owners is one of mixed fact and law, and we pretermit the present determination of that question. For the purposes of the present motion, we assume the fact to be as averred in the pleadings."

It is now contended that the plaintiffs were not joint owners, because as matter of law they could not be such. This contention is grounded upon the fact that several of the plaintiffs are corporations, Wabash College, Indianapolis Rolling Mills Company, Meridian National Bank, and could not therefore be "joint tenants" with natural persons, and 5 Bacon's Abridgement, 240, Co. Litt. 296, and Telfair v. Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637, are cited. This doctrine had its root in the common law relating to joint tenancies of real property as affected by the law of descents and of survivorship in joint tenancies, and we should have supposed that the rule had application only to real estate wherein alone the peculiar character of joint tenancy exists. But it was held in the South Carolina case that it applied also to a joint estate in personal property. That was a case where there was nominally a bequest to two incorporated religious societies, one of which was found to be nonexistent. And the question was whether the other was entitled to the whole of the bequest by virtue of the jus accrescendi, or whether a moiety was distributable to the next of kin. The court held upon the analogy of the rule in case of joint tenancies that such an estate was not created, and that the existing society took only one moiety as a separate estate upon the similitude of a tenancy in common. And it was shown in the passage cited from Lord Coke that in the case of a devise to two bishops, although they could not take as joint tenants, yet that they would take as tenants in common. This conclusion was the foundation of the decree of the South Carolina court; for if no estate at all was vested in the existing society the decree would not have been justified; and Chancellor Dunkin, whose decree was affirmed, said that "the joint words used in this bequest must therefore be construed to make several estates." Now, we cannot think that two or more owners of undivided interests in a negotiable note or bond indorsed to them, or payable to them as the bearers, sustain toward each other any such relation as joint tenants of real property at the common law. Their position is more nearly that of tenants in common, and in Indiana, where the holders of these bonds resided, there is a statute which provides that:

"The survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common, unless otherwise expressed in the instrument." Section 8136, Burns' Ann. St. 1894.

Other states have similar statutes, and in still others it is a rule of the common law. If this be so, there can be no doubt, upon any authority, that a corporation may be one of several joint indorsees or bearers of a negotiable instrument, using the term "joint" in its general sense, and not in the restricted sense when applied to a tenancy of real property, and it may sue thereon as one of several co-obligees joined as plaintiffs. Upon the death of a joint obligee the right to maintain the action survives to his co-obligee; and all such survivors must join in a suit at law on the obligation. It would be erroneous to join the personal representative of the deceased. Jackson v. The People, 6 Mich. 154. And if one dies pending an action the suit may be prosecuted in the name of the survivor, and, if he recovers, he recovers the whole sum due on the obligation, and thereupon he holds that part of the recovery which represents the interest of his deceased co-obligee in trust for those entitled to have it. The obligor has no concern with the proportions in which the recovery is distributed; that is a matter entirely between the other parties, the surviving plaintiff and the representatives. The cause of action is entire and cannot be split up. And the defendant is protected by the judgment. The right to maintain the action on a negotiable instrument and the ultimate disposition of the proceeds are different things, and statutes which protect the interests of deceased tenants in common and practice codes which require the action to be brought in the names of parties in interest have not confounded the distinction. Morrison v. Winn, Hardin (Ky.) 480; Brown v. King, 1 Bibb. (Ky.) 462; McIntosh v. Zaring, 150 Ind. 309, 49 N. E. 164; Webster v. King's Co. Trust Co., 145 N. Y. 275, 39 N. E. 964; Sessions v. Peay, 19 Ark. 267; Pomeroy, Code Rem. § 143 (4th Ed.). These and other authorities would seem to show that the personal representatives of deceased plaintiffs were not necessary or even proper parties to the action. Donnell v. Manson, 109 Mass. 576. Jackson v. The People, supra. But as their presence has harmed no one (Quinton v. Neville, 152 Fed. 879, 883, 81 C. C. A. 673, 677), we think the formal error may be corrected by direction to the court below. If a survivor of several obligees may maintain an action without joining the representatives of a deceased co-obligee, as must be conceded, it is difficult to see why he might not continue an action after the death of a coplaintiff, the result of the action being precisely the same. It is obvious that the revivor is a matter of form only. As a matter of procedure it is usual to suggest the death of the coplaintiff, and obtain an order that the cause proceed in the name of the survivor. In the several states there are generally statutes indicating such a procedure. The Civil Code of Practice of Kentucky, § 500, provides that, "if the right of action survive to or against the remaining parties, the action may proceed without revivor, after statement on the record of such death or cessation of power"; and section 507 provides that "an order to revive an action in the name of the representative or a successor of a plaintiff may be made forthwith,

but shall not be made without the consent of the defendant after the expiration of one year from the time when the order might have been made." The last section is one which seems applicable to the death of a sole plaintiff; and the former to the death of one of several, and is substantially identical with section 956 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 697]. In the latter case—that is, when one of several plaintiffs dies—no revivor is necessary. A statement on the record is sufficient. Doubtless such provisions in state statutes are to be observed in suits in federal courts except when section 956, Rev. St. U. S., applies. Nevertheless, the failure to observe them in a case where there are surviving plaintiffs does not defeat the jurisdiction. If the defendant permits the suit to go on as if a formal entry had been made, and secures a judgment in his favor on the merits, which it is still defending, we think the objection cannot be made on a writ of error sued out by the other party. Wetzel, etc., Co. v. Tennis Bros. & Co., 145 Fed. 458, 75 C. C. A. 266; Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; Swift v. Donahue, 104 Ky. 137, 46 S. W. 683; J. Newnham v. Law, 4 Term R. 577; Cozens v. Long, 3 N. J. Law, 764; Stoetzell v. Fullerton, 44 Ill. 108; Butler v. Lawson, 72 Mo. 227. The case is not like that of the death of a sole plaintiff, which necessarily puts a stop to the proceedings until a new plaintiff is made. As we have stated, the fact that some of the plaintiffs were dead was apparent from the record, and from this it appears that counsel for defendant did not regard a formal entry as material. The right to proceed with the suit is absolute, and the statement of the death a matter of form, which may be waived by a failure to make seasonable objection, or, if objection be made, by stipulating to go to trial on the merits, and taking the chances of a judgment as was done here. Said Bigelow, Judge, in Fox v. Harding, 7 Cush. (Mass.) 520:

"So too in judicial proceedings for the furtherance of public justice, and the discouragement of dilatory pleas and technical objections, parties who do not seasonably avail themselves of their legal rights are held by the courts to have conclusively waived them."

And see Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657; Thomas v. Wooldridge, 23 Wall. (U. S.) 283, 23 L. Ed. 135; Campbell v. Haverhill, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280. Objections to the jurisdiction are fundamental and cannot be waived. But, short of that, most objections may be waived, and this may be done by the conduct of the party in not insisting upon a formality which he had a legal right to have observed.

It is true that on the 14th day of March, 1904, defendant's counsel moved for "a rule on the surviving plaintiffs named in the petition and amended petitions herein to furnish the dates of the deaths of the parties plaintiffs named in said pleadings who have died since the institution of this action, and to show cause why this action should not be dismissed for failure to revive within the times prescribed by law." The court made no order in that behalf, but the plaintiffs in response to the rule proposed stated that they had "no knowledge of the death of any of the plaintiffs except such as shown in the rec-

ord herein, and the action has been revived in the names of their proper personal representatives," and they insisted that no revivor was necessary. This response was sworn to by the plaintiffs' attorney. The defendant tendered no issue on this response, or proof to the contrary. On November 7, 1904, the court overruled the motion for the rule. And on March 22, 1905, the parties stipulated that the record of the case of Quinlan v. Green County should be treated and read in this case so far as applicable on the motion to dismiss and on the merits of the case that day submitted; and, second, that "the issues of fact in this case may be tried and determined by the court without the intervention of a jury, a jury being hereby waived." And the court made the same finding in respect to the facts and the same conclusions of law as in the Quinlan Case. Thereupon the court entered judgment for the defendant as above stated. The objection is a dilatory one, not affecting the merits, and, as in the case of a plea in abatement, the objection should have been distinctly pointed out. The ground for the motion to dismiss was because of the "failure to revive within the time prescribed by law." It is not stated what law is referred to, but we infer that it was the law limiting the right to revive in the case of a sole plaintiff to one year, for that is the case in which the law prescribes that limitation. That law had no application to the death of one or more of several plaintiffs. In the latter case there was no such limitation; and, as we elsewhere point out, no such revivor was required by the statute of Kentucky. Nor is it required by the statute of the United States. This was not an objection that no statement of the death of parties had been entered on the record. It was not a motion which the court could have properly granted. Moreover, we think that if it appeared in the record, either upon the suggestion of the plaintiffs or defendant that some of the plaintiffs were dead, the requirement of section 956 of the Revised Statutes, which we incline to think govern the case, was substantially fulfilled; or, if it was not, we might direct, on remanding the case, that upon the making of the proper suggestion, and striking out the names of personal representatives, the judgment be entered for the plaintiffs in accordance with this opinion. And for the sake of form we will so order.

Some of the personal representatives were appointed by probate courts in another state than Kentucky. The statute of that state also provides that a personal representative of a foreign state may sue in the courts of Kentucky upon giving a bond for costs. But it was held by the Court of Appeals that the giving the bond was waived by not demanding it. Swift v. Donahue, 104 Ky. 137, 46 S. W. 683. In the earlier case of Marrett v. Babb, 91 Ky. 93, 15 S. W. 4, cited by defendant in error, there was a demurrer to the petition which we suppose (though this is not clear) raised the question of the status of the plaintiff. At all events the case of Swift v. Donahue is the latest decision, and must be taken as the law of Kentucky. But all this is immaterial if, as we think, the right of action survived to the survivors.

There are no other questions which merit consideration. The conclusion must be that the judgment should be reversed, with direction

that upon the correction of the record as above stated it enter a judgment for the plaintiffs as they then appear of record, for the amount of the principal of the bonds in suit, with interest thereon from the date when their latest coupons severally became due, and for the coupons in suit with interest on each from the time when they severally fell due.

LURTON, Circuit Judge (dissenting). I dissent from the opinion and judgment in this case for the reasons stated in my dissent in Quinlan v. Green County. Every one of the objections to the judgment in that case apply here, including particularly the direction for a judgment upon the bonds in suit and upon the coupons sued upon. I think a new trial should be directed if the judgment in favor of the county is reversed, because the findings are not definite enough to justify and do not cover all the issues presented by the county. Neither do I agree that the plaintiffs were joint tenants of the bonds and coupons in suit. Joint tenancies are regarded with little favor, and in cases of doubt the construction favored is that the parties were tenants in common. See the authorities cited in 23 Cyc. 485. By statute, in many of the states, joint tenancies have been legislated against, and in the state of Indiana, where the owners of these bonds resided and where their alleged joint tenancy was created, it is provided that "the survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivors of tenants in common unless otherwise expressed in the instrument." The same statute, in substance, exists in Kentucky. The effect of this Indiana statute is to abolish survivorship unless otherwise provided for. This is the practical concession of the majority, for, upon that ground, they say that a corporation may be a joint tenant with natural persons, a thing unknown at the common law. There was no agreement in respect to survivorship. Therefore this suit must abate as to deceased persons where there has been no revival. The distinguishing feature of a joint tenancy is that the tenants hold by one title and one right. Then the survivors take the whole title and right. In such a tenancy there need be no revivor in the name of the representative of a deceased joint tenant. And so section 956, Rev. St., provides that a suit started in the name of a number of joint tenants shall not abate by the death of one, but that upon "the death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff."

Under the regulation of the practice by statute there was no authority to proceed with the case by making a finding of facts until there was placed upon the record a suggestion of the death of such of the original joint tenants as had died, and the county of Green ought not to be concluded by a finding of facts made without compliance with this practice. In view of the fact that these findings do not cover some of the issues made by the defendant below, and are vague and insufficient in others, I think it a great injustice that a new trial is not awarded instead of a peremptory direction for a judgment against the county in opposition to the judgment for the county made by the trial judge.

BYERS v. CARNEGIE STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. February 25, 1903.)

No. 1,712.

1. EVIDENCE—WEIGHT—CREDIBILITY OF WITNESSES.
In the absence of established facts and circumstances with which one's testimony cannot be reconciled, it cannot be disregarded as incredible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2437.]

2. MASTER AND SERVANT—INJURY TO SERVANT—RES IPSA LOQUITUR.
Though generally, in actions by employés for negligent injury, the fact of an injury raises no presumption of negligence on the employer's part, when the character of an accident and the circumstances in which it occurs are such as to point strongly to a condition which is abnormal and dangerous and to a long-continued existence of such condition, under circumstances indicating that the employer by reasonable care should have known of such condition, and where the evidence shows that the employé suffered injury through no negligence of his own and through no risk assumed by him, and that such abnormal and dangerous condition was the proximate cause of the accident, the fact of the relation of employer and employé does not forbid an inference of the employer's negligence from the fact of the accident, notwithstanding the absence of direct testimony, by personal observation, of the existence of the specific defect alleged to have caused the accident.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898.]

3. SAME—FELLOW SERVANTS—NATURE OF COMMON SERVICE.
A hydraulic elevator used in a steel works not being a machine whose condition as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, for materials or new parts supplied by the master for that purpose, the operator of the lever of the elevator and the millwrights were not, respecting the performance of duties of inspection and repair, fellow servants of one employed to operate an electrical locomotive in pulling ladle cars onto the elevator.
[Ed. Note.—Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

4. SAME—EVIDENCE—SUFFICIENCY.
Evidence in an action for injury to an employé caused by the sudden rising of an elevator caused by a defect in the hydraulic cylinder *held* sufficient if believed, to justify an inference that the sudden rising was due to a defective valve, and that such defect was or should have been known to defendant by ordinary care in inspection; thus meeting the burden of proof imposed upon plaintiff.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954–977.]

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

This case is here for the second time. The plaintiff, an employé of the defendant in the operation of an electrical locomotive, was injured by the sudden rising of a hydraulic elevator or "jack," used in defendant's plant in carrying cars of molten metal from the furnaces to the mixer. The method of operation of the elevator, and the manner in which the accident occurred, are described in the opinion of this court upon the former review. Carnegie Steel Co. v. Byers, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677. Upon the former trial as well as upon the second, it clearly appeared that the sudden rising of the elevator must have occurred through either an ac-

tual manipulation of the lever, or a defect in the valves regulating the admission of water. Upon the former trial there was no evidence that the elevator had ever risen before the time of the accident except under actual manipulation through the lever. There was no direct evidence of any defective condition of the valves. On the contrary, the testimony on the former trial indicated that an upward movement of the elevator, due to defective valves, would not be so sudden and swift a rise as described by plaintiff. There was affirmative and uncontradicted evidence that an inspection of the valves had been made at 8 o'clock of the morning of the accident, the spools examined, new leathers put on, and the valves left in such condition that they could not leak, and that this condition of the valves was shown by actual test at that time. The testimony of the alleged reported working loose of the spools at 6 p. m. (two hours before the accident) was disputed by the millwright and one of the assistants alleged to have taken part in the examination thereof. The testimony on the part of the assistant (the only one who testified to such examination) was that he found nothing wrong with the spools. The testimony was affirmative that the valve worked normally for hours before the accident and that it worked normally immediately after the accident, and without repair.

The trial court instructed the jury that the circumstance of the rising of the elevator as shown would permit an inference of negligence upon the part of defendant, and throw upon defendant the burden of showing that it was in the exercise of ordinary care. It was held by this court that under the circumstances appearing in the record the doctrine of res ipsa loquitur did not apply; that the burden was upon the plaintiff to show that the sudden and single erratic upward movement of the elevator was due to a defect in the mechanism which was known, or should have been known, to defendant, and which it had neglected to repair; that there was no evidence justifying an inference that the movement of the elevator was due to a defective valve and that such defect was known, or might have been known, by ordinary care in inspection; but that under the evidence the cause of the accident was wrapped in doubt and mystery, the indications pointing strongly to a premature movement of the lever by the servant who had charge of the operation of the lever. Judgment was reversed and a new trial ordered.

Upon the second trial the defendant introduced no testimony. The testimony presented by the plaintiff was uncontradicted that a sudden rise of the elevator, such as shown in the evidence, could have occurred only through either a manipulation of the lever or a working loose of the spools; that when the valves were in normal condition, they would hold the elevator stationary when the lever was at center, and that an automatic rising of the elevator would be impossible when the lever was either at center or at "extreme reverse." The only workmen who, so far as the evidence shows, could have touched the lever testified, without contradiction, that it had not been touched by them since it was last sent down, five minutes before the accident. This testimony was more complete than that offered on the former trial. The testimony was also express and uncontradicted that, by reason of the alleged varying pressure of the water under ordinary circumstances, a loose working of the spools would have a tendency to cause the elevator to rise suddenly in the same manner it is testified to have risen at the time of the accident. There was no evidence of an inspection or testing of the valves on the morning of the accident, nor of the renewal of the leathers thereof, nor of the condition of the valves at that time, nor that the latter worked normally immediately after the accident. The testimony of the reported working loose of the spools at 6 p. m. (two hours before the accident) was undisputed. The testimony of the assistant millwright, Seaborn, tended to show that nothing was done by way of attempting to correct the reported looseness except to grease the spools, and that these spools were, after being greased, put back and the water turned on, and a call given to the operator above that the elevator was ready for use. There is no testimony as to the actual condition of the spools at 6 o'clock, except that Seaborn—who says it was not his duty to examine the spools—states that he saw nothing wrong with them. There is no affirmative testimony indicating that any examination of the leathers was had. The testimony of an expert, Popovich, was to

the effect that greasing the spools would have no tendency to overcome their loose-working, as the great pressure of the water when turned on (600 to 750 pounds to the square inch) would immediately cut off the grease; that a test by listening was necessary after the spools were replaced to determine whether they worked loosely. Seaborn testified that no test was made after the spools were put back to determine whether they were still loose. The plaintiff introduced the uncontradicted testimony of one Harrof, the operator in charge of the elevator in question, by day and night turns, "week about," for about three months before the accident, to the effect that for two or three months before the accident the machine was in such defective condition that even when the elevator was down and the lever in "extreme reverse" (as when the elevator was being lowered), the elevator would not always stay down; that on three occasions within the two or three months next preceding the accident, when the lever was so at "extreme reverse," the elevator, without warning and without it or the lever being touched, jumped up suddenly and rapidly for a distance of two feet or more, the lever flying back past the center; that one of these occasions was about two or three months before the accident, another two weeks later than the first, and the third but a short time before the accident. The witness further testified that during these two or three months before the accident he had when on duty, for the purpose of preventing the sudden rising of the elevator, been in the habit, on his own motion and on his own sole authority, of tying the lever to the railing which went around the shaft by means of a rope which he got for himself; that he was not "supposed" to use a rope, and that no other precaution was provided for preventing the rising of the elevator; that on three occasions previous to the accident, and within two or three months immediately preceding it, this rope had caught fire through sparks from the mixer or converter and had been burned off, and that Harrof had each time supplied its place by a new rope. Harrof was not on duty at the time of the accident. No rope was in use at or for several hours before the accident. The testimony of the witness Harrof was not introduced on the former trial. The testimony as to plaintiff's ignorance that the elevator was subject to such sudden rise, or that the machinery was in any way defective or out of repair, as well as of his freedom from negligence, is undisputed. The trial court directed a verdict for defendant.

Charles Koonce, for plaintiff in error.

C. A. Manchester, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). If the evidence of the operators of the lever, to the effect that it had not been touched since the elevator was lowered five minutes before the accident and the lever then left at extreme reverse, is to be believed, any inference that the sudden starting was due to a premature movement of the lever on the part of the operator, and thus through the negligence of plaintiff's fellow servant, was excluded. If the testimony of the expert Popovich is likewise to be believed, the sudden rising of the elevator could have been due only to a loose working of the spools, and there was no affirmative evidence that the spools were not working loosely. If the testimony of the witness Harrof is to be believed, the inference is permissible that the valves had been in an abnormal and dangerous condition for two or three months before the accident, and so plainly abnormal and dangerous, in view of the testimony as to the use of the rope and its reported burning off and resupplying, as to justify an inference that the defendant company knew, or by the exercise of ordinary

care should have known, of this abnormal and dangerous condition. We are asked to disregard Harrof's testimony; but, in the absence of established facts and circumstances with which that testimony could not be reconciled, we cannot say that it is not credible. Moreover, if the testimony of the witness Seaborn is to be believed, the defendant had actual notice, on the day of the accident, that the spools were working loosely, and the testimony of the witness Popovich, if believed, was evidence that no sufficient inspection was made after such express notice to determine whether the defect had been remedied. In a word, if the undisputed testimony of the witnesses referred to is to be believed, the cause of the accident is not wrapped in doubt and mystery, but the inference would be fairly permissible that it must have been due to a defective valve, and that this defective condition should have been known to the defendant in the exercise of ordinary care.

Upon the record before the court on the former review it was held that the fact of plaintiff's injury justified no inference of defendant's negligence, for there the evidence was too conjectural to justify an inference that the injury was not the result of a risk plaintiff assumed, as the negligence of the operator of the lever, but was, on the other hand, due to a defect which the defendant knew, or should have known, existed. This holding, under the circumstances there presented, was amply supported by the authorities cited in the former opinion.

It is the general rule, in actions by employés for negligent injuries, that the mere fact of an injury raises no presumption of negligence on the part of the employer. In Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, it is said that while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, a different rule obtains against an employé; that the fact of accident carries with it no presumption of negligence on the part of the employer, but that it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence, the court saying:

"When the testimony leaves the matter uncertain, and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen 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."

As stated by this court in Cincinnati, etc., Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 324, 1 L. R. A. (N. S.) 533, the reason for the difference in the rule of presumption between actions by employés and actions by those not sustaining such relation, is the peculiar contract of the employé by which he assumes the risks incident to his employment, including the negligence of his fellow servants, and the resulting requirement that the injured employé show that the injury of which he complains was the result of a risk he did not assume. The rule stated in Patton v. Texas &

Pacific Ry. Co. has been applied by this court in Illinois Central R. R. Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101, 103—where the foregoing extract from the opinion in Patton v. Railroad Company was quoted—and in Carnegie Steel Co. v. Byers, 149 Fed. 667, 82 C. C. A. 115, 117, 8 L. R. A. (N. S.) 677, upon the former hearing of this case. In each of the cases cited the inference of negligence as to risks not assumed by the employé was held to depend upon conjecture. But there is no hard and fast rule that the doctrine of res ipsa loquitur can in no case be applicable in a suit by an employé against an employer for negligent injuries. On the contrary, the rule referred to has been applied in numerous cases of that nature, the applicability of the rule being determined by the circumstances under which the accident is shown to have happened.

In Griffin v. Boston & Albany R. R., 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526, which was an action by an employé for alleged negligent injury, it was said (page 146 of 148 Mass., page 167 of 19 N. E. [1 L. R. A. 698, 12 Am. St. Rep. 526]):

"No general rule can be laid down that the mere occurrence of an accident is or is not sufficient prima facie proof of actionable negligence, for each case must depend upon its own circumstances; and what would be sufficient proof of such negligence in an action brought against a railroad company by a passenger, or by a stranger, might not be so in an action brought by one of its servants."

And, as stated elsewhere in the same opinion (page 145 of 148 Mass., page 167 of 19 N. E. [1 L. R. A. 698, 12 Am. St. Rep. 526]):

"If the accident appears upon the evidence to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail, and the case should not be left to the jury."

In Hamilton v. Kansas City Southern Ry. Co., 123 Mo. App. 619, 100 S. W. 671, 674, it is not altogether inaptly suggested that the difference between the rule res ipsa loquitur as applied to a passenger or stranger and a servant is that in the case of a passenger a presumption aids the occurrence to speak; while in the case of a servant there is no such aid, and the occurrence itself must speak its character.

Among the cases in which the rule of presumption or prima facie evidence of negligence has been applied in favor of employés are Sullivan v. Rowe, 80 N. E. (Mass.) 459; Hemphill v. Buck Creek Lbr. Co., 141 N. C. 487, 54 S. E. 420; Sackewitz v. Amer. Bis. Mfg. Co., 78 Mo. App. 144, 151; Gorman v. Milliken (Sup.) 86 N. Y. Supp. 699; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348. In Sullivan v. Rowe, where a buffer iron, used to stop at a desired point buckets running along the iron rail of a trench machine owned and operated by defendant, slipped off a bolt on which it was hung, by reason of the coming out of the split key used to hold it in place, and fell on the plaintiff, an employé of the defendant, while working in a trench below the machine, the occurrence was held to be of itself evidence of negligence, the evidence being conflicting as to whether or not, at the time of the accident,

there was a rope attached to the bolt on which the buffer iron was hung which would prevent it from falling in case the split keys came out. In Hemphill v. Buck Creek Lumber Co., where a brakeman was injured because of the derailment of a car on which he was riding, occurring through a spreading of the track on account of the rotten cross-ties, it was held that a presumption of negligence on the part of the master arose. In Sackewitz v. American Biscuit Mfg. Co., the plaintiff, a packer in the factory, was struck by the falling of a piece of timber which was being used in making repairs to the building. It was held that the circumstances under which the plaintiff was injured were such as to create a presumption of negligence, and that the doctrine of res ipsa loquitur was applicable. In Gorman v. Milliken, where a derrick furnished by the employer fell, injuring an employé, the failure of the master to explain the fall was held prima facie evidence of his negligence, the court saying that "the burden of proof is not shifted to the defendant by evidence of the fall of the derrick, as is claimed by the plaintiff, but the burden imposed upon the plaintiff of showing defendant's negligence is met by evidence of the fall of the derrick." Moynihan v. Hills Co. contains a valuable discussion of the rules governing the assumption of risk by an employé with reference to failure to inspect and repair machinery; and is authority for the proposition that the elevator in question, not being a machine whose condition as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, for materials or new parts supplied by the master for that purpose, neither Harrof, the mere operator of the lever, nor the millwrights were, with respect to the performance of duties of inspection and repair, fellow servants of the plaintiff.

It is true that no one has testified in this case, from actual view of the valve, that it was out of repair. But the evidence presented by the plaintiff, if believed, excludes any other cause for the accident; and in such case it is open to the jury to infer the existence of such cause, even in an action by an employé. This rule has been frequently recognized. Thus: In McLean v. Pere Marquette R. R. Co., 137 Mich. 482, 485, 10 N. W. 748, a railroad company permitted planing mill refuse to be loaded loosely on an open rack car, so that as the car was being transported some of the material was likely to be dropped from the car. The plaintiff, a section hand, was injured by derailment of a hand car, apparently caused by its striking, upon the rail, a piece of wood of the same material as that with which the car (which had lately passed over the track) was loaded. There was no other probable theory of the cause of the accident. The evidence as to whether the suction of the train upon such a piece of wood could have caused it to lodge on the track was conflicting. It was held that it was open to the jury to infer from the testimony that the piece of wood had fallen from the car. In Schoepper v. Chemical Co., 113 Mich. 582, 586, 71 N. W. 1081, where an employé was injured by the explosion of chemicals, the cause of which was not susceptible of absolute demonstration, but

there was room for drawing inferences better supported upon plaintiff's theory than upon that of the defendant, it was held that the cause of the injury did not rest wholly upon conjecture, and that it was open to the jury to infer the cause of the accident from the circumstances attending it. In Fearington v. Blackwell-Durham Co., 141 N. C. 80, 53 S. E. 662, a freight elevator, not under operation by the plaintiff employé, suddenly dropped, without any assignable reason. It was held that under the doctrine of res ipsa loquitur there was evidence to be considered by the jury as to the negligent and defective condition of the elevator, and a negligent breach of duty on the part of the defendant. In Samuels v. McKesson (Sup.) 99 N. Y. Supp. 294, after an elevator, which was being run by an employé other than the plaintiff, had risen a few feet, the bottom of it was torn out. There was evidence that it was in the habit of shaking, tilting, and jerking, as though the sides of the bottom caught. It was held that such facts were sufficient to justify an inference of negligence under the doctrine of res ipsa loquitur. See, also, Wabash Screen Door Co. v. Black, 126 Fed. 721, 725, 61 C. C. A. 639.

The proposition is fully supported, both by reason and authority, that where the character of an accident and the circumstances under which it occurs are such as to point strongly to a condition which is abnormal and dangerous, and to a long-continued existence of such abnormal and dangerous condition, under circumstances indicating that the employer by the exercise of reasonable care should have known of such condition, and where the evidence shows that the employé had no knowledge of such condition, and suffered injury through no negligence of his own and through no risk assumed by him, and that such abnormal and dangerous condition was the proximate cause of the accident, the fact of the relation of employer and employé does not forbid an inference of the employer's negligence from the fact of the accident under circumstances so stated; notwithstanding the absence of direct testimony, by personal observation, of the existence of the specific defect alleged to have caused the accident. This proposition is entirely consistent with the proposition applied upon the former review of this case, and is in no way in conflict with the proposition that inference of negligence depending upon mere conjecture will not be permitted, nor with the proposition that the court will not permit negligence to be shown by testimony of an incredible situation.

We are constrained to hold that the evidence presented upon the second trial was such as, if believed, to justify an inference that the sudden rising of the elevator was due to a defective valve, and that such defect was or should have been known to defendant by ordinary care in inspection, and thus to meet the burden of proof imposed upon the plaintiff.

Judgment reversed, and new trial ordered.

THE WESTERN STATES.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

1. ADMIRALTY—JURISDICTION—STATUTES—APPLICATION.

Rev. St. § 566 [U. S. Comp. St. 1901, p. 461], providing that in cases of admiralty and maritime jurisdiction relating to any matter of contract or tort arising on or concerning any vessel of 20 tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the issues of fact shall be tried by jury when either party requires it, applies only to the Great Lakes and waters connected therewith, and then only to such issues of fact as arise in cases of contract or tort; the statute having no reference to foreign vessels or those trading between ports of the same state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 595.]

2. SAME—EFFECT OF VERDICT.

Where a libel in admiralty was filed by a passenger of a steamboat on the Great Lakes for an assault and robbery on libelant while occupying her stateroom as a passenger by a member of the crew, during which libelant was chloroformed and robbed of her rings, watch, and $38 in money, and a jury summoned to try the issues of fact as authorized by Rev. St. § 566 [U. S. Comp. St. 1901, p. 461], awarded libelant $15,000, the district judge properly set such verdict aside on the ground that it was the result of passion and prejudice, or a misunderstanding of his charge, and entered a decree for libelant for $5,000, without reference to whether such verdict was conclusive or merely advisory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 598.]

3. SAME—ADMIRALTY JURISDICTION — TRANSPORTATION CONTRACT — PERFORMANCE—NEGLIGENCE.

A libel in admiralty in rem was maintainable for injuries to a passenger of a steamboat on the Great Lakes resulting from negligence in the performance of the transportation contract, by reason of which negligence the passenger's stateroom was entered, and she was assaulted and robbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 284.

Admiralty jurisdiction as to matters of contract, see notes to The Richard Winslow, 18 C. C. A. 347; Boutin v. Budd, 27 C. C. A. 530.]

4. SHIPPING—CARRIAGE OF PASSENGERS—NEGLIGENCE.

Where a passenger steamboat on the Great Lakes was equipped with 343 staterooms on two decks in two rows, with a passageway between them, the boat was negligent in failing to provide a sufficient watch; one man only being provided for that purpose.

5. SAME—NEGLIGENCE OF WATCHMAN.

Where an oiler on a steamboat was able to leave his quarters below and traverse parts of the boat which were brilliantly lighted, and where he had no right to be, and break into a stateroom, rob a passenger, and get away without being seen, such facts were sufficient to show that the watchman provided was negligent.

6. SAME—SECURING DOORS.

The vessel was negligent in failing to provide the door of the stateroom with bolts or inside protection other than a lock which could be operated from outside, and was not excused by the fact that such inside securities might embarrass the passenger in case of fire or sudden danger.

7. ADMIRALTY—APPEAL—AFFIRMANCE.

Where, on appeal in an admiralty proceeding from a decree in favor of libelant for $5,000, the Court of Appeals found that the amount awarded would compensate libelant for her injury, the decree would be affirmed

with interest and costs, instead of directing the District Court to enter a decree in accordance with the views of the Court of Appeals, which would be the proper course; the proceeding on appeal being in the nature of a new trial.

Appeals from the District Court of the United States for the Western District of New York.

For opinion below, see 151 Fed. 929.

Bushnell & Metcalf (J. N. Metcalf, of counsel), for libelant.

Rogers, Locke & Babcock (Louis Babcock and Evan Hollister, of counsel), for claimant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libelant was a passenger September 12, 1904, on the steamboat Western States from the city of Buffalo to the city of Detroit. At about 2 in the morning she was awakened by hearing a man in her stateroom. He went out, but in a short time came back, put a cloth with chloroform on it over her face, held her forcibly down in her berth until she was unconscious, and then took her rings from her fingers, her watch from under her pillow, and about $38 in money from her purse. When she regained consciousness, she found she had been very sick at her stomach, and, putting on a cloak, went down into the saloon where she found only a bellboy asleep. At her request, he brought the nightwatchman, and subsequently the captain, to whom she told her story. They were, according to her account, both incredulous and discourteous. A day or two afterwards the police of Detroit arrested a man who had been an oiler on the steamboat, and he, when confronted by the libelant, admitted the assault and robbery, and was convicted of piracy and sentenced to hard labor for life.

The door of the libelant's stateroom was solid, opening with a key in the usual way from the outside, but when closed locking itself. The key could not be used from the inside, and no one could get in from the outside except by the use of the key. There was no bolt or contrivance of any kind on the inside which would protect the passenger from the entrance of anyone so provided. The steamboat had 343 staterooms, which were on two decks, the lower one called the "saloon deck" and the upper one the "promenade deck." These staterooms for a considerable distance amidships were in two rows on each side with a passageway between. The libelant occupied No. 323, an outside room on the port side on the promenade deck. There was but one night watchman, whose duty it was to patrol these decks from 6 p. m. to 6 a. m., and report every half hour to the lookout in the pilot house that he had done so. The libelant began this action in the District Court of the United States for the Western District of New York against the steamboat in rem, charging the owners with negligence in performing the contract of transportation in not affording her a sufficient means of securing herself against intruders into her stateroom, in not keeping a sufficient and vigilant watch, and in treating her disrespectfully and discourteously when she reported the occurence. The claimant in its answer admitted the robbery, but de-

nied all negligence connected either with the security of the state-room or with the sufficiency of the watch or with the disrespectful treatment of the libelant. It further excepted to the libel on the ground that the cause of action was for an assault, which, under rule 16 of the Supreme Court in admiralty, could not be maintained in rem. This exception the district judge overruled on the ground that the cause of action was not for the assault, but for negligence in the performance of the contract of transportation. Subsequently the libelant, under section 566 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 461], demanded a trial of the issues of fact before a jury and the same took place October 11, 1906, in the District Court of Lockport, resulting in a verdict for the plaintiff of $15,000.

The provisions of this section, so far as applicable, are as follows:

"* * * In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

The question is raised whether the verdict of the jury is binding upon the District Court as contended by the libelant, or like a feigned issue out of chancery, only advisory, as contended by the claimant. The provision is an anomaly in the admiralty jurisdiction, which it is hoped Congress will repeal. It applies only to the Great Lakes and waters connected therewith, and then not to all issues of fact, but only to those arising in cases of contract or tort. It cannot be availed of in case of foreign vessels or of vessels trading between ports of the same state, and it introduces a system of trial wholly foreign to the practice, forms, and procedure of courts of admiralty. The history of it is as follows: The original test of admiralty jurisdiction in England was that the contract was made or the tort or transaction occurred on tidal waters, and, as in that country there was no navigation except upon tidal waters, the test was a very fair one. This was equally true of the United States in its early history, so that the same test was applied in determining the jurisdiction of admiralty courts. But when commerce developed upon the Great Lakes, especially after the introduction of steamboats, it was thought desirable that the same law should be applied there as had always been applied on the high seas and tidal waters connected therewith. Accordingly Congress passed Act Feb. 26, 1845, c. 20, 5 Stat. 726, entitled "An act extending the jurisdiction of the District Courts to certain cases, upon the lakes and navigable waters connecting the same," in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning, steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting said lakes, as is now possessed

and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts in all such matters of contract or tort, the remedies, and the forms of process, and the modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction; saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation."

This was, as the title implies, plainly an act professing to extend the jurisdiction and the provision saving the right of trial by jury of facts put in issue where either party should require it was included because of reverence for the jury system. In the year 1851 a cause arising out of a collision on Lake Ontario between the propeller Genesee Chief and the schooner Cuba reached the Supreme Court. The owners of the schooner having filed their libel in rem against the propeller, the claimant averred that the collision did not take place in tidal waters nor on the high seas, and therefore that the court had no jurisdiction thereof. The Genesee Chief, 12 How. 443, 13 L. Ed. 1058. The court proceeded to inquire into the whole subject of jurisdiction. Section 2 of article 3 of the Constitution provides:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The judiciary act of 1789 (Act Sept. 24, 1789, 1 Stat. 73, c. 20, § 9) gives to the District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction including all seizures under the laws of impost, navigation or trade of the United States where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden within their respective districts as well as upon the high seas." The court pointed out that the jurisdiction under this act depended, not upon the question whether the waters were tidal, but upon the question whether they were navigable, and, the waters of the Great Lakes being navigable, it was held that the District Courts of the United States had exclusive jurisdiction over them under the act of 1789. The act of 1845 which was passed for the purpose of extending the admiralty jurisdiction was accordingly construed as really restricting it.

The reservation of the right to a jury trial was treated as a mere matter of practice:

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power, as well as the mode of proceeding in which

that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implications from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may, therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And, in the proceedings under the act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it."

In 1868 the question arose again in the case of The Eagle, 8 Wall. 15, 19 L. Ed. 365. The court departed from the ruling in the case of the Genesee Chief, which had been followed in the cases of Allen v. Newberry, 21 How. 246, 16 L. Ed. 110, and in Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451, and held that the act of 1845 was not restrictive, but entirely inoperative except as to this reserved right to a jury trial:

"We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it."

It is probably in consequence of this observation that the practice of injecting jury trials into admiralty proceedings on the Great Lakes and waters connected therewith was carried into section 566 of the Revised Statutes.

Courts of chancery have always, for the purposes of their own enlightenment, exercised the power of submitting issues of fact to be tried by juries. In such cases, however, the chancellor prepares the issues, and he is not bound by the verdict of the jury upon them. So little bound that a bill of exceptions cannot be taken, or, if taken, can only be used on a motion for a new trial. Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271; Watt v. Starke, 101 U. S. 247, 250, 25 L. Ed. 826. When, however, the statute gives to a party the right to a jury trial, it is difficult to believe that it was intended to authorize the court to take this right away and substitute its own findings for the jury's, as in the case of feigned issues sent out of chancery. Such a practice does not give the party a jury trial at all, or, at best, it gives with one hand what it takes away with the other. It seems to us that, consistently with a party's right to a jury trial, the power of the court can go no further than to grant a new trial.

This is concisely stated by Judge Haight in McClave v. Gibb, 157 N. Y. 413, 52 N. E. 186, 187:

"Where a party is entitled by the Constitution or by express provisions of law to a trial by jury of one or more issues of fact, the finding of the jury is conclusive in the action, unless the verdict is set aside or a new trial is granted; but, where the party is not entitled as of right to a trial by jury, the verdict is not conclusive upon the parties, and the trial court may adopt it, modify it, or disregard it, and find the facts anew. In the latter class of cases the verdict is treated as an aid to the court to inform its conscience, but it is in no wise bound thereby, for the responsibility of determining the facts rests upon the trial judge and our Code has not changed the rule in this respect. Code Civ. Proc. 970, 971; McNaughton v. Osgood, 114 N. Y. 574, 21 N. E. 1044; Learned v. Tillotson, 97 N. Y. 1, 6, 49 Am. Rep. 508; Jackson v. Andrews, 59 N. Y. 244; Colie v. Tift, 47

N. Y. 119; Wilson v. Riddle, 123 U. S. 608, 8 Sup. Ct. 255, 31 L. Ed. 280; Van Alst v. Hunter, 5 Johns. Ch. [N. Y.] 148."

See, also, 16 Cyc. pp. 410–429; Hill v. Phillip's Adm'r, 87 Ky. 169, 7 S. W. 917; Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685; The State v. Farrish, 23 Miss. 483; Cuthbert v. Ives, 65 Hun, 625, 20 N. Y. Supp. 469; Meeker v. Meeker, 75 Ill. 260; Whitted v. Fuquay, 127 N. C. 68, 37 S. E. 141; Griffith v. Griffith, 9 Paige (N. Y.) 315.

Still, in the Sixth circuit, Judge, afterwards Mr. Justice, Brown, in the case of The Empire (D. C.) 19 Fed. 558, seems to have held a contrary view. A jury trial under section 566 had been had, and the libelant moved for a new trial. The learned judge set the verdict aside, but the report does not show whether he ordered a new trial or entered a decree in accordance with his own views of what was right. He did hold, relying principally upon the opinion of Mr. Justice Matthews in Boyd v. Clark (C. C.) 13 Fed. 908, that the verdict was advisory only. But in Boyd v. Clark the only point decided was that the proper practice in such cases was to take an appeal, and not a writ of error, and upon the appeal the case stood for trial in the Circuit Court precisely as if tried by the District Court. As to the effect of the verdict, Mr. Justice Matthews declined to express any opinion, saying:

"Whether the jury allowed in this class of admiralty cases is anything more than advisory to the District Court as are juries in chancery cases I do not deem it necessary to express an opinion."

We do not discover anything in this case or in two others cited by Judge Brown which justified the conclusion that verdicts rendered under section 566 are advisory only. The two other cases cited were Lee v. Thompson, 3 Woods, 167, Fed. Cas. No. 8,202, in which everything Justice Bradley said about jury trials was with reference to feigned issues for the enlightenment of the court, and Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452, which was an action in equity for an injunction only, in which Justice Field held that the statute of Montana allowing only one form of civic action, and providing that "issues of fact shall be tried by jury unless a jury is waived or a reference ordered," was not intended to abolish the difference between legal and equitable actions. He said:

"But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but, if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment, respecting them, and not from the judgment of others."

Judge Longyear, in Gillette v. Pierce, Brown's Admiralty, 553, Fed. cas. No. 5,437, held that section 566 did not apply at all, because the pleadings did not show that the vessel involved was enrolled or licensed for the coasting trade. In his very interesting discussion of that section he simply suggested that Congress should legislate to make the jury trials advisory only. It is true that Judge Ricks, in The City of

Toledo (D. C.) 73 Fed. 220, did hold such verdicts advisory only because he thought any other construction would be a curtailment of the power of the admiralty judge. This does not seem consistent with the view of the Supreme Court in the Genesee Chief, supra, which treats the provision as a mere regulation of practice, and was not necessary to be decided because the learned judge found the vessel did not fall within the provisions of section 566. The district judge, following the practice established in the Sixth circuit, entered a decree in favor of the libelant for $5,000 because he thought the verdict of $15,000 was the result of passion or prejudice, or of misunderstanding his charge.

Upon the whole case we think the district judge right. We have no doubt of the jurisdiction in rem in a cause where negligence in the performance of a contract of passenger transportation is involved. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; The Minnetonka, 146 Fed. 509, 77 C. C. A. 217. We also think that the watch maintained was insufficient. One man upon two decks in a large steamboat so cut up by staterooms that it is necessary to keep walking about in order to see them at all seems a meager protection. That the watchman was not vigilant may be inferred from the fact that an oiler could leave his quarters below, traverse parts of a brilliantly lighted steamboat where he had no right to be, accomplish this robbery, and get away without being seen.

In one respect, however, we think the District Judge took too favorable a view for the claimant, viz., in holding that the vessel was not at fault for not giving the libelant a bolt or some means of securing the door of her stateroom from the inside. It is true there was some evidence, though far from convincing that bolts or inside protections were not generally used in steamboats on the Great Lakes. While the failure to use appliances generally employed may be evidence of negligence, the general neglect of safeguards does not establish care. Admitting that the lock itself was a good one, it seems to us that an inside bolt should have been supplied, and that the reason given for not doing so, viz., that it might embarrass the passenger in case of fire or sudden danger, is wholly unsatisfactory.

The proceeding before us is in the nature of a new trial in which we find that the sum of $5,000 and interest will sufficiently compensate the libelant for the injury received by her. Irvine v. The Hesper, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175. In such circumstances the proper course, strictly speaking, would be to direct the District Court to enter a decree in accordance with these views. It seems, however, unnecessary to subject the parties to the annoyance and expense of such a proceeding, as the decree on file is in accordance with the views entertained by us.

The decree is affirmed, with interest and costs of the District Court, but, as both parties have appealed, without costs to either in this court.

JOHNSON v. CHARLES D. NORTON CO.

(Circuit Court of Appeals, Sixth Circuit. January 27, 1908.)

No. 1,714.

1. GUARANTY—CONSTRUCTION AND OPERATION—WHAT LAW GOVERNS.
A contract of guaranty made to enable traction companies operating lines in Pennsylvania to buy coal on credit for use on their roads, wherever executed, is presumably to be performed in Pennsylvania, and is governed by the law of that state.

2. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
A contract of guaranty is a well-known form of commercial contract as to the construction and effect of which the federal courts are not bound to follow state decisions not based on a local statute or usage having the force of a local law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 979.

Conclusiveness of judgment 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.]

3. GUARANTY—REMEDY OF CREDITOR—CONDITIONS PRECEDENT.
The distinction between a general guaranty of payment and a guaranty of collection is well settled; the former being an unconditional, and the latter a conditional, contract. Under a guaranty of payment by a railroad company for supplies, where the company has become insolvent, and its property has passed into the hands of receivers in a foreclosure suit, the creditor is not compelled to pursue its claim to judgment against the company before resorting to the guarantor; nor is it obliged to unsuccessfully assert a claim to priority over the mortgage debt in the foreclosure suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 89.]

4. SAME—AMOUNT RECOVERABLE—INTEREST.
Interest is recoverable against a guarantor from the time the debt became due and after demand and notice, although the effect is to increase the judgment beyond the limit fixed by the contract of guaranty.

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

This was an action against a guarantor upon three letters of guaranty, in the following words:

"January 16, 1903.

"To Charles D. Norton Company, Philadelphia, Pa.—Gentlemen: In respect to the coal accounts of the Lehigh Valley Traction Company, the Philadelphia & Lehigh Valley Traction Company and the Allentown Electric Light & Power Company, respectively, with you. We hereby personally, jointly and severally make this contract of guaranty, to wit:

"That to the extent of twenty thousand dollars ($20,000) we guarantee the payment of any and all amounts due or to become due from the said companies or either of them to you for coal furnished from time to time to them or on their order respectively. This contract and guaranty to be a continuous one, and to apply to all credits given to the said companies or either of them within the limits of the amount above set forth, until such time as we shall in writing notify you of our withdrawal of this guaranty, in the event of which notice our guaranty shall cease on all coal supply thereafter.

"Yours truly, [Signed] Tom. L. Johnson,
"Robt. E. Wright."

"February 19, 1903.

"To Charles D. Norton Company, No. 219 Stephen Girard Bldg., Philadelphia, Pa.—Gentlemen: In respect to our letter or contract addressed to you bearing dates January, 1903, guaranteeing accounts of the Lehigh Valley Traction Company, the Philadelphia & Lehigh Valley Traction Company and

the Allentown Electric Light and Power Company, we beg to say that the guaranty therein contained is to cover shipments both by Charles D. Norton & Co., and Charles D. Norton Co., or either.

"[Signed] R. E. Wright,
"Tom. L. Johnson."

"Lehigh Valley Traction Company, Allentown, Pa.

"Commonwealth Building, Allentown, July 1, 1903.

"Messrs. Chas. D. Norton & Co., No. 209 Stephen Girard Bldg., Philadelphia, Pa.—Gentlemen: In respect to the contract of guaranty entered into by us with you in January, 1903, whereby we agreed to become the guarantors as therein stated of certain indebtedness of the Lehigh Valley Traction Company, the Philadelphia and Lehigh Valley Traction Company and the Allentown Electric Light and Power Company respectively to you, we have this to say: That if you comply with the suggestion that has been made by those companies, or either of them, that for that indebtedness and for the notes representing it you should accept renewal notes from time to time from those companies and so continue to do the same until otherwise notified by us such action on your part shall not relieve us from our guaranty, but that our liability under that contract shall continue as heretofore and as set forth in the contract.

"Yours respectfully, [Signed] Tom L. Johnson,
"Robt. E. Wright."

Notes and renewal notes were taken from the principal debtor, the Lehigh Valley Traction Company; the last renewals being three notes, each for $6,603.48, dated, respectively, September 20, October 20, and October 21, 1904, maturing 60 days after date of each. Demand and notice were duly made and given.

A demurrer to the petition was overruled. A reply was then filed averring that the plaintiff had not pursued the principal debtor to judgment. It also averred that the property of the Lehigh Valley Traction Company was in the hands of a receiver appointed by a Pennsylvania court under a mortgage foreclosure proceeding; that the claim of the plaintiff was for coal supplied to maintain the operation of the traction company, and the claim of plaintiff was entitled to preference over the mortgage debt, and the property in the hands of the receiver was more than enough to pay all preferential debts; that the plaintiff filed its said claim before a master directed to report preferential debts, but has not prosecuted same to judgment, nor instituted any suit against the said Lehigh Valley Traction Company. A demurrer to this answer was sustained so far as it contained affirmative matter. Thereupon the case was submitted to a jury upon evidence adduced by the plaintiff in support of its petition. The jury, by direction, returned a verdict for $19,810.42, being the aggregate of the principal due upon the three notes mentioned with interest upon $6,603.47 from December 20, 1904, and interest upon a like amount from December 21, 1904, and upon a like sum from January 18, 1905.

J. C. Brooks, for plaintiff in error.

G. M. Dahl, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). The traction companies, whose contracts Mr. Johnson guaranteed, were companies operating lines of railway in the state of Pennsylvania. The Charles D. Norton Company and Charles D. Norton were dealers in coal, carrying on business in that state, and the object of the guarantee was to secure them in the sale and delivery of coal to the former companies used from day to day for the operation of their several lines. There is no evidence as to where the contracts of guaranty were signed, and no express agreement that the guarantee was given in view of

the law of any particular state. If we assume the guarantee to have been written in Ohio, the state of the residence of Mr. Johnson, one of the guarantors, the implications from the character and circumstances of the contract are that the contract of guaranty was to be fulfilled in Pennsylvania, and that the guaranty was given with a view to the law of the place of performance. Cox v. United States, 6 Pet. 172, 8 L. Ed. 359; Boyle v. Zacharie, 6 Pet. 635, 644, 8 L. Ed. 527; Bell v. Bruen, 1 How. 169, 11 L. Ed. 89; United States Bank v. Daniel, 7 Pet. 33, 9 L. Ed. 989; Pritchard v. Norton, 106 U. S. 124, 136, 1 Sup. Ct. 102, 27 L. Ed. 104. Upon this assumption we should interpret and give effect to the guaranty according to the law of Pennsylvania.

For the plaintiff in error it is contended that, according to the laws of Pennsylvania, this guaranty is conditional, and that the guarantor is not liable until the principal debtor has been pursued to insolvency. To sustain this counsel cite: Isett v. Hoge, 2 Watts (Pa.) 128; Brown v. Brooks, 25 Pa. 210; Hoffman v. Bechtel, 52 Pa. 190; National Society v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359; Hartman v. First National Bank, 103 Pa. 581. It may be doubted whether under the Pennsylvania decisions it is essential to pursue an insolvent principal to judgment; such a course being fruitless. Cambell v. Baker, 46 Pa. 243; Janes v. Scott, 59 Pa. 178, 98 Am. Dec. 328.

A contract of guaranty is a well-known form of commercial contract, and it is not to be conceded, on the Pennsylvania cases cited, that the liability of a guarantor should be made to depend upon an unsuccessful resort to an equitable proceeding to assert a claim as preferred over mortgage debts because created for supplies to keep an insolvent railway line in operation. Certainly, if it did not appear that harm had resulted to the guarantor as a consequence, a court of law would not repel a plaintiff upon such a defense. See National Loan Association v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359. Passing this, we find that these decisions of the Pennsylvania courts are not based upon any local statute, custom, or usage, having the force of local law and purport only to be the view of the Pennsylvania courts as to the general commercial or common law in respect to the interpretation and effect of contracts of guaranty.

In holding that a general guaranty of payment is a conditional guaranty, dependent upon the exercise of due diligence in collecting from the principal debtor, the Pennsylvania courts are not in line with the great weight of authority. In the absence of some special limiting or qualifying words, the line of distinction between a guaranty of payment and a guaranty of collection is well settled. The one signifies an unconditional contract, and the other a conditional contract. 14 Am. & Eng. Enc. of Law, 1141; 20 Cyc. 1450. Of the many decisions holding that a simple guaranty of payment is an absolute guaranty, we cite only a few: Neil v. Ohio Agricultural Bank, 31 Ohio St. 15; City Savings Bank v. Hopson, 53 Conn. 453, 5 Atl. 601; Yancey v. Brown, 3 Sneed (Tenn.) 89; Klein v. Kern, 94 Tenn. 34, 28 S. W. 295; Brown v. Curtiss, 2 N. Y. 225; Miller v. Rinehart, 119 N. Y. 368, 23 N. E. 817; Donley v. Camp, 22 Ala. 659, 58 Am. Dec. 274; Sanford v. Allen, 1 Cush. (Mass.) 478; Inkster v. Marshal National Bank, 30 Mich. 143; Dana v. Conant, 30 Vt. 246; Wren v. Pearce, 4 Smedes & M. (Miss.) 91. Most

of the cases, English and American, hold that neither notice of the acceptance of the guaranty nor demand of payment from the principal debtor with notice to the guarantor are requisite steps to the liability of a guarantor of payment. In this particular, the Supreme Court of the United States holds otherwise, though they do hold that the guarantor is relieved only to the extent that he has been injured by default in such demand and notice. Douglass v. Reynolds, 7 Pet. 113, 126, 8 L. Ed. 626, s. c. 12 Pet. 497, 9 L. Ed. 1171; Davis v. Wells, 104 U. S. 160, 170, 26 L. Ed. 686. That it is not essential to show an unsuccessful effort to coerce payment by the principal debtor is the plain conclusion from the Supreme Court cases cited, as well as from Memphis v. Brown, 20 Wall. 289, 311, 22 L. Ed. 264, where the question arose upon a guaranty that:

"The city of Memphis will and does hereby guarantee the contractors the payment of said accounts so assessed against the property owners for the payment according to plans and specifications."

The court said of this:

"It will be perceived that this is a guaranty of payment, and not of collection merely, and upon which, upon general principles of law, a suit may be commenced against the grantor (guarantor) without any previous suit against the principal. The 30, 60, and 90 days had long passed, and the payments had not been made by the owners. These periods, we think, furnish the limit of delay, that could have been contemplated, before the city became liable to pay. Numerous authorities are cited in brief of counsel and in the learned opinion of the circuit judge, to show that, upon a contract thus worded, the city is liable in a suit brought by the contractor. They fully sustain the position. The fact, however, that the Supreme Court of Tennessee has now decided that an assessment upon the property owner for this expense is void, as in violation of the Constitution of the state, would seem to render such discussion unnecessary. The work was done under a contract with and by the employment of the city; the claim of the contractor is upon his contract, to which the city alone is the counter party. A particular mode in which payment was expected to be obtained fails. The city cannot allege the illegality of the proposed detail of payment as a defense to itself. If it 'caused' the owners to pay, that was well. If it failed in that, as it has, both in fact and in law, its guaranty of payment remains in force."

In Douglass v. Reynolds, 7 Pet. 113, 126, 8 L. Ed. 626, Justice Story, speaking of the necessity of a demand and notice and of the general character of a guaranty of payment, said:

"By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable, upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure upon his part to perform his engagements, are indispensable to constitute a casus fœderis. The creditors are not, indeed, bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the nonpayment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due."

Contracts of guaranty are a well-known form of commercial obligation. In Davis v. Wells, cited above, the court said they were "to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse." Bell v. Bruen, 1 How. 169, 186, 11 L. Ed. 89; Lawrence v.

McCalmont, 2 How. 426, 449, 11 L. Ed. 326; 3 Kent's Comm., side page 121. With respect of such a question of general law, involving, as this does, the construction and effect of commercial obligations so much used in commercial transactions, the courts of the United States, while inclined to agreement with the decisions of the court of the state of the solution of the contract, are not compelled to follow such decisions when they do not profess to be based upon a local statute nor any local usage having the force of local law.

Section 721, Rev. St.[U. S. Comp. St. 1901, p. 581], which requires the courts of the United States to regard the laws of the several states, except when the Constitution, treaties, or statutes of the United States shall otherwise provide, in trials at common law, "as rules of decision" when they apply, has again and again been construed and limited in its action to state laws strictly local; that is to say, to the statute of the state and their construction by the local courts and to rights and titles to property having a situs by their nature or character. That the section mentioned does not extend to contracts having a commercial character, such as that here involved, nor questions dependent upon the general common law, is well settled. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Oates v. National Bank, 100 U. S. 239, 246, 25 L. Ed. 580; Carpenter v. Providence Ins. Co., 16 Pet. 495, 511, 10 L. Ed. 1044; Railroad Co. v. National Bank, 102 U. S. 14, 55, 26 L. Ed. 61; Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359; Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788; Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 91, 100, 20 Sup. Ct. 33, 44 L. Ed. 84; Baltimore & Ohio Railroad Co. v. Baugh, 149 U. S. 371, 377 et seq., 13 Sup. Ct. 914, 37 L. Ed. 772; Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271; Bell v. Bruen, 1 How. 186, 11 L. Ed. 89; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686; Douglass v. Reynolds, 7 Pet. 113, 126, 8 L. Ed. 626; Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; and Memphis v. Brown, 20 Wall. 289, 22 L. Ed. 264—were cases involving guaranties, and in every instance the matter was treated as one of general law.

There was no error in the allowance of interest after demand and notice, although the general result was to increase the judgment beyond the limit of liability. The sums demanded were due and payable when demanded, and interest then began to run.

Judgment affirmed.

NOTE.—The following is the opinion of Tayler, District Judge, on demurrer to the petition:

TAYLER, District Judge. This is an action brought by the plaintiff against the defendant, in which it seeks to recover some $20,000 on a contract of guaranty entered into between the parties, whereby the defendant guaranteed, to the extent of $20,000, the payment of any or all amounts, due or to become due from certain corporations, or either of them, to the plaintiff for coal furnished from time to time. The contract was later enlarged so as to make it cover notes, or renewals thereof, which might be given by the companies for the indebtedness accruing for coal.

To this petition the defendant has filed a general demurrer, and the ground on which this demurrer is sought to be sustained, in argument, is that it nowhere appears in the petition that the plaintiff has exhausted its remedy against the principal debtor. Counsel for the defendant claim that the guaranty sued upon is what is called a conditional guaranty, and not an absolute

guaranty; that it is a guaranty of that sort has been determined by the Supreme Court of Pennsylvania, in which state the contract was made, and where it was to be executed; and that, under the decisions of the courts of that state, before suit can be instituted and prosecuted on such a guaranty, resort must primarily be had to the original debtor, and only upon his failure to respond to legal proceedings instituted for the collection of the debt can suit be brought against the guarantor.

The claim that the meaning of this contract and the effect to be given to it by this court are to be determined by the law of Pennsylvania is unsound. The question thus made is a question of general law, in respect to which the federal courts will follow the rules of general law as laid down by federal courts. This doctrine is established by the case of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, and a long line of authorities subsequent to the decision in that case.

The rule established by the federal courts, and by the courts of most of the states, is to the effect that such a guaranty as that on which this suit is based is absolute, and that it is not necessary, in order to predicate an action at law upon it, that suit should have been prosecuted against the original debtor, or that any steps should have been taken against him. It would be sufficient in case of such guaranty that default should have been made. That appears in this case according to the allegations of the petition, and therefore a right of action has accrued against the defendant.

The demurrer to the petition is therefore overruled.

TOLEDO, ST. L. & W. R. CO. v. REARDON.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1908.)

No. 1,727.

1. WRIT OF ERROR—FORMER DECISIONS—LAW OF CASE.

Where, on a former writ of error in an action for injuries to a servant, the court reversed a judgment for defendant, and held that the court should have submitted the case to the jury, such determination constituted the law of the case on a retrial, where the evidence was conflicting and much the same as on the first trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661–4665.]

2. COURTS—FEDERAL COURTS—SUBMISSION TO JURY—STATE LAW.

The law of the state with reference to submission to the jury of special interrogatories does not control the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 927.]

3. WRIT OF ERROR—REVIEW—MATTERS OF DISCRETION—SUBMISSION OF INTERROGATORIES.

Refusal of the trial judge in the exercise of discretion to submit special interrogatories to the jury because they were not filed until during the argument cannot be assigned as error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3858, 3859.]

4. SAME—INVITED ERROR.

Where, in an action for injuries to a servant, defendant's counsel presented 20 requests to charge with respect to the duties and liabilities of the respective parties, no one of which limited the employer's duty to provide a safe place to the exercise of ordinary care in that behalf, defendant was not entitled to urge on writ of error to reverse the judgment that an instruction that one of the things which an employer is required under the law to do for the employé is to provide reasonably safe places at which, or on which, or in which the employé is required to

work, etc., was defective because an employer was bound only to use ordinary care to provide a reasonably safe place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3602-3604.]

5. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—USAGE OR CUSTOM.

Where, in an action for injuries to a railroad switchman by an alleged defect in an embankment by the side of the track on or over which plaintiff stepped when he left the engine to turn a switch, the question arose as to whether the defect was within defendant's right of way or was on private property adjacent thereto, proof of a custom for switchmen to alight at the place where plaintiff did, and where the defect existed, was admissible to show that though the place may have been private property the defendant by using it for his own purposes, so far as its employés were concerned, was bound to keep it in a reasonably safe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 913-932.]

6. TRIAL—INSTRUCTIONS—REFUSAL TO REQUEST.

It was not error to refuse requests to charge, where the instructions given were full and fair, and aptly presented the case on the law and the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

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

C. A. Schmettau, for plaintiff in error.

C. A. Thatcher, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. This cause is brought before this court for the second time. The action was brought by Reardon to recover damages for a personal injury sustained by him on March 3, 1904, in consequence, as he alleges, of the negligence of the railroad company in the maintenance in proper condition of the grounds used in its business at its yards in the city of Toledo. He was at the time of the accident, and had been for a considerable time before, employed by the company as a switchman at that place. At the first trial the court being of opinion that the plaintiff had not made out his case directed the jury to return a verdict for the defendant. This was done. And from the judgment entered thereon the case was brought here. Upon consideration of the evidence we thought the facts should have been left to the jury. The judgment was reversed and the cause remanded for a new trial. 147 Fed. 187, 77 C. C. A. 415. A second trial was had and resulted in a verdict for the plaintiff. The present writ of error, sued out by the railroad company, brings up the record of that trial and the judgment for review upon assignments of error, the main burden of which is that the court refused to instruct the jury to find for the defendant at the close of the evidence. The nature of the case and of the issues controverted are stated in our former opinion and need not be repeated.

1. The evidence was much the same on the last as on the former trial. There were small differences, but, as before, upon the material

facts the evidence was conflicting. It might be that the preponderance of it was as to some questions greater, and on others less, than on the former trial. But this did not affect the relative provinces of the court and jury. This being so, it follows that our former decision must be regarded as controlling. The court below would have disregarded it if it had again taken the case from the jury.

2. During the argument before the jury counsel for defendant requested the court to submit to the jury in connection with the main issue certain special interrogatories in regard to particular facts, for special findings. The court denied the request, assigning as a reason that they had not been filed until during the argument to the jury. And counsel refer to a statute and decisions thereon of the courts of Ohio to the effect that such requests may be submitted at any time before the case is submitted to the jury. But the law of the state does not control the federal courts in respect to the mode in which causes shall be submitted to a jury. Nudd v. Burrows, 91 U. S. 441, 23 L. Ed. 286. Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Lincoln v. Power, 151 U. S. 443, 14 Sup. Ct. 387, 38 L. Ed. 224. It was a matter entirely within the discretion of the court whether it would submit the special questions for separate findings, and its action therein cannot be assigned as error.

3. It is also complained that the court, in charging the jury on the subject of plaintiff in error's duties towards Reardon, used the following language:

"Now, the particular duty which the plaintiff claims the defendant owed to him and did not perform is this, in substance: One of the things which an employer is required under the law, as it has grown up, to do for the employé is to provide reasonably safe places at which, or on which, or in which the employé is required to work in performing the master's work; and plaintiff claims that that duty the master in this case—the railroad company—failed to perform, and that in consequence of that failure he was injured."

It must be admitted that this was not a precisely correct statement of the law upon the subject. The defendant contends that the court should have said that the employer was bound to use ordinary care to provide a reasonably safe place. No doubt, if the court had been then asked to modify its instruction in that way, the request would have been granted; but the defendant contented itself with a general exception to the instruction without pointing out the particular in respect of which the statement needed modification. The defendant's counsel presented 20 requests to instruct the jury in regard to the duties and liabilities of the respective parties. But in no one of them was the duty of the defendant to provide a safe place put with the modification now suggested. For example, the fifth, which was:

"If you find from the evidence that the defendant had provided a safe place at the switch where its switchmen could perform their work, it had thereby complied with its legal duties in that respect, if the switchmen, instead of using the place provided by the defendant, chose some other place in which to perform their duties, they did so at their own risk."

And the eighth:

"If the plaintiff fails to prove by the preponderance of the evidence that the ground on top of the retaining wall was maintained by the defendant,

and that the defendant negligently failed to maintain the same in a safe condition, and negligently permitted a hole to remain back of the retaining wall by reason of which Reardon was injured, then your verdict must be for the defendant."

The court in its charge seems to have accepted this form of statement of the defendant's liability as correct. In these circumstances we think the error, not then noticed, or if noticed was allowed to lurk without challenge, cannot now be employed to disturb the judgment. The circumstances are very similar to those on which error was assigned in the case of Coney Island Co. v. Dennan, 149 Fed. 687, 79 C. C. A. 375, which we disposed of in like manner.

4. Another question discussed in the briefs of counsel relates to the competency of the proof of a custom or usage, which the evidence tended to show had been practiced and permitted by the railroad company for a long time, for the switchmen to get off the train at the place where plaintiff left the engine to throw the switch, and where the defect which caused the accident existed. A question arose as to whether the defect in the embankment by the side of the track on or over which the plaintiff stepped when he left the engine was within the line of the company's ownership or was on private property adjacent to that owned by the company. Proof of the usage was competent in the latter case to show that notwithstanding the place may have been on private property, yet that, by assuming control over and using it for its own purposes, the conditions, so far as its employés were concerned, were the same as if the company owned it. This was the view taken by the court in receiving the evidence and submitting it to the jury, and we think it was entirely correct. It would be utterly unreasonable to require the switchmen to enter into an inquiry respecting the company's right to occupy the place where he was set to work if there had been a custom to use it of such long standing that he would naturally suppose it had the right which the custom indicated.

Some other questions of minor importance are made, none of which seem to deserve separate discussion, unless it be a complaint that several of the defendant's requests to charge the jury were not given. But the charge of the court covered all the essential features of the case, and the court was under no duty to give the instructions prepared by counsel. The instructions given were full and fair, and aptly presented the case on the law and the evidence. The clearness with which this was done would probably have been more marred than mended by giving the disjointed requests of counsel, although the latter may have been entirely correct.

The judgment must be affirmed, with costs.

WESTERN LOAN & SAVINGS CO. v. THIBODEAU et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,432.

1. REFORMATION OF INSTRUMENTS—MISTAKE—FRAUD—EVIDENCE.
Equity has jurisdiction to reform written instruments where there is a mutual mistake or mistake on one side and fraud or inequitable conduct on the other, but such relief will not be granted unless the evidence is so cogent as to thoroughly satisfy the mind of the court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 157.]

2. SAME—EVIDENCE.
Evidence *held* to sustain findings that a note and mortgage had been fraudulently obtained for an excessive amount, and that complainants executed the instruments in good faith under an honest mistake without negligence, and were therefore entitled to reformation.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 157–193.]

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

James Ingebretseb and William H. King, for appellant.
Hall & Patterson, for appellees.

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

ROSS, Circuit Judge. The appellees, Thomas H. Thibodeau, Sue R. Thibodeau, his wife, and Dennis Lee, brought this suit in the court below for the reformation of a certain promissory note, and mortgage given to secure the same, made to the appellant (defendant below), and for a decree to the effect that the note and mortgage as executed be canceled upon their paying the balance alleged to be due from them in accordance with the actual agreement of the parties.

The note as executed read as follows:

"$11900.00 Missoula, Montana, December 9th, 1902.

"For value received we promise to pay to the Western Loan and Savings Company, a corporation of Salt Lake City, Utah, the sum of eleven thousand nine hundred dollars ($11900.00) in payments as follows: one hundred and forty dollars ($140.00) on the 16th day of each and every month, commencing with the month of December, 1902, until eighty-five (85) payments shall have been made. Payable at the Utah Commercial and Savings Bank, Salt Lake City, Utah."

"The jurisdiction of equity to reform written instruments where there is a mutual mistake, or mistake on one side, and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court." Simmons Creek Coal Company v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 245, 35 L. Ed. 1063.

The court below had the advantage of observing the conduct and manner of testifying of the various witnesses, and was, as stated in its opinion found in the record, entirely satisfied that the complainants had sustained their case; the findings of the court being to the effect

that the complainants applied to the defendant's agent for a loan of $7,000, payable in monthly installments of $140 per month, with interest at the rate of 10 per cent. per annum, out of which payments of $140 per month the interest accrued on the loan for the previous month should first be paid, and the balance applied to reduce the principal sum, the complainants to have the privilege of paying the debt in full at any time; that the agent agreed to make the loan upon those terms, and induced the complainants to execute the note above set out, and the mortgage securing the same, upon the belief of the complainants that the note and mortgage so executed by them expressed the terms upon which the complainants applied for, and the defendant's agent agreed to make, the said loan; "that defendant's agent knew, and purposely did not explain to Thibodeau or to any of the complainants, the difference between a loan of $7,000, payable at the rate of ten per cent. per annum, in monthly payments of $140 per month to be applied on interest and principal, and the contract as executed by the parties; that the defendant's agent, Brooks, knew Thomas H. Thibodeau well, and knew that he was illiterate, of French parentage and unfamiliar with the English language, and of complainants' reliance upon and confidence in said agent Brooks and his statements, yet he knowingly permitted Thibodeau and the other complainants to believe that the loan was such as Thibodeau and complainants requested—that is, in effect one for $7,000, with interest at ten per cent. per annum, payable in monthly installments; that the defendant, for the purpose of misleading and deceiving complainants and preventing them from knowing the rate of interest provided for in said note and mortgage executed by complainants, did not express in said note or mortgage the rate of interest provided for therein, nor notify complainants or any of them that said note or mortgage provided for a rate of interest in excess of ten per cent. per annum, but to deceive complainants and to prevent them from knowing the actual rate of interest provided by said note and mortgage, caused the sum of $4,900 to be placed therein as interest, and represented to complainants that said $4,900 was ten per cent. interest per annum on $7,000, payable in installments of $140 per month until paid, and that it amounted to the same thing whether complainants paid $7,000 with interest at the rate of ten per cent. per annum in monthly payments of $140 per month and applying the payments first to pay the interest for the previous month, and applying the balance to reduce the principal, as it would be to pay eleven thousand nine hundred dollars ($11,900) in eighty-five (85) monthly installments of $140 per month; that said sum of $4,900, placed in said note and mortgage as interest, was far in excess of ten per cent. per annum, and was about nineteen and one-half per cent. per annum; that complainants would be required to pay as much interest on the last installment, when all but one installment had been paid, as they would be for the first month, when complainants had the full $7,000; that complainant Thomas H. Thibodeau, on behalf of complainants, had full charge of the negotiations for said loan, and communicated the negotiations concerning said loan to the other complainants; that said Thibodeau was illiterate; that he had made a previous loan from defendant through said agent

on a different plan, which loan was settled to the satisfaction of Thibodeau; that defendant had gained the confidence of complainants through said transaction and the previous relations of said Thibodeau with Brooks, and complainants relied upon the statements of said Brooks in executing the note and mortgage; that said Thibodeau was unable to figure the amount of interest that $7,000 upon interest at the rate of ten per cent. per annum, payable in monthly installments of $140 each, would amount to, and complainants believed, relied, and acted upon the representation of Brooks that the sum of $4,900 placed in said note and mortgage, with the $7,000 loaned, was the correct amount which the $7,000 payable in monthly installments of $140 per month at the rate of ten per cent. per annum interest would amount to. That complainants, desiring to pay off said loan in accordance with the terms they believed were contained in said note and mortgage in the month of December, 1905, requested from defendant the amount it would require to satisfy said note and mortgage, and, upon receipt of a statement from defendant of the amount claimed, complainants knew for the first time that defendant claimed a rate of interest on said loan in excess of ten per cent. per annum, and then for the first time knew that said note and mortgage failed to contain a provision giving complainants the privilege of paying the said loan in full at any time. That, upon said discovery, complainants notified defendant of the terms upon which it was agreed said note and mortgage should be given and said loan made, and requested defendant to reform said note and mortgage in accordance therewith, and complainants offered to return said $7,000, with interest thereon for the time complainants retained the same at the rate of ten per cent. per annum, but that said defendant refused to reform said note and mortgage in accordance with the complainants' understanding and agreement for said loan, or to accept the offer of complainants to return the loan, or to accept the offer of complainants to return the loan of $7,000 secured by complainants from defendant, with interest thereon at the rate of ten per cent. per annum, but defendant refused to modify or change or alter the conditions or terms of said note or mortgage in any respect, but elected to adopt and stand upon the provisions and terms of said note and mortgage as executed by complainants. That complainants would not have executed said note or mortgage or have accepted said loan had they known the rate of interest provided by said note and mortgage exceeded the rate of ten per cent. per annum on the sum held by them. That said loan was made and said note and mortgage executed and delivered, and all payments on said loan up to the time of trial were paid to defendant's said agent, Brooks, at Missoula, Mont., and were accepted by said defendant, and the provisions of said note and mortgage requiring payment to be made at Salt Lake City, Utah, were waived by defendant. That, at the time of negotiating and making of said loan and mortgage and executing said note and mortgage, complainants were and have at all times since been residents of the city of Missoula, state of Montana. That the note and mortgage signed by complainants did not express the thought and intent of the complainants, and that, by the intentional failure of the defendant's agent to explain to the complainants that the

contract executed was different from that intended to be entered into, complainants were misled, and that defendant's agent intended to mislead them. That the defendant's agent knew that the complainants believed the note and mortgage executed by them was for a loan of $7,000 as Thibodeau had applied for, and for such a loan as he, the agent, had said could be had, but which was not as the defendant expressed it in the papers signed. That complainants believed from the representation of defendant's agent that their contract with defendant's agent was equivalent to the terms in the note and mortgage signed. That if complainants had known that their contract for a loan was as literally expressed by the note and mortgage, they would not have signed them or accepted said loan. That complainants executed the instruments involved in good faith, under an honest mistake. There was no negligence on complainants' part. By the representations and actions of defendant's agent and defendant, calculated to mislead and deceive complainants, they never understood the terms or the effect of the note and mortgage signed by them, and their error was brought about by a misunderstanding of the papers signed by them."

Upon the evidence in the case we would not be justified in interfering with these findings made by the trial judge, and therefore must affirm the decree reforming the note and mortgage to conform with the actual agreement of the parties.

The decree is affirmed.

SOUTHERN RY. CO. v. FISK.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908.)

No. 1,406.

1. RAILROADS—INJURY TO PEDESTRIAN—CROSSINGS—CARE REQUIRED.

Use of a public highway for passage at a railroad crossing or elsewhere is the right of all travelers in common, within the law requiring all users to exercise reasonable care with reference to a like use by others, so that, while the tracks are a warning to the traveler of railway movements, the highway crossing is likewise notice to the train operators that travelers are to be expected on the highway; care being exacted from them commensurate with the recognizable conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 956, 981–987.]

2. SAME—DIVISION FROM HIGHWAY LINE.

Where a traveler was injured while crossing a railroad track, and the injury would have been avoided by the exercise of care on the part of the train operatives, the mere fact that the traveler deviated from the street or highway boundary line at the crossing, without obscuring his purpose of crossing or making such care unavailable for his protection, did not absolve the railroad company from its liability for negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1014–1019.]

3. SAME—TRESPASSERS.

While a railroad company is chargeable with notice to guard travelers against injury at a highway crossing, and with corresponding duty in its operations there, no such notice or duty is implied in the case of a

trespasser, not at or near a public way, as to whom the railroad company is only required to refrain from a willful or wanton injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239.]

4. SAME—QUESTION FOR JURY.

In an action for injuries to a boy by being run over by defendant's train just outside the line of a street crossing, whether plaintiff in the position he had taken was a trespasser, or whether he had not so far departed from the highway as to deprive him of the rights of a traveler, *held* for the jury.

5. SAME—WILLFUL INJURY—NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries to a traveler near a railroad crossing, the court charged that plaintiff was technically a trespasser on the railroad right of way, an instruction defining the conduct on defendant's part for which it would be liable to a trespasser as "willful or wanton negligence," and in effect directing that a finding of gross negligence on the part of the railroad company, as distinguished from ordinary negligence, would authorize a verdict in favor of the assumed trespasser, was erroneous; there being no authorized distinction in degrees of care and negligence, and the railroad's liability to a trespasser being based on injuries wantonly, as distinguished from negligently, inflicted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239, 1384–1388.]

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

The defendant in error was the plaintiff below, and recovered judgment against Southern Railway Company, as defendant, in an action of trespass on the case, from which this writ of error is brought by the railway company. For convenience the parties are hereinafter referred to under the designation of plaintiff and defendant, respectively, as in the trial court. The plaintiff, a boy of 12 years of age, was attempting to cross the railroad tracks on Converse avenue, in East St. Louis, about 5 o'clock in the evening, when it was dark, and his foot was caught and held fast in a switch point in the tracks, immediately south of the south line of the street, at a distance variously stated from 2½ to 6 feet. While endeavoring to release his foot and making outcries, he was struck by a switch engine and train of cars, owned and operated by the defendant company, cutting off his foot and right leg below the knee. The declaration is in several counts, and alleges (a) negligent operation of the train, and by insufficient equipment in power or train brakes, as proximate causes of such injury, and further alleges (c) that the servants of the company "willfully and wantonly drove and propelled said engine" upon the plaintiff, when they saw and "knew his presence and danger," or by the "exercise of ordinary and reasonable care could and would have seen" him so caught and held in the switch. Issues were joined, and upon trial to a jury verdict was returned for the plaintiff, under instructions which submitted (in effect) the last-mentioned issue alone of wanton injury. Error is assigned for denial of instructions requested, on exceptions to instructions given, and to rulings on the admission and rejection of testimony. The matters involved in these assignments, in so far as deemed material, are specified in the opinion.

Bruce A. Campbell, for plaintiff in error.

Maurice V. Joyce, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The questions involved in this review are grouped in the argument under three heads, and may well be so considered, without detailing the

various assignments upon which they are predicated. These facts are undisputed: The plaintiff below was struck by the locomotive and train while his foot was caught and held in the switch point, in the immediate vicinity of the street crossing, but outside the boundary line of the street, at a distance not exceeding six feet. When thus caught he was attempting to cross the tracks, after dark, so that the way was obscured, and the street line, at the crossing, is unmarked by sidewalk, paving, or other means, aside from the frontage of buildings upon the street, beyond the crossing. Whether the plaintiff was actually engaged in crossing the tracks on the street, or intentionally diverged therefrom, is a question raised in the argument by way of an alleged inference of fact from the testimony. The engine was backing, in charge of an engineer, but hauling a train of 31 cars, approaching at a speed of four or five miles an hour, with a switchman riding on the rear footboard, who jumped off and ran ahead on hearing outcries. Several coal cars were standing upon a track beside the switch, further obscuring the view from the engine (as the witnesses state) of the entrapped plaintiff, and when his situation was discovered the switchman rushed to the rescue, but, failing to free the foot from the switch, pulled the body from the track, to save the life of the unfortunate boy, while his foot and leg were severed under the wheels. The presence and plight of the plaintiff were not discovered by the engineer in time to avoid the catastrophe. Although outcries were made by the plaintiff and by other boys, who were in the vicinity and testified in the case, the engineer and other men on the train testify that their import was not understood; and the testimony is conflicting in reference to watchfulness and care in running the train and opportunity to discover the danger. Beyond the uncontroverted facts, no discussion of the testimony is needful or desirable upon either of the contentions for reversal, which are: (1) That the defendant was entitled to have a verdict directed of not guilty, as requested; (2) that the court erred in the instructions which were given upon the issue submitted; and (3) that rulings upon the admission and rejection of testimony were erroneous and prejudicial.

1. The alleged error in denying the motion for direction of a verdict in favor of the defendant must be considered in reference to the evidence as an entirety, within the well-recognized rule applicable to such motions, and irrespective of the theory upon which the court finally submitted the case to the jury, as considered under the second proposition. Thus presented, the test is whether it appears conclusively, as a matter of law, that the plaintiff was in the relation of trespasser upon the property of the defendant company, within the rule which absolves the latter from liability unless injury is inflicted wantonly. While the solution may not be free from difficulty under various expressions in the authorities called to attention, we are of opinion that the testimony authorized submission of that question to the jury—even under the most favorable view of the defendant's contention of fact—as a fact to be ascertained from the circumstances, under proper instructions. The inquiry whether a traveler across

the railroad tracks, at a highway crossing, is entitled to protection as such traveler, does not rest, as we believe, upon the ascertainment of the actual boundary lines of the highway, either by survey or alignment with buildings or other structures outside the crossing, but upon all attendant circumstances. Use of a public highway for passage, at crossing or elsewhere, is the right of all travelers in common. So the law requires all users to exercise such right with reference to like use by others, regulating their conduct in conformity with the liabilites of meeting and passing other travelers thereon. The use of railway tracks crossing such highways is subject to like regard for these highway purposes, modified only by the fixed place and expectations of speed in the passage of engines and cars; hence the rule of care for the safety of travelers upon such highway crossing which governs alike the railway use. While the tracks are a warning to such traveler of railway movements liable to be met, the highway crossing is likewise notice to the operators of engine or cars that travelers upon the highway are to be expected; and care is exacted commensurate with recognizable conditions—frequency of such use in a city street being an important element in the measure of care and watchfulness. It is the vicinity and uses of the public crossing which make this care needful. If not exercised in the operation of a train over such crossing, when it appears that injury would have been avoided with its exercise, the mere fact of deviation by the injured person from the street or highway boundary line, without obscuring his purpose of crossing or making such care unavailable for his protection, cannot, as we believe, absolve the railroad company from the requirements of the rule, nor authorize escape from liability thus arising. Baltimore & Ohio Rd. v. Owings, 65 Md. 502, 513, 5 Atl. 329; F. C. & P. Ry. Co. v. Foxworth, 41 Fla. 1, 65, 25 South. 338, 79 Am. St. Rep. 149.

We are satisfied that the rule of exemption from such exercise of care in respect of trespassers upon the tracks and property of the railroad, with liability only for injuries caused wantonly, is inapplicable to an attempted crossing on the street, with the slight deviation above assumed. That rule is predicated alone on the distinction between the relation of the parties, where in the one instance each is in the exercise of a mutual right at a highway crossing, and in the other injury is suffered by one who assumes the risk of using the track and property of the railway company, for passage or other unauthorized purpose, in no sense as a public way—a trespasser per se. While the company may be chargeable with notice to guard against injury at the highway crossing, and with corresponding duty in its operations there, no such notice or duty is implied in the case of the trespasser, not at or near a public way, and thus gives rise to the separate rule, to be defined under the next proposition. In the view above stated, the defendant was not entitled to direction of a verdict in his favor, as a conclusion of law under the testimony, that the plaintiff was in the relation of trespasser when injured; and error is not well assigned for denial of the motion and instructions requested upon that theory. The issues raised were purely issues of fact for determination by the jury. If the plaintiff was unmistakably attempting to cross the tracks upon the

street crossing, and his deviation was accidental, as stated in the direct testimony, he was within the benefits of such crossing rule; for the exercise of reasonable care in the movement of the train, measured by the conditions which were either known or within the observation of the engineer and trainmen, and thus unaffected by the rule as to trespassers. On the other hand, if circumstances appeared which indicate that he was not attempting to cross upon the street, as the defendant contends —and we deem no expression of opinion thereon, under the present testimony, needful or proper—raising a question of fact whether he so entered as a trespasser and thus assumed the risks incurred by such entry, that issue, as well, was for the jury to determine and apply the rule of law which then became applicable. In either aspect no direction of a verdict was authorized.

2. The jury were instructed by the court, in substance, as a premise for their guidance, that the plaintiff was off the street and on the property of the defendant when he suffered the injury complained of; that he was technically a trespasser, and "the defendant owed him no duty in that situation, except not to willfully or wantonly injure him." While this direction was erroneous, as we believe, under the view above stated, it was not prejudicial to the defendant, and error is not assigned thereon. In the further instruction, however, the court defines the conduct on the part of the defendant, for which it is chargeable with liability to a trespasser—repeatedly referred to as "willful or wanton negligence"—in terms which are plainly inconsistent with the rule uniformly upheld in the decisions of this court in reference to such liability. These instructions were, in effect, that a finding of gross negligence under the name of "willful or wanton negligence," as distinguished from the class (for which liability was incurred at a crossing) there described as "want of ordinary care, or what is termed ordinary negligence," would authorize a verdict of guilty, as against the assumed trespasser. As well pointed out in the opinion of Judge Baker, for this court, in Kelly v. Malott, 135 Fed. 74, 76, 67 C. C. A. 548, no such distinction in degrees of care and negligence is authorized, to ascertain liability under either hypothesis. In reference to liability for injury to a trespasser, the doctrine is settled, in this jurisdiction at least, that it arises only for injuries wantonly inflicted, which involves timely discovery and willful disregard of the danger in running the trespasser down—criminal conduct, and not negligence, in any sense of the term. Cleveland, C., C. & St. L. R. Co. v. Tartt, 64 Fed. 823, 826, 12 C. C. A. 618; Sheehan v. St. Paul & D. Ry. Co., 76 Fed. 201, 204, 22 C. C. A. 121; Cleveland, C., C. & St. L. Ry. Co. v. Tartt, 99 Fed. 369, 370, 39 C. C. A. 568, 49 L. R. A. 98. See, also, I. C. R. R. Co. v. Eicher, 202 Ill. 556, 560, 67 N. E. 376. The rules referred to were obviously overlooked by the trial court in framing these instructions and we are of opinion that they were erroneous and prejudicial.

3. On examination of the several assignments of error for rulings upon the admission and rejection of testimony, we are not impressed with either objection as well founded, with the exception of the question raised by the fourth assignment. The testimony referred to in that objection appears to have no bearing upon the issues which were

submitted to the jury, and whether it was prejudicial in any sense does not require discussion, as it can be omitted or excluded upon retrial.

The judgment of the Circuit Court is reversed, for error in the instructions as above stated, and the cause remanded for a new trial.

COX et al. v. BRICE et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,663.

EVIDENCE—PEDIGREE—DECLARATIONS BY MEMBERS OF FAMILY.

Where, in trespass to try title, plaintiff's claim rested on a grant to the heirs of C., a member of Shackleford's company in Fannin's command, who perished in the massacre of Texas prisoners on March 27, 1836, evidence of declarations of members of plaintiff's family that C. was the son of Z. C. and wife who came from Pendleton district, S. C., to Northern Alabama in the early days, and resided there until 1848, when they removed to Georgia, and thence to Texas where Z. C. died in 1877, and that C. enlisted in Shackleford's company, and was reported to have been killed while with Fannin, was admissible to identify C. as a member of plaintiff's family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1149–1151.]

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

H. M. Whitaker, for plaintiffs in error.

Hal W. Greer and G. P. Dougherty, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This case is the Texas action of trespass to try title to land described in the pleadings. The land was granted by the government to the heirs of Harvey Cox, who was a member of Shackleford's company in Fannin's command, and perished in the massacre by the Mexicans of the Texas prisoners with Fannin at Goliad on the 27th day of March, 1836. The plaintiffs (including the interveners in the term "plaintiffs") sue for the land claiming that they are the heirs of this Harvey Cox, who, they claim, was a son of Zachariah and Susannah or Susan Cox. The trial court instructed the jury, in part, as follows:

"There is only one question of fact for this jury to determine. You are to determine from the evidence who was the Harvey Cox that fell with Fannin at Goliad. It is immaterial what Harvey Cox it was, unless the plaintiffs' and interveners' proof shows that it was the Harvey Cox, a son of Zachariah and Susan Cox."

The bill of exceptions shows that it was conceded as established that Shackleford's company, of which Harvey Cox was a member, was organized in and came from North Alabama; that plaintiffs and interveners offered testimony tending to show that one Zachariah Cox and his wife, Susannah or Susan, came from Pendleton district, S. C., to North Alabama at a very early day; that they had a large family of children, and that one Harvey Cox was the eldest child; that they

lived in Benton county, Ala., and continued to reside there until about the year 1848, when they removed to Cherokee county, Ga., and from thence, about the beginning of the Civil War, to Wood or Upshur county, Tex., where Zachariah died in 1877 and his wife in 1870. As tending to show the identity of the Harvey Cox, who perished in the Goliad Massacre, with the eldest son of Zachariah Cox and his wife, Susan, they offered an extract from the United States Census Rolls for the year 1840, taken in Benton county, Ala., which showed the name of Zachariah Cox as the head of a family then consisting of 14 white persons, of whom 8 were males and 6 were females, with certain details as to their ages, occupation, etc. The bill of exceptions recites that it appears that the children of Zachariah Cox who testified in this cause by depositions were illiterate and could not write, and signed their depositions by making their marks. The plaintiffs also offered a certified copy of an affidavit made by Zachariah Cox and now on file with the Department of Interior, Bureau of Pensions, at Washington, made on the 26th day of August, 1873, before the clerk of the district court of Upshur county, state of Texas, in which he gives his age as 83 years; his residence, Upshur county, Tex.; and declares that he was married; that his wife's name was Susannah Whitmire; that she is dead; that they were married at Pendleton district on the 16th day of May, 1813; that he served 60 days in the military service of the United States in the War of 1812; that he is the identical Zachariah Cox who was enrolled in Capt. William Cannon's company in Col. Nash's regiment at East Etoh Muster Ground in Pendleton district in the state of South Carolina on the 20th day of January, 1814; that the service he was engaged in was directed against the Creek Indians in the state of Alabama; that his command was not in any actual engagement; that they captured some Indians; that he has received a bounty warrant of 160 acres; does not recollect the number of same nor the date of the act under which same was granted; that he volunteered at East Etoh Muster Ground in Pendleton district in the state of South Carolina on or about the 1st day of January, A. D. 1814. The defendants objected to the introduction of this proof because the contents were irrelevant and immaterial, and because the declarations of Zachariah Cox were self-serving, ex parte, and inter alias acta, hearsay, and not the copy of such an instrument as could be used in evidence; which objections were sustained by the court.

In connection with the evidence just excluded, plaintiffs offered the testimony of Thomas Cox, one of the plaintiffs, who, it was shown, was a son of Zachariah Cox and his wife, Susannah, and who, it appears, was 65 years old at the time of the taking of his deposition in the year 1905; that he was a farmer, residing at Valleyhead, Ala. He testified that he had the following brothers and sisters: Harvey Cox, Carr Cox, Casson Cox, William Cox, Holcomb Cox, A. P. Cox, Cynthia Cox, Judia Cox, and Sallie Cox. He stated that Zachariah and Susan Cox were the father and mother of Harvey Cox and the others above named besides himself. He was then asked if he knew or knew of Harvey Cox, and if he knew what became of the said Harvey Cox. To this he answered as follows:

"Have heard of him; and heard he went to Texas with one Shackleford between the years 1830 and 1840."

He was further asked the following question:

"State whether or not there is any repute among the members of your family accepted as true by you and your uncles and aunts and other members of your family, as to where the Harvey Cox you have testified about lived, and as to whether he is living or dead."

To this the witness answered:

"He lived in and joined Dr. Shackleford's company of North Alabama."

Being further asked the following question:

"Please state whether or not there is any general repute among your uncles and aunts and other members of your family, accepted by you and your uncles and aunts and brothers and sisters, as to whether or not the Harvey Cox mentioned by you in the foregoing interrogatories was a soldier in the Texas Revolutionary War; and if yea, what part did he take in said Revolutionary War, and to whose command did he belong?"

—the witness answered as follows:

"I have been informed that he was in the service of the Revolutionary War in the state of Texas, but don't know what particular part he took. Have heard he was with Fannin."

The witness was further asked the following question:

"If you have stated that it was the general family repute among the members of your family that Harvey Cox lived in the state of Alabama before he came to Texas, then state in what part of Alabama he lived, as near as you can, and state where the father and mother of Harvey Cox were living at the time said Harvey Cox came to Texas, and, if they ever moved from that location, then state the different places they lived after that time, and how long they lived at each place up to the date of their deaths, as near as you can?"

To this question the witness answered as follows:

"Lived not very far from Tennessee river, west of Sand Mountain, in North Alabama, with his father and mother, Zachariah and Susan Cox. Some years after that they moved to one of the Carolinas (i. e., Zachariah Cox and his wife), and later from Carolina to Cherokee county, Georgia, and must have lived there about twenty years previous to their move to Texas during the Civil War."

To the introduction of all of the above answers of the witness the defendants objected on the ground that the witness being 65 years old when testifying was so young that he could not have had any personal knowledge of the matters; that his testimony was therefore hearsay; that it did not appear that he derived his knowledge from any member of the family; that it did not appear at what time he received or acquired the information; that therefore it did not appear that the information was not derived from declarations of persons who were constituting themselves heirs; and therefore it did not appear that the sources of information of the witness were not self-serving declarations—which objections were by the court sustained.

In connection with the foregoing offered and excluded evidence, plaintiffs offered the deposition of Thomas H. Cox, one of the plain-

tiffs, which showed that he was a physician, 47 years old, and resided in Atlanta, Ga.; that he was a son of Carr Cox, who was a son of Zachariah and Susannah Cox; that the said Carr Cox was dead, and had been dead about five years; that the first information he had with reference to his interest in the land in suit as an heir of Harvey Cox arose from inquiries made in answer to a newspaper advertisement appearing about 1901 or 1902, asking for the heirs of Harvey Cox. He was asked:

"State whether or not there is any repute among the members of your family, accepted as true by you and your uncles and aunts and other members of your family as to where the Harvey Cox which you have testified about lived, and as to whether he is living or dead, whether he was married; and if married, whether his wife is living or dead, as to when and where she died, and as to whether or not the said Harvey Cox mentioned by you left surviving him any child or children, and, if you say he did, state their names and whether he or she married; and if married, to whom and when, and where each is living at the present time?"

—to which the witness answered:

"Yes, it is an accepted fact, as a family repute, that Harvey Cox, who was killed in Texas, was my father's brother. The general repute in my family is that Harvey Cox died single and never married. It has been said in my family, and the report is, that Harvey Cox was killed in Texas."

He was further asked:

"Please state whether or not there is any general repute among your uncles and aunts and other members of your family, accepted by you and your uncles and aunts and brothers and sisters, as to whether or not the Harvey Cox mentioned by you in the foregoing interrogatories, was a soldier in the Texas Revolutionary War; and if yea, what part did he take in said war, and to whose command did he belong?"

—to which he answered:

"I do not know, but the repute has been ever since I can remember that Harvey Cox was in the war in Texas, and served in Fannin's command."

He was asked on cross-examination:

"Is it not a fact that you said that Harvey Cox left shortly after the Civil War?"

—to which the witness answered:

"No, I have heard that Harvey Cox was killed in Texas."

The witness, in answer to cross-examination, further stated that his uncle Harvey Cox was killed in Fannin's command in Texas. To all of these direct interrogatories and answers defendants' counsel objected on the ground that the questions were leading in form, and suggested the desired answer from the witness; and on the further ground that on account of the age of the witness it was apparent that he could have no personal knowledge of the matters and things testified to by him, and that therefore his testimony was hearsay; that while it did appear that his information was derived from his father and other members of the family, it did not appear at what time it was acquired, but owing to the age of the witness it must have been acquired at a period when such declarations by his father

would be self-serving, and it did not appear from the witness' testimony that such declarations were not made at a time and by such persons as would make them self-serving declarations on the part of the declarants. Further, that all of said testimony of the witness in relation to where Harvey Cox died, and as to his being in the Texas Revolution, was not pedigree, and, being hearsay, was not within the exception admitting hearsay testimony. Which objections were by the court sustained, and the testimony excluded. The plaintiffs duly saved their exception to this action of the court. There was a verdict and judgment against the plaintiffs. They prosecute this writ.

In Byers Bros. v. Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760, the following language is used:

"It is too well settled that hearsay evidence, such as is contained in the declarations proved and those excluded, is admissible to prove pedigree, to admit of discussion or to require authority. The question is, were the statements as to independent facts, such as being a member of the army, presence in Texas, or the time and place of death, admissible under the rule? It is often stated that declarations of the deceased members of a family are not admissible to prove the time nor place of birth, residence, or death. But this rule has been applied in the main to cases in which the poor laws were being administered, and a right was being asserted based upon the residence or birth at a given place. Where the time or place of residence or death is introduced for the purpose of identifying the person in question as a member of a particular family, it is admissible as being closely related to, if not in fact part of, pedigree, that the same rules of law are applicable. * * * If this were a suit against the state to establish the right to the certificate (in some cases it was allowed to heirs to sue for that purpose), then the declarations as to the place of death would not be admissible, for the grant was made for the reason that the deceased fell at that time and place, as a principal cause why the heirs should receive the certificate. The certificate, however, has been granted to the heirs of William Wallace, who fell at Goliad in Capt. Wyatt's company. The right of the heirs of the William Wallace who fell at the time and place named is established, and the question for decision was, which of the claimants, if either, were the heirs or claimed under the heirs of that William Wallace. To connect the deceased soldier with the family of each claimant was the sole object of the evidence. * * * The evidence admitted and that excluded was admissible for the purpose of identifying the deceased as a member of the family. It was so closely connected with the pedigree that it comes within the rule that admits hearsay evidence of this character from the necessity of the case."

Elsewhere in the opinion it is said:

"Family history is nothing but the declaration of different members of a family repeated by so many persons and for such a time as to become common repute in the family. Upon the same subjects the family history and the declarations of a deceased member of a family are equally admissible; the weight to be given to each depends upon the circumstances, and is a question for the jury, not a question of admissibility."

On the authority of Byers Bros. v. Wallace, supra, and of Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92, we conclude that the trial court erred in excluding the testimony which we have recited.

There are other questions presented by the assignments of errors, which we have carefully examined, and conclude do not now require

comment from us; and, on the ground above noted, the judgment of the Circuit Court is reversed, and the case remanded, with direction to award the plaintiffs a new trial.

DELAWARE, L. & W. R. CO. v. GLEASON et al.

(Circuit Court of Appeals, Third Circuit. February 17, 1908.)

No. 58.

1. MINES AND MINERALS—DEEDS—"COAL BED"—"COAL VEIN."
   Where a deed conveyed all that certain "coal bed" on Lackawanna creek on lot No. 1, occupied by W., the word "coal bed" was synonymous with "coal vein," and passed to the grantee the entire bed or vein of coal, and not a parcel or piece thereof.

2. SAME—CONSTRUCTION.
   Where a deed conveyed all that certain coal bed on Lackawanna creek on lot No. 1 now occupied by W., the expression "all that certain coal bed" was indicative of an entirety; the phrases "on the Lackawanna creek," "on lot No. 1," and "now occupied by W." being merely used to identify the thing conveyed, and not to divide nor define its extent.

3. EVIDENCE—PAROL EVIDENCE—VARYING WRITTEN CONTRACT—DEEDS.
   Where the description in a deed as to the property conveyed was not ambiguous, parol evidence of an agreement as to the boundaries of the property conveyed to vary the contents of the deed was inadmissible.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1719-1728.]

4. SAME—RES INTER ALIOS ACTA.
   In ejectment to recover an undivided one-half of a vein of coal, certain deeds, in no way connected with the deed under which defendant claimed title, and which also did not tend to maintain plaintiff's theory, were incompetent for any purpose.

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

For opinion below, see 151 Fed. 321.

E. N. Willard and John G. Johnson, for plaintiff in error.

James H. Torrey and S. P. Wolverton, for defendants in error.

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

DALLAS, Circuit Judge. In this opinion the parties will be designated in accordance with their respective positions in the court below, where the defendants in error were plaintiffs, and the plaintiff in error was defendant. The action was ejectment for "the equal undivided one-half part of * * * a certain stratum, vein, or seam of anthracite coal, commonly known as the 'G Vein,' or the 'Big Vein,' lying and being under the surface of the piece or parcel of land" described in the writ. At the close of the trial the court, reserving the question "whether upon the whole case the verdict should not be for the defendant," directed a verdict for the plaintiffs, which accordingly was rendered. Subsequently a motion by defendant for judgment in its favor non obstante veredicto was denied, and the judgment now for review was entered for the plaintiffs.

Both parties claimed through mesne conveyances from Albert Felts. The plaintiffs deduced to themselves a prima facie title to the parcel of land beneath the surface of which the G vein extends; but the defendants set up a title of earlier origin, founded upon a deed by Albert Felts to John Wilson, which is copied in the margin;[1] and a

[1]Albert Felts to John Wilson.

This indenture, made this 29th day of November, in the year of our Lord one thousand eight hundred and twenty-three, between Albert Felts, of the township of Providence, in the county of Luzerne, in the Commonwealth of Pennsylvania, of the one part, and John Wilson, of the township of Pittston, in the county and Commonwealth aforesaid, of the other part.

Witnesseth that the said Albert Felts, for and in consideration of the sum of three hundred dollars, money of the United States, to him in hand paid by the said John Wilson at and before the ensealing and delivery hereof, the receipt and payment whereof he doth hereby acknowledge, hath granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said John Wilson all that certain coal bed on the Lackawanna creek on lot No. 1, in the township of Providence aforesaid, now occupied by the said Wilson, together with a road and cartway to and from the said coal bed to the public road through said lot of land No. 1, with egress and regress to and from the said coal bed along the said road to the said public road free and clear from him, the said Albert Felts, his heirs and assigns, forever.

To have and to hold the said coal bed and road or cartway hereby granted or released or mentioned, or intended so to be, unto the said John Wilson, his heirs and assigns, to the only proper use, benefit and behoof of him, the said John Wilson, his heirs and assigns, forever.

And the said Albert Felts, for himself and his heirs, executors, and administrators, doth covenant, promise, grant and agree to and with the said John Wilson, his heirs and assigns, by these presents that the aforementioned coal bed and road to the said John Wilson, his heirs and assigns, against him, the said Albert Felts, and his heirs, and every other person claiming the same by, through or under them, will warrant and forever defend.

In witness whereof, I have hereunto set my hand seal, dated the day and year first above written. Albert Felts. [Seal.]

Signed, sealed and delivered in presence of us

Comer Phillips.

Ebzr. Slocum.

Received, on the day of the date of the above indenture and from the above-named John Wilson, the sum of three hundred dollars in full for the consideration money above mentioned. Albert Felts.

Witness:

Commonwealth of Pennsylvania, Luzerne County—ss.:

Before the subscriber, one of the justices of peace in and for the said county, personally came Albert Felts, the signer and sealer of the above indenture, and acknowledged the same to be his free act and deed, desiring it may be recorded as such.

Given under my hand and seal at Providence, November the 29, 1823.

Ebzr. Slocum, J. Peace. [Seal.]

Recorded 9 January, 1824. Exd.

Commonwealth of Pennsylvania, Luzerne County—ss.:

I, Michael C. Russell, recorder of deeds, etc., in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a conveyance from Albert Felts to John Wilson in full and complete as the same remains of record in Deed Book No. 22, page 593, etc., in my office.

Witness my hand and official seal at Wilkes-Barre, Pa., this second day of February, 1894. M. C. Russell, Recorder,

Per T. C. Mullally.

principal and decisive question in the case is: Did this deed convey to John Wilson the body of coal in dispute? In terms it conveyed "all that certain coal bed on the Lackawanna creek, on lot No. 1, * * * now occupied by the said Wilson"; and in this designation and description there is no ambiguity, either patent or latent. A coal bed is specified, and the particular coal bed intended does not become doubtful when the descriptive words are related to the subject-matter, for they are precisely applicable to the "stratum, vein, or seam" now claimed by the plaintiffs. They, however, contend that the name "coal bed" was not intended to apply to the whole of this stratum, vein, or seam, but only to a part of it, and to this contention we have given careful consideration.

Seeking in the first instance, as we must, to ascertain the scope of the words "coal bed" without reference to extrinsic evidence, no real difficulty confronts us. As we have said, these words are not ambiguous. Their plain meaning is, and always has been, a bed of coal, just as the meaning of "coal vein" is a vein of coal, and never could have been anything else. A "bed" has been well defined as being "synonymous with vein." It is not a section or piece of one. Still it has been suggested that the words "coal bed" were here used in a peculiar sense, and if, from the context, this appeared to be true, such peculiar sense should be accepted; but, in reality, there is nothing in the deed to warrant a surmise that they were used in any sense other than their ordinary one. The expression "all that certain coal bed" is plainly indicative of an entirety, and not of a part, and the phrases, "on the Lackawanna creek," "on lot No. 1," and "now occupied by said Wilson," simply identify the thing conveyed. They neither divide it nor define its extent. They particularize the subject-matter, but do not limit or abridge it. The circumstance that a certain road was granted in connection with the coal is devoid of significance. It may be inferred that the use of that road in removing the coal was anticipated; but to deduce from such an inference an intent at variance with the express terms of the paramount grant is not reasonably nor legally possible. As, then, the words in question are common words, having a plain meaning, which, so far as the context shows, is the meaning that was intended, there is no necessity, and consequently no warrant, for interpreting them. The office of construction is to resolve doubts, not to create them; and extrinsic evidence, though it may be resorted to, when requisite, to determine the meaning of expressions not commonly intelligible, is never admissible for the purpose of showing that the parties to a deed meant something which they did not say, or anything different from that which they did say. Yet, as several supposed "aids to construction" have been earnestly pressed upon our attention, we will briefly refer to them.

When the deed to John Wilson was made, he was not in the actual occupancy of the entire coal bed; but it was not possible, nor is it requisite, that he should have been. For the purpose of identification, at least, his occupation of a part was sufficient. Importance, too, has been ascribed to his method of taking the coal; the one side

asserting that he merely quarried it, and the other that he drove a gangway for some distance under ground. But what has this to do with the extent of the grant? Certain it is that a "coal bed" was conveyed, and that the grantee took it, whatever its extent, in absolute fee simple, and with the right to work it as he pleased. If a "quarry," or a license to quarry, had been intended, nothing could have been more easy than to say so, and nothing more obvious than the necessity for a specific statement of the limits of the quarry referred to. But the deed contains no such thing, and we are not at liberty to guess what it might have contained, if at the time it was made the deposit of coal to which it related had been thoroughly known and fully appreciated.

The testimony of Isaac B. Felts, which, in the brief for defendant in error, is stated to have been "substantially to an agreement between John Wilson and Albert Felts as to the boundaries of the coal bed," should have been excluded. It may be conceded that adjoining owners can so settle the location of a boundary line upon the land as to conclude those claiming under them; but what really was sought in this instance was, not to show an agreed application of the terms of the deed to its subject-matter, but to vary its contents, and for such a purpose oral evidence is never admissible.

The court below, in an opinion which was filed on February 11, 1907, mentioned that, "in addition to the oral testimony, counsel on both sides exhibited contemporaneous deeds," and, on March 11, 1907, it made an order as follows:

"Certain deeds having been used and referred to with the consent of both parties on the arguments of the rule to show cause why judgment should not be entered for the defendant non obstante veredicto, and the court having considered and treated them as in evidence, it is now ordered that the said deeds be printed in full as a part of the record in this case, to wit," 17 designated deeds.

None of these deeds had been, or was entitled to be, admitted in evidence; for they were not in any way connected with the Wilson deed, or with any issue or question in the cause. In giving them consideration, the learned judge, no doubt, was misled by the initiative of counsel; but it does not follow that this court should consent to found its judgment upon writings which were not, and could not be made, a part either of the record or of the bill of exceptions. Therefore it must suffice to say of these extraneous deeds that we do not think they tended to maintain the theory of the plaintiffs, and that, no matter what might have been their apparent effect, they should have been wholly excluded from contemplation, as well as from evidence, for the reason embodied in the maxim, "Res inter alios acta alteri nocere non debet."

The judgment of the Circuit Court is reversed.

CALHOUN v. PULLMAN CO.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1908.)

No. 1,664.

1. PLEADING—DEMURRER—ADMISSION OF FACTS.
   A demurrer to a petition admits all the facts well pleaded.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525-534.]

2. CARRIERS—CARRIAGE OF PASSENGERS—SLEEPING CARS.
   All the duties to a passenger incident to a carrier's contract of transportation continue to rest on the railroad company, notwithstanding the passenger, by virtue of another contract with the sleeping car company, is entitled to special accommodations in the sleeping car; the sleeping car company having no control over the contract for transportation, and not being responsible for the manner in which it is performed.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1578, 1582, 1589.]

3. SAME—ACTS OF AGENT—SCOPE OF AUTHORITY.
   Where a passenger's railroad ticket reading from New York to Washington, and thence to Chattanooga, provided that the ticket should be countersigned at New York, the passenger was bound to know that a sleeping car company could not guarantee the manner in which the railroad company should perform its contract, and that the sleeping car company's agent had no authority to agree that the passenger's ticket would be acceptable for transportation to Washington without being countersigned in New York, and might be countersigned in Washington.

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

This cause was disposed of in the court below upon a demurrer to the plaintiff's petition. The demurrer was sustained, and the judgment was for the defendant. The opinion of the court by Judge McCall is reported in (C. C.) 149 Fed. 546. The action was for a breach of contract for the use of a sleeping birth in one of the cars of the defendant from Providence, R. I., to Washington, D. C., and an alleged supplementary agreement that he could have a certain railroad ticket, which he had for transportation from New York to Washington, countersigned in Washington, whereas the railroad company required it to be countersigned in New York, in consequence of which he was refused further transportation by the railroad company at Trenton, N. J., and obliged to return to New York.

The petition alleged: "That on the 1st day of September last the plaintiff was the holder of a ticket which entitled him to be carried over the Pennsylvania R. R. from New York City to Washington City, and thence over connecting lines to Chattanooga, Tenn., which said ticket be exhibited to the agent of the defendant in Providence, R. I., who informed him that by purchasing a local ticket from Providence to Jersey City he could sell him and furnish him a lower berth in the Pullman car from Providence to Washington, where he could get the railroad authorities to fix his railroad ticket so that he could go forward on his journey, returning to Chattanooga. The aforesaid agent of the defendant examined the aforesaid railroad ticket, and informed him that it was not necessary for him to go to New York for the purpose of having his ticket countersigned. That he could have that done in Washington, and thereupon, and upon the assurance given by the agent of the defendant, the plaintiff purchased a local ticket which entitled him to enter upon the train of the connecting railroad company, and to enter a sleeping car thereto attached and to be transported therein over the lines of that carrier to Jersey City and over the lines of the Pennsylvania R. R. from Jersey City to Washington, and having the assurance as aforesaid, that with the aforesaid railroad ticket and the sleeping car ticket, and upon the undertak-

ing of the defendant, for the compensation it received for the said sleeping car berth, to furnish the plaintiff the accommodations of the sleeping car from Providence, R. I., to Washington City, and upon the assurance made to him by the agent of the aforesaid defendant, and the warranty that, upon his aforesaid railroad tickets and the sleeping car ticket, he would have and enjoy the right to occupy the berth he purchased from Providence, R. I., to Washington City, he entered into the aforesaid contract with the defendant company, became a passenger upon the car, occupied the berth assigned to him, and was carried without molestation until the train reached Trenton, N. J., when he was awakened by the porter of the sleeping car and informed that the train conductor desired to see him. That the train conductor informed him that, notwithstanding the representation and warranty made to him by the agent of the defendant company, he would not be carried as a passenger, because his ticket had not been countersigned at New York, and that, unless he paid him the local fare, he would be ejected from the car. That the plaintiff thereupon paid to the conductor the local fare to Philadelphia, it being the nearest station at which the train stopped, and then, notwithstanding the assurance and warranty so made by the defendant company as aforesaid, he was ejected by the conductor from the said car, and suffered the humiliation of a public ejection, was necessitated to go back to New York to have his ticket countersigned, was delayed upon his trip, subjected to indignities and expense, to his great damage $10,000, for which he sues and demands a trial by jury."

The demurrer assigned, beside other causes, the following: (1) "Defendant says that as a matter of law the declaration sets forth no cause of action against it, for the reason that there is no allegation that the defendant, or its agents, breached any contract entered into between it and the plaintiff." (2) "The declaration fails to aver that the Pullman Company failed to furnish the sleeping car accommodations contracted for." (3) "The declaration fails to aver that the sleeper upon which plaintiff was being carried was not taken through over the lines of the railroads according to the route indicated by the railroad transportation which the plaintiff alleges he exhibited to the agent of the defendant." (4) "The declaration does not allege that he was put off the car by the Pullman Company or its agents. On the contrary, it alleges that he was put off by the agents of the railroad company, for a defect in his railroad transportation." (5) "The declaration alleges that the plaintiff being a holder of a railroad ticket which entitled him to be carried over the Pennsylvania R. R. from New York City to Washington City, and thence over connecting lines to Chattanooga, Tennessee, and which was required to be countersigned at New York, which ticket he exhibited to the agent of the Pullman Company in order to procure a sleeping car berth; that the agent of the Pullman Company informed him that the railroad ticket could be countersigned at Washington as well as at New York; but said declaration fails to allege any authority upon the part of the agent of the Pullman Company to pass on the regularity of the railroad ticket held by the plaintiff. It fails to allege that it was the duty of the Pullman Company, or its agent, to countersign the railroad ticket, or to pass on its validity."

Carroll & McKellar, for plaintiff in error.

Thomas H. Jackson, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge (after stating the facts as above).

The demurrer admits all facts well pleaded in the petition, and the question is whether the information given to the plaintiff by the defendant's agent of whom he purchased his sleeping berth ticket, that he could get his transportation ticket countersigned at Washington instead of New York, bound the defendant as by a guaranty that the railroad company should transport him to Washington without his

ticket being countersigned at New York. The solution of this question depends upon the relation of the sleeping car company and the railroad company, and their respective relations to the passenger. These relations are well known to the public, and recognized by the courts.

The railroad company is the carrier and is the party with whom the passenger contracts for his transportation. Among other things it contracts to supply him with the usual conveniences for his comfort while being transported. The parlor or sleeping car company's business is to provide the passenger with certain conveniences and comforts which are in addition to those contracted for by the railroad company. Those duties to the passenger which are incident to the carrier's contract for transportation continue to rest upon the railroad company, notwithstanding he may have another contract with the sleeping car company for special accommodations. The use of the car for carrying the passenger is a matter for arrangement between the companies. The railroad company retains the power of control and management of its trains including the sleeping cars as to all matters except those which are peculiarly incident to the other company's special contract with the passenger. The duties of the sleeping car company to the passenger are coextensive with the nature of its contract. It does not undertake those which belong to the railroad company. The compass of the duties which belong to each company is defined by this demarcation. It follows that the obligation of the sleeping car company must be dependent upon the contract which the passenger is expected to have with the railroad company. And, since it has no control over that or its execution, it is not responsible for the manner in which it is carried out. These propositions express, as we think, the doctrine generally held upon this subject, and seem to be the logical relation of the law and facts. Duval v. Pullman's Palace Car Co., 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715; 23 U. S. App. 527; Paddock v. Atchison, T. & S. F. R. Co. (C. C.) 37 Fed. 841, 4 L. R. A. 231; Campbell v. Pullman Car Co. (C. C.) 42 Fed. 484; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; The Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; Chicago, etc., Railroad Co. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. We have not been able to find that the Supreme Court has ever passed directly upon such a question as we have before us. But the reasoning in the discussions in the three cases last cited throws some light upon the relations between railroad companies and other companies which it permits to enjoy the privilege of furnishing additional conveniences to the public by the use of its own facilities. The deduction seems clear that in doing this the railroad company relinquishes none of its own powers and rights, and is not absolved from its own obligations to the public as a common carrier.

The plaintiff relies much upon the case of Pullman's Palace Car Co. v. King, 99 Fed. 380, 39 C. C. A. 573. But the facts of that case are distinguishable. The passenger exhibited to the defendant's agent a transportation ticket from New Orleans to New York, the last coupon of which was for passage from Washington to New York by the Baltimore & Ohio Railroad, and asked for a sleeping car ticket to cor-

respond. The agent sold him one in a sleeping car which did not run from Washington to New York by the Baltimore & Ohio, but by the Pennsylvania Railroad, from which he was ejected after leaving Washington for refusal to pay his railroad fare. The court held that the defendant guaranteed that the car in which was the berth sold was one which would go by the Baltimore & Ohio Railroad, and that it was liable for this breach of contract.

It was therefore beyond the sphere of the Pullman Company's business to negotiate with the plaintiff in regard to the manner in which his contract with the railroad company should be performed, and its agent at Providence had no authority to make any stipulation for it in that regard. The plaintiff was bound to know what the usual course of business is in such matters, and that the sleeping car company would not guarantee the manner in which the railroad company should perform its contract with him, and that the information which he says the agent gave him, that it was not necessary for him to get his transportation ticket countersigned at New York, and that he could have it done at Washington, could amount to no more than the agent's personal opinion upon the subject.

We have this far considered the case as if it were alleged that the defendant's agent had undertaken to make a guaranty in behalf of the defendant with the plaintiff in regard to the rights of the plaintiff under his contract for transportation. But it is doubtful whether the petition in the face of the demurrer can be held to amount to an allegation that there was any such guaranty. It is therein alleged that "the aforesaid agent of the defendant examined the aforesaid railroad ticket, and informed him that it was not necessary for him to go to New York for the purpose of having his ticket countersigned." It is then stated that "upon the assurance given by the agent" he purchased the sleeping car ticket; and again that upon the assurance "and the warranty that upon his aforesaid railroad tickets and the sleeping car ticket he would have the right" to occupy the berth, etc., he became a passenger upon the car. It is evident in using the words "assured" and "guaranty" nothing else is referred to than the previously mentioned information by the agent, for there is nothing else stated to have been assured or warranted. However, we will put our decision upon the broader ground that the plaintiff was not entitled to treat the representation of the agent as a contract of the defendant company. The opinion of the court below was in harmony with the view we have expressed. We think the court was right in sustaining the demurrer.

The judgment must be affirmed, with costs.

WHEELER et al. v. ABILENE NAT. BANK BLDG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1908.)

No. 2,602.

1. CORPORATIONS—TRUST—SINGLE MAJORITY STOCKHOLDER IN FIDUCIARY RELATION WITH MINORITY STOCKHOLDERS.

The holder of a majority of the stock of a corporation stands in a fiduciary relation to the holders of the minority of the stock, because he has a community of interest with them in the same property, and because they can act and contract in relation to the corporate property only through him.

2. SAME—DUTY OF MAJORITY STOCKHOLDER TO MINORITY STOCKHOLDERS.

The power of a single holder of a majority of the stock of a corporation devolves upon him the correlative duty to the holders of the minority of the stock to exercise good faith, care, and diligence to make the corporate property produce the largest possible amount, to protect the interests of the minority stockholders, and to secure and deliver to them their just proportion of the income and of the proceeds of the property.

3. SAME—SALE OF CORPORATE PROPERTY TO HIM FOR LESS THAN PRICE OBTAINABLE FROM ANOTHER, THOUGH FOR FAIR VALUE, VOIDABLE.

Any sale of the corporate property by a single holder of the majority of the stock by the use of the meetings of the board of directors and the meetings of the stockholders in legal form for its fair value, but for a smaller amount than he could have obtained for it from another, is voidable at the election of the minority stockholders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 668.]

4. SAME—SALE VOIDABLE, NOT VOID—COURT MAY REQUIRE DEPOSIT AS CONDITION OF DECREE AVOIDING.

Such a sale is voidable, not void; and a court of equity may condition its decree of avoidance by a requirement that the complainant shall bid and deposit an amount equal to the amount paid at the sale and the expenses of a master's sale, to be applied in payment for the property in case no one bids more, or in case the depositor is the highest bidder.

5. SAME—SALE TO MAJORITY STOCKHOLDER AVOIDED—FACTS—CONCLUSIONS.

The holder of the majority of the stock of a corporation was its president, its creditor, and one of its board of directors. The four other members of the board were qualified by his transfer of one share of stock to each. After one of the holders of a minority of the stock had offered him $3,500 for the property of the corporation, and had notified the secretary that he desired to bid for it, that property was sold to the owner of the majority of the stock for $2,500, which was its fair value, by means of regular action of the meeting of the directors and of the meeting of the stockholders, at which the purchaser's stock was voted for the sale.

Held, the sale was voidable at the election of the minority stockholders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 668.]

6. EQUITY—PRACTICE—MASTER'S CERTIFICATE OF EVIDENCE REQUISITE TO ASSAIL HIS FINDING OF FACT.

The master's finding of facts upon evidence taken before him cannot be impeached, in the absence from the record of his certificate, or other competent proof, either that the evidence presented is the entire evidence that was before him, or that it was all the evidence which was before him, relative to the specific finding or findings challenged.

(Syllabus by the Court.)

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

Ross B. Gilluly and Elijah Robinson (William H. England and Arthur E. Lybolt, on the brief), for appellants.

G. W. Hurd (H. Southworth and J. H. Austin, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Two holders of the minority of the stock of the Abilene National Bank Building Company, a corporation, brought a suit in the court below to avoid a sale of all the property of the corporation to Hiland Southworth, who was the president of the corporation, its creditor, one of its board of directors, and the holder of the majority of its stock. After the issues had been joined the case was referred to a master to find the facts. He found them, exceptions to his finding were filed and overruled, and the court dismissed the bill. A portion of the testimony taken before the master appears to be printed in the transcript of the record before us, but no order of the court below that the master should return into court the evidence he obtained, and no certificate of the master that he has done so, or that the record contains that evidence, or a correct transcript of it, can be found. For this reason, and because the facts essential to a determination of the case appear on the face of the master's finding, the exceptions to his report and the evidence printed will not be farther noticed. A master's finding of facts upon evidence taken by him cannot be impeached, in the absence from the record of his certificate, or other competent proof, either that the evidence presented is the entire evidence taken by him, or that it contains all the evidence which was before him relative to the specific finding or findings challenged. Sheffield, etc., Ry. Co. v. Gordon, 151 U. S. 285, 293, 14 Sup. Ct. 343, 38 L. Ed. 164; Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763; Donnell v. Columbian Ins. Co., Fed. Cas. No. 3,987; McCourt v. Singers-Bigger, 145 Fed. 103, 112, 76 C. C. A. 73, 82; Scotten v. Sutter, 37 Mich. 526; Nay v. Byers, 13 Ind. 412; Fellenzer v. Van Valzah, 95 Ind. 128.

The following facts appear from the pleadings and the finding of the master: The only property of the corporation was a lot and building in Abilene, which was sold to Southworth, the holder of the majority of the stock of the company, in June, 1904. The fair value of this property was $2,500. The corporation had power to buy, sell, and deal in real estate, and it had issued 173 shares of stock. The complainants, who lived in the state of Vermont, owned 46 shares. The defendant Southworth, who resided in Abilene, in the state of Kansas, owned 101 shares. The defendants Humphrey, Malott, Ella M. Southworth, the wife of Southworth, and Stella Duckworth, his stenographer, held 1 share each which Southworth had transferred to them to qualify them to act as directors. Southworth was the president. Stella Duckworth was the secretary. Southworth, Mrs. Southworth, Stella Duckworth, Humphrey, and Malott constituted the board of directors. The corporation owed Southworth, but its property was of greater value than the amount of its debts. Malott and Humphrey inquired, and found that $2,500 was a fair price for the property, and the board sold and the corporation conveyed it to Southworth for that amount, paid the debts of the corporation, declared a dividend on its stock, and

remitted the proper amount to each stockholder; but the complainants refused to accept their dividends. In July, 1904, Wheeler, one of the complainants, objected to this sale and told Southworth he would give $3,500 for the property. In August, 1904, Southworth and wife conveyed the lot and building to the corporation. On August 29, 1904, Wheeler sent a letter to Stella Duckworth, the secretary of the corporation, which she received, wherein he wrote that if the property was offered for sale he desired an opportunity to bid upon it; but this letter was never brought to the attention of any meeting of the stockholders or of any meeting of the directors. On November 10, 1904, the board of directors accepted the reconveyance of the property. Malott said he had made diligent inquiry regarding its value, and that he could find no one who would place a higher value than $2,500 upon it. Southworth offered $2,500, the board unanimously voted to sell it to him for that price, and the corporation again conveyed it to him. Legal notice that there would be an annual meeting of the stockholders on December 6, 1904, to elect a board of directors and to transact such other business as might come before the meeting, was given. There were present at that meeting Hurd, Humphrey, Malott, Stella Duckworth, and Southworth, who together represented 111 shares of stock, and they voted unanimously to confirm the sale to Southworth for $2,500. Southworth and the other directors acted in good faith. Upon these facts the court below dismissed the bill, and the complainants appealed.

The question which this case presents is: May the holder of the majority of the stock of a corporation make a sale to himself, unassailable in equity, of all the property of the corporation for its fair value, when he knows that that value is only five-sevenths of the amount which the corporation can obtain for it. It is not material to the determination of this issue whether the notice of the stockholders' meeting specified, or failed to state, that the question of the confirmation of the sale to Southworth would be there considered, or whether or not the other proceedings of the defendants complied with the requirements of the law; and for the purposes of this decision it will be conceded, but it is not decided, that all the proceedings of the parties and of the corporation were in strict accordance with the forms of law. The objection to this sale lies deeper. It is that it was violative of the duty of a fiduciary.

A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates such a fiducial relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others who have the same rights. Jackson v. Ludeling, 21 Wall. 616, 622, 22 L. Ed. 492; Jones v. Missouri Edison Electric Co., 144 Fed. 765, 771; 75 C. C. A. 631, 637; Booker v. Crocker, 132 Fed. 7, 8, 65 C. C. A. 627, 628.

The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to con-

trol and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery. Jackson v. Ludeling, 21 Wall. 616, 622, 22 L. Ed. 492; Jones v. Missouri Edison Electric Co., 144 Fed. 765, 771, 75 C. C. A. 631, 637; Burnes v. Burnes, 137 Fed. 781, 790; 70 C. C. A. 357, 366; McCourt v. Singers-Bigger, 145 Fed. 103, 107, 76 C. C. A. 73, 77; Pepper v. Addicks (C. C.) 153 Fed. 383, 405; Wardell v. Railroad Company, 103 U. S. 651, 658, 26 L. Ed. 509; Menier v. Hooper's Telegraph Works, 9 Ch. App. Cas. 350, 352, 353; Goodin v. Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, 182, 183, 98 Am. Dec. 95; Ervin v. Oregon Ry. & Nav. Co. (C. C.) 20 Fed. 577, 580, Id., 27 Fed. 625, 632; 2 Story's Eq. Jur. §§ 1261, 1262; Sage v. Culver, 147 N. Y. 241, 247, 41 N. E. 513; Farmers' Loan & Trust Co. v. N. Y., etc., R. R. Co., 150 N. Y. 410, 425, 430, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Hinds v. Fishkill, etc., Gas Co. (Sup.) 88 N. Y. Supp. 954, 957; Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48; Sidell v. Missouri Pac. R. Co., 78 Fed. 724, 727, 24 C. C. A. 216, 219; Barr v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 444, 449, 451, 456; Wright v. Oroville M. Co., 40 Cal. 20, 27; Pondir v. N. Y., L. E. & W. R. R. Co., 72 Hun, 384, 390, 25 N. Y. Supp. 560; Gregory v. Patchett, 33 Beavan, 595, 607; Meyer v. Staten Island Ry. Co., 7 N. Y. St. Rep. 245, 248. The reason for this rule is the detriment to the holders of the minority of the stock from such sales and transactions, and not the benefit the holder of the majority derives therefrom. Symmes v. Union Trust Co. (C. C.) 60 Fed. 830, 865; Memphis & Charleston R. R. Co. v. Woods, 88 Ala. 641, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. It is the duty of the master of the corporation who sells its property to procure the highest possible price for it (Jack-

son v. Ludeling, 21 Wall. 616, 625, 22 L. Ed. 492); and, if he sells it to himself for less, the sale is voidable by the holders of the minority of the stock at their option, although he paid the fair market value for it. Miller v. Brown, 1 Neb. (Unof.) 754, 95 N. W. 797.

The principles which have been briefly reviewed and the decisions which have been cited in support of them spring from the law's jealous care of the fiduciary relations, from its persistent endeavor to prevent a conflict of duty and interest by removing from every person in such a relation every possible temptation to advance his own welfare in disregard of his duty to his correlate, by avoiding every transaction in which he has endeavored to do so. They have been repeatedly discussed and affirmed in the Supreme Court and in this court, and a more extended consideration of them is now unnecessary. Suffice it to say that one of the familiar rules they sustain and illustrate is that one may not be an agent to sell for another and a purchaser at the same time, that such a sale is voidable at the election of the principal, and that under this rule, and under the equitable principles to which reference has been made, the sale to Southworth cannot be sustained in a court of chancery. He grasped and held all the powers of the corporation. It could act and contract only through him. He was the agent through whom, and through whom alone, under the law, the corporation and the holders of the minority of its stock could sell its property. He sold it to himself by his use of the powers of the company. If that sale had been fair and open, after full opportunity to all interested to bid, for the highest amount that could be obtained for the property, it might have been sustained. But it was made for $2,500 to the holder of the majority of the stock, who was one of the members of the board of directors and the president of the company, and to whom one of its stockholders had offered $3,500 for the property only about four months before the sale, and who had written the secretary that, if it was offered for sale, he desired to bid.

The president of the corporation and the members of the board of directors may have acted in good faith, in the sense that they had no intent to inflict injury upon the holders of the minority of the stock. They may have believed that if they procured for the corporation the fair value of the property they discharged their whole duty. In this they were in error. If they could have obtained for the property by an open and honest sale $1,000 more than it was worth, it was their duty to the stockholders of the corporation to do so, and the holder of the majority of the stock could not be permitted to sell it to himself for less.

The sale, however, is voidable, not void, and the court below may require a complainant who seeks equity to do equity. The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with directions to enter an interlocutory decree to the effect that the sale to Southworth be avoided, and the property be sold by a master, on condition that, within 60 days after the entry of the interlocutory decree, the complainants, or one of them, offers to pay for the property and deposits with the clerk of the court $3,000, to be applied in payment for the property at the master's sale in case no one offers more, and in case the depositor proves to be the highest bidder, other-

wise to be returned to him, and in case such a deposit is made to enter a decree for the sale of the property by a master, for a proper accounting, and for such other relief as may be proper, and in case no such deposit is made to enter a decree of dismissal of the bill for failure to comply with the condition specified; and it is so ordered.

HAGER et al. v. AMERICAN NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit. January 25, 1908.)

No. 1,688.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
When the validity, meaning, and effect of a state statute involves no question arising under the Constitution or laws of the United States, a court of the United States should accept the meaning and effect given to such law by the highest court of the state, except in the limited class of cases when rights have vested or contracts have been made under such statute before it has received interpretation by the state court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950–957.]

2. SAME—CONSTRUCTION OF STATE STATUTE.
The decision of the Court of Appeals of Kentucky construing Act Ky. March, 1906 (Acts 1906, p. 134, c. 22), relating to the taxation of banks and trust companies, which went into effect June 11, 1906, in so far as it holds that such act was intended to and did apply to assessments made in 1906, and that assessments made for that year after it went into effect were lawfully made thereunder, is binding upon a federal court in a suit by a national bank to restrain the collection of taxes based on such assessment.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950–957.]

3. TAXATION—NATIONAL BANKS—TAXATION BY STATE.
That the value of the shares of a national bank includes value due to nontaxable United States bonds owned by the bank is no objection to the validity of an assessment of such shares for taxation by a state without excluding the value of the bonds.

4. SAME—CONSTRUCTION OF KENTUCKY STATUTE—VALIDITY.
Act Ky. 1906, providing the method of taxing state and national banks and trust companies "upon each one hundred dollars of value of the shares" of such banks and companies, as construed by the Court of Appeals of the state, is not invalid as to national banks under the federal law, as imposing the tax upon their capital and surplus, and not on their shares.

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

J. W. Ray, for appellants.
James Helm, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and McCALL, District Judge.

LURTON, Circuit Judge. This is a bill to restrain the assessment of the shares of the American National Bank without deducting therefrom the value of United States bonds held by the bank.

Prior to June 12, 1906, the assessment law of Kentucky did not assess the shares of stock of state banks, but did assess the assets of

all such banks. Under the same law the shares of national banks were assessable, the banks being required to pay such assessment in behalf of shareholders. It is not necessary to go into the details of prior acts. They may be found in the Kentucky Assessment Acts of 1902 (Acts 1902, p. 312, c. 128) and 1904 (Acts 1904, p. 145, c. 66), now sections 4092a and 4092b, Ky. St. 1903. The national banks claimed that this method operated as a discrimination against national banks, inasmuch as the state banks were allowed to deduct from their capital the amount of United States bonds held by such banks, no such deduction being made from the value of shares, that value being ascertained by aggregating the value of all the assets of the bank, and deducting only tangible property separately assessed. And so the Kentucky Court of Appeals held in a test case. Marion National Bank v. Burton, Sheriff, 90 S. W. 944, 28 Ky. Law Rep. 864, 10 L. R. A. (N. S.) 947. In that case the assessments were ordered to be corrected to avoid discrimination by deducting from the aggregate assessed value that part which represented the value of United States bonds so held by such bank.

The present bill seeks the same relief, and there could be no answer made to the contention but for the effect to be given to an act of the Kentucky Legislature which went into effect June 11, 1906 (Acts 1906, p. 134, c. 22), one day before the assessment now complained of was made. The opinion of the Kentucky Court of Appeals, before referred to, was handed down January 31, 1906. The Kentucky Legislature was then in session. To avoid the discrimination which existed under the prior laws, an act was passed which did not, under the Constitution, take effect for 90 days, being June 11th, there being no emergency clause to put it into force earlier. That act was as follows:

"An annual tax at the same rate which may be fixed by law upon other personalty for state purposes is hereby imposed upon each one hundred dollars of value of the shares of state banks and trust companies incorporated under the laws of this commonwealth, and of national banks doing business therein, and such tax shall be paid to the treasurer of the state annually by such banks and trust companies for and on behalf of the owners of such shares of stock, and in addition thereto the said banks and trust companies shall pay to the local authorities in counties, cities, towns and districts taxes at the same rate imposed upon other personalty therein.

"Sec. 2. In order to determine the value of the shares of such trust companies, state and national banks, and to assess all shares in such state and national banks and trust companies for state purposes, it shall be the duty of the president, cashier or other chief officer of each state bank, trust company and national bank in this state, annually between the first day of September and the first day of March, to make and deliver to the Auditor of Public Accounts a statement, verified by its president, cashier or other officer, in such form as the Auditor may prescribe, showing the following facts, to wit: The name and postoffice address of the bank or trust company, the names of the officers, the number of shares of stock and the par and market value of each share, the amount of surplus fund and undivided profits, the amount of value of all real estate situated in this commonwealth, held and owned by the bank or trust company on the first day of September of each year, the amount of its loans and discounts, the amount of its deposits, and such other information as the Auditor may require."

The Act also provided in section 3 that:

"Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares by said board the assessed value of its

real estate in this state. It shall be the duty of the trust companies and banks to list with the county assessor of each county and with the assessing officer in each city, town and taxing district, its real estate and pay the taxes thereon to the sheriff, and to the collecting officer in each city, town and taxing district.

"Sec. 4. Every state bank and trust company incorporated under the laws of this commonwealth, and every national bank doing business therein, shall make to the assessing officer of the county, city, town or taxing district a report similar to that required by this sub-division to be made to the state board of valuation and assessment for assessment for state purposes. The assessing officer of the county, city, town or taxing district wherein any trust company, state or national bank is situated shall assess the shares of such banks and trust companies for taxation for county, city, town and taxing district purposes in the manner prescribed in this sub-division for assessing the same by the state board of valuation and assessment for taxation for state purposes; and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district at the same time and manner as prescribed by law for the return of the assessment of personal property.

"Sec. 5. All laws or part of laws in conflict or inconsistent with this act, providing for other methods of taxation of shares of national banks or the taxation of trust companies and state banks incorporated under the laws of this commonwealth, in the collection of taxes thereon, are repealed."

The assessment was made, as before stated, on June 12, 1906, no assessment having theretofore been made against the shares of either state or national banks. The method of obtaining the assessable value of the shares of both classes of banks was the same. The reports from the several banks theretofore filed, under the prior acts, were taken, and from those reports the board found the value of their capital stock, surplus, and undivided profits and from that deducted the value of tangible property separately assessed. The result thus reached was treated by the board as fairly representing the assessable value of the total shares. Thus there has been no discrimination between the taxation imposed upon state and national banks, and this harmony has been brought about by a law which now subjects state banks to precisely the same method as that before applicable to national banks.

The first objection to the assessment as made is that the assessors erred in not deducting from the value of the aggregate shares the value of the United States bonds owned by the bank and shown by its report, upon which the assessors acted, because the law of 1906 was not applicable to the taxes of 1906, and that it was therefore error in the board to assess state banks upon their shares, and not to deduct from the valuation of national banks' shares the value of exempt United States bonds held and owned by such bank as required by the law, as settled in Marion National Bank v. Burton, 90 S. W. 944, 28 Ky. Law Rep. 864, 10 L. R. A. (N. S.) 947.

The second objection is that under the act of 1906, assuming it to be the applicable law, the assessment is really upon the capital and assets, although nominally upon the shares. Suits raising precisely the same questions were brought in the state courts. One or more of these had been argued and submitted in the Court of Appeals of Kentucky when this cause came on to be heard. Pending our consideration, that court has handed down an opinion holding, first, that an assessment made on June 12, 1906, was necessarily made under the act of 1906, inasmuch as by that act the prior acts relating to the assessment of

banks, state and national, had been repealed or superseded; second, that the assessment authorized by that act was an assessment upon shares, and not an assessment upon capital and assets. Touching the applicability of the act of 1906 to the bank assessments for 1906, made after that act went into effect, the Kentucky court, in part, said:

"As the assessment was made on June 12th, the day after the act of 1906 went into effect, it is, of course, apparent that the assessment was not made upon reports furnished under the act of 1906, but under reports furnished under the act of 1904. At the time the assessment was made, all prior acts had been expressly repealed by the act of 1906; hence, if the board of valuation and assessment made any assessment at all, it must have been made under this latter act. But, when it is considered that the appellee banks do not maintain that the valuation of their shares were fixed at too high a price, or to show they have made any effort to obtain a reduction in the amount of assessment, or that any error to their prejudice was committed in the manner of valuing their shares, except in the failure to deduct United States bonds, we regard it as immaterial what information the state board of valuation and assessment had before it in making the assessment. This inquiry would be pertinent if the valuation fixed or the method of assessing it was assailed.

"A good deal is said in argument on both sides upon the question whether or not the act of 1906 had a retrospective effect. Counsel for the state insist that it did, while counsel for the bank as earnestly argue that it did not. In our opinion, it is not necessary to give the act of 1906 a retrospective effect in order to sustain the assessment made in 1906. The act of 1906 was a remedial statute, enacted for the purpose of curing defects in prior laws, and to place all banking institutions in the state upon exactly the same footing so far as taxation was concerned, and must be liberally construed to effectuate its intention.

"Under the decision of this court in the Marion county bank cases, the Legislature was confronted with the situation that, under the laws as they then stood, the shares of national banks would not be taxed as other moneyed capital invested in state banks and trust companies, but the latter would in fact be discriminated against, as they did not hold national bank bonds. Knowing that this discrimination would exist if the taxes payable in 1906 were assessed under the existing law, the Legislature undertook to change the law. There were the same reasons for changing it as to the year 1906 as to subsequent years. So, in the first section of the subdivision of the act, relating to banks and trust companies, it provided as follows:

" 'An annual tax at the same rate which may be fixed by law upon other personalty for state purposes is hereby imposed upon each one hundred dollars of the shares of state banks and trust companies incorporated under the laws of this commonwealth, and of national banks doing business therein.'

"The purpose was to supersede the old law. The taxes due by banks for previous years had been paid to the state, and it was intended that thenceforth the taxes as to banks should be assessed under the provisions of this act, so that no loss would result to the state treasury from the decision of this court in the Marion county cases. With this purpose in view, sections 5 and 6 were included in this subdivision:

" 'Sec. 5. All laws or parts of laws in conflict or inconsistent with this act, providing for other methods of taxation of shares of national banks or the taxation of trust companies and state banks, incorporated under the laws of this commonwealth, and the collection of taxes thereon are hereby repealed.

" 'Sec. 6. All national banks, trust companies and state banks shall file with the Auditor their reports herein provided for on or before the 15th day of April, 1906, and annually thereafter on or before March the first. Said reports shall be made up to and including the first day of the preceding September.'

"If it had not been intended that the taxes for 1906 were to be assessed under the act, there was no need for a special repealing clause in this subdivision; and the sixth clause must otherwise be rejected as meaningless. It is true the act did not take effect until June 11th, but the Legislature plainly intended that the assessment should be made under it, and it was done. Even

if an assessment for 1906 had been made before the Legislature met, it could have directed another assessment to be made and the taxes to be paid under it. And so, if the board had made an assessment under the act of 1904, it would have been its duty after June 11, 1906, to have made an assessment under the act of 1906, and the taxes should have been paid under that assessment.

"The fiscal year for 1906 did not expire until June 30, 1906 (Const. § 169), and clearly the board had the power at any time within the fiscal year to make an assessment for that year. Aside from this, it would scarcely be contended that the failure of an assessing officer to make an assessment within the time allowed by law would prevent him from making it within a reasonable time thereafter, or render invalid the assessment so made, unless it could be shown that the meritorious rights of the property owners were prejudiced by the delay. Anderson v. City of Mayfield, 93 Ky. 230, 19 S. W. 598. If an assessing board, by failing to perform a manifest duty should prejudice the meritorious rights of the property owner, no doubt he could obtain proper relief; but, in this case the fact remains that the board of valuation and assessment in delaying this assessment did not prejudice the meritorious rights of appellee. The law under which the assessment was made was in every substantial particular identical with the preceding law of 1904. If the assessments had been made under it, the property of appellee would have been assessed at precisely the same sum at which it was assessed. The argument that if its shares had been assessed under the act of 1904, and the capital of state banks and trust companies under the act of 1902, it would have had the right to deduct the value of the United States bonds owned, and hence was prejudiced by the failure to assess under that law, does not impress us either favorably or forcibly. Why would it have been entitled to this exemption? Certainly not on account of anything in the act of 1904, but because of a discrimination in the act of 1902, under which state banks were assessed; and when this was removed, the technical right of national banks to exemption ceased to exist, and it was removed when the act discriminating in favor of state banks was repealed, and they were assessed under an act applying equally and alike to all banks. As the act under which the national banks were assessed did not permit any discrimination against them, either in law or fact, or impose upon them any rate of taxation greater than was assessed upon other moneyed capital, or state banks or trust companies, they will not be heard to say that they were prejudiced by the delay of the assessing board."

This decision by the highest court of the state construing the act of 1906 as a remedial statute, that it operated as a repeal of prior acts, and that the legislative intention was that the assessments of banks for 1906 should be made under that act, that discriminations might be eliminated, is so peculiarly a decision in respect of local law that it ought to be followed by this court. The discriminating feature of the prior law has been removed, not by any change in the method of taxing national banks, but by providing that state banks should be taxed by the same plan. A statute which thus prevents a discriminating method of assessment does not give rise to any such independent right of construction of a local statute as is exercised by United States courts when contracts have been made under a state statute before interpretation by the highest court of the state of the contract. When the validity, meaning, and effect of a state statute involves no question arising under the Constitution or laws of the United States, a court of the United States should accept the meaning and effect given to such law by the highest court of the state, except in the limited class of cases when rights have vested or contracts have been made under such statute before it has received interpretation by the state court. In the latter kind of cases, the federal courts will feel it admissible, in suit

between citizens of different states, to exercise its independent judgment, though, as put in the case of Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, they "will lean toward an agreement of views with the state court."

The question as to whether the act of 1906 was intended to or did apply to the assessments for 1906, and whether the assessors should not have made all such assessments before June 12, 1906, and under the law in force prior to that act, and whether having omitted to make assessments prior to June 12, 1906, they might not then assess under the new act, were all questions peculiarly for the decision and interpretation of the state court. The contentions in opposition to the view the Kentucky court took are quite plausible. But a majority of that court disregarded them. They present no question arising under the Constitution or laws of the United States. Section 5219, Rev. St., permits the states to assess and tax the shares of shareholders in national banks, only providing "that the taxation shall not be at any higher rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." That the value of the shares included value due to nontaxable United States bonds owned by the bank is no objection to an assessment upon such shares without excluding such value. This has been more than once decided. Van Allen v. The Assessors, 3 Wall. 573, 18 L. Ed. 229; Mercantile Bank v. New York, 121 U. S. 139, 7 Sup. Ct. 826, 30 L. Ed. 895; Cleveland Trust Co. v. Lander, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456; Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901. So far, therefore, as the decision of the Kentucky court involves the applicability of the act of 1906 to the assessments made June 12, 1906, we feel it our duty to accept and follow the interpretation and effect given to that act. Stutsman County v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; Cleveland Trust Co. v. Lander, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456; Merchants' Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; Louisville & Nashville Railroad Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298.

There remains the question as to whether the method of taxing banks in this act of 1906 imposes a tax upon capital and surplus of such banks, and not a tax upon shares. That it is not a tax upon shares is the construction adopted by the bill in this case, and no issue is made by any pleading which challenges the act as really imposing a tax upon the property of the bank. The suggestion that it is really a corporate property tax, and not a tax upon shares, is bottomed upon the case of the Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901. That was a bill filed by a state bank claiming an exemption on account of United States bonds owned by it from a tax which it contended was imposed by the Iowa act upon capital and surplus, and not upon shares as the property of shareholders. Upon examination, the Supreme Court held that it was imposed as a tax upon corporate property, and that against such a tax United States bonds owned by the bank were nontaxable as property of the bank. That case turned upon the interpretation of the peculiar phraseology of the Iowa statute, which differed in material particulars from the

Kentucky act. The latter act has been construed as not imposing a tax upon the corporate capital, but strictly a tax upon shares. See the case of Marion National Bank v. Burton, 90 S. W. 944, 28 Ky. Law Rep. 864, 10 L. R. A. (N. S.) 947. This construction of the act would seem to be conclusive as a decision which we should accept. Upon just such a question the Supreme Court held that the state decision should be followed. Aberdeen Bank v. Chehalis County, 166 U. S. 440, 444, 17 Sup. Ct. 629, 41 L. Ed. 1069. But if we treat the question as one for an independent construction, we agree with the Kentucky court in construing the act as one imposing the tax upon shares and not upon corporate assets. The first section of the act of 1906 provides that the tax shall be "upon each one hundred dollars of value of the shares of state banks and trust companies, * * * and of national banks, doing business therein." And that such "tax shall be paid to the treasurer * * * by such banks and trust companies for and in behalf of the owners of such shares of stock. * * *" That the act requires the bank to pay the tax "for and in behalf of the shareholders" does not prove that the tax is anything else than a tax on shares. The same question was made in National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701, when a Kentucky act of like character was involved, and in Aberdeen Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, and in both cases the court held that the bank might be required to pay the tax as a method of collection from the shareholders.

The judgment must be reversed and remanded, with directions to proceed consistently with this opinion.

HAGER et al. v. LOUISVILLE NATIONAL BANKING CO.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1908.)

Nos. 1,689–1,703.

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

Bills by the Louisville National Banking Company, the Southern National Bank, the Union National Bank, the National Bank of Kentucky, the State National Bank, the Henderson National Bank, the First National Bank, the Citizens' National Bank, the Clark County National Bank, the City National Bank, the Fayette National Bank of Lexington, the Lexington City National Bank, the Farmers' & Traders' National Bank of Covington, the First National Bank of Covington, and the German National Bank against S. W. Hager and others. Decrees for complainants, and defendants appeal. Reversed and remanded.

J. W. Ray, for appellants.
James Helm, for appellees.

Before LURTON and RICHARDS, Circuit Judges, and McCALL, District Judge.

PER CURIAM. The question in these cases is identical with that decided in S. W. Hager et al. v. American National Bank, 159 Fed. 396, wherein an opinion has this day been handed down. Upon the authority of that opinion, the decrees in these cases will be reversed, and the causes remanded, with directions to dismiss the bills.

NATIONAL TRADING CO. v. VULCANITE PORTLAND CEMENT CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 117.

SALES—CONTRACT—OFFER AND ACCEPTANCE.

Plaintiff offered to sell defendant cement on certain specified terms. Defendant accepted such offer, with an additional provision that the cement should pass specifications of the department of highways of the borough of Brooklyn, adding that a certain paving company would guarantee defendant's account. Plaintiff, after having received such letter of acceptance, shipped a small portion of the cement, and replied that the contract was acceptable to it, and would become effective as soon as plaintiff received the written guaranty from the paving company, which was never given. *Held*, that the shipment of the cement prior to the sending of plaintiff's last letter did not constitute an unconditional acceptance of the proposition as modified by defendant, and the terms of plaintiff's last letter never having been fulfilled, there was no meeting of minds sufficient to constitute a contract of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 39–43.]

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

Writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of the defendant in error who was the plaintiff below. In the following opinion the parties are designated as in the court below.

John C. Wait (G. H. D. Foster, of counsel), for plaintiff in error.

Wm. Forse Scott (W. F. Upson, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The complaint charges breach of contract. It alleges, in substance, that the parties entered into a written agreement for the purchase and sale of cement as stated in three exhibits annexed to and made a part of the complaint, and that the defendant failed to perform its part of such agreement. Upon the trial the plaintiff, to prove the contract, introduced these exhibits in evidence. The trial court charged that the basis of the action was the contract represented by them, and that they should all be treated together to get at the contract. If, then, we find that these exhibits disclose no contract, the plaintiff's case, being founded upon them, fails.

The exhibits are letters between the parties. The first is dated September 4, 1903, and is a proposition from the plaintiff to the defendant. It also bears the defendant's indorsement of acceptance, and, omitting a few unimportant details, reads as follows:

"We quote below our prices and terms to you on Vulcanite Portland Cement, delivered at alongside lighter available pier within lighterage limits

New York Harbor, in quantities, as ordered, not less than 1,000 bbls. at each delivery, nor exceeding 5,000 bbls. within any one calendar month, quantity to which this quotation applies 25,000 bbls., more or less, variation not to exceed 10%. Shipments not to begin before September 5th, 1903. Whole amount to be ordered for delivery before June 1st, 1904. Prices, including packages: In cotton sacks, per bbl. (4 sacks to the bbl.) $1.69.

"Note.—Equivalent to $1.29 net if all bags are returned in good order.

"Invoices will include price of sacks, bags and barrels, and must be paid in full. Cotton Vulcanite sacks returned to Vulcanite, N. J., freight prepaid, within 90 days from delivery of the cement will be purchased by this company at 10 cents each, if in good condition, but only on the inspection and count of the company at its works. Barrels and paper bags are not returnable. This quotation applies only to Vulcanite Portland Cement purchased for delivery as above. If you do not take within any month the full amount to which you are entitled, this company may deliver to you the following month more than the maximum monthly amount above stated, but it shall not be bound to do so.

"This company reserves the right to cancel the contract if bills are not paid according to terms. For delays caused by strikes, differences with employés, accidents to machinery, fire, flood, car famine, or other contingencies beyond our control, this company shall not be held responsible. Terms, net cash 90 days from date of each invoice; 2% discount from net price of cement for cash within 10 days from date of each invoice.

"We send you this proposition in duplicate; upon your returning one of the copies duly accepted in writing received by this company on or before Sept. 8, it shall constitute the contract between us.

"Vulcanite Portland Cement Co.,
"Albert Moyer, Manager.

"Accepted 5th day of September, 1903, at Brooklyn, N. Y., by National Trading Co.,
Paul C. Grening, Treas."

The second letter is from the defendant to the plaintiff, is dated September 5, 1903, and accompanied the defendant's acceptance of the plaintiff's proposition. It follows:

"We accept your proposition of the 4th inst. to sell us 25,000 barrels of cement to be delivered between September 5th and June 1st next at $1.29 per barrel in bags. Bags to be charged for and credited at 10¢ each. The cement to pass the specification of the department of highways of the borough of Brooklyn. The Uvalde Asphalt Paving Company will guarantee the account and make payments to you as per terms in your offer after due certification of the bills by us. You may ship the first 1,000 barrels to arrive a week from date."

The third letter, from the plaintiff to the defendant and dated September 8, 1903, follows:

"We beg to acknowledge receipt of your favor of Sept. 5th, inclosing contract signed by you for 25.000 barrels, more or less within 10%, of 'Vulcanite' Portland Cement, all of which is to be delivered prior to April 1st, 1904; but not exceeding 5,000 barrels during any one month. This contract is acceptable to this company, and will become effective as soon as we receive written guarantee from the Uvalde Asphalt Paving Company, guarantying your account as per terms. First shipment of 1,000 barrels has been made, and is now on the way to you."

The first proposition and the acceptance indorsed thereon, if standing by themselves, undoubtedly would have constituted a contract. There was an offer to sell and its unconditional acceptance. But both parties agree that the defendant's letter accompanying the acceptance must be treated as a part of it. So treated, it is clear that the defendant did not unconditionally accept the plaintiff's offer, but made a

counter proposition. It made an additional requirement of quality—the cement must pass the specifications of the Brooklyn Department of Highways. It also stated that the Uvalde Company would guarantee the account. This latter subject was not mentioned in the plaintiff's written proposition but had been spoken of in prior negotiations. When this counter proposition was presented to the plaintiff it replied, as we have seen, that the contract was acceptable to it, and would "become effective as soon as we receive written guarantee from the Uvalde Asphalt Paving Company guarantying your account as per terms." The Uvalde Company never gave the written guaranty, and the plaintiff delivered only the 1,000 barrels of cement which it had shipped before sending its last letter, and for which it was duly paid. Upon this statement it is clear that there was no contract between the parties with respect to the undelivered cement. Manifestly, the plaintiff did not unconditionally agree to the defendant's proposition, and, consequently, there was no meeting of the minds of the parties. Had the plaintiff unconditionally accepted the defendant's terms, there would have been a valid executory contract between them—a promise upon the one side based upon a promise upon the other, with immediate rights of action for failure to perform. But as we have seen the plaintiff did not accept unconditionally. It stated that the contract would be effective when it received the written guaranty, which was equivalent to saying that it would not be effective until it did receive it. Instead of binding itself in reliance upon the defendant's promise to furnish a guarantor, it insisted upon the fulfillment of that promise in writing before it should be bound. It required an act in addition to a promise. It stated a condition precedent to the existence of the contract. As this condition was not complied with, there was no contract.

But while the plaintiff in stating its case based it upon its alleged acceptance in writing, of the defendant's proposition, it now seeks to ignore its second letter. It now claims that it unconditionally agreed to the defendant's terms by shipping the 1,000 barrels of cement before it sent the letter; that, being bound, it could not alter its position by a subsequent letter. Of course, in many cases, the acceptance of an order for goods may be inferred from their shipment. In the present case, however, the defendant's proposition called for the approval of its requirement as to quality. Something more than the shipment of a small portion of the cement was necessary. Certainly, unconditional acceptance cannot be inferred from such an act in the face of a letter written within a day or two imposing conditions. When the question was before it, the plaintiff declined to assume obligations. We cannot now comply with its request to thrust them upon it.

For these reasons, we think that the plaintiff failed to establish any cause of action against the defendant, and that a verdict should have been directed for the defendant.

The judgment of the Circuit Court is reversed.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. ABOUT FOUR HUNDRED BARRELS OF WINE et al.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

No. 57.

SALVAGE—RIGHT TO COMPENSATION—ALLEGED SPOLIATION OF PROPERTY.

A vessel laden with wine in casks caught fire at sea and was run ashore, and libelant was employed to save the cargo. While this was being done a storm broke up the vessel and a large number of barrels of wine went adrift. Libelant made no effort to recover them, but its wrecking crew told respondents that they were derelict and would be the property of whoever should save them; and respondents, thus encouraged, salved a large number, most of them at sea and some several miles from the wreck. *Held*, that the fact that they claimed them as their own and refused to give them up on demand to libelant, or that they bored gimlet holes in some of the barrels, it appearing that the salt water had leaked into some, which were injured, and spoiled the wine, did not deprive them of the right to salvage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 49, 50.]

Appeal from the District Court of the United States for the District of New Jersey.

Robinson, Biddle & Benedict, for appellant.

William Pintard, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. The ship Francis, bound from San Francisco to New York, caught fire and was run ashore on the New Jersey coast. Her cargo consisted of domestic wines. The libelant, a wrecking company, was employed by the owners and underwriters to save the cargo. While doing so a storm broke the vessel and a large number of barrels of wine went adrift. The libelant made no effort to recover them. The proof is, and it is not denied, that libelant's wrecking crew told the respondents they were entitled to the derelict casks and encouraged them to go after them, telling them where they could be found along the coast. A few of the barrels here in controversy were picked up along the beach; but the substantial part of them were reclaimed either at sea or along the coast, in many cases several miles from the wreck. The respondents recovered some 300 barrels, which would have been wholly lost but for their efforts. After the shore people thus began bringing in the barrels the insurance companies insisted on their being retaken by the libelant and brought to New York. A shore agent of libelant then demanded the barrels and paid salvage of about $3 per barrel on a number which had been gathered up along the shore. He was unable to settle with the respondents, some of whom then and yet contend the casks had been wholly abandoned by the libelant and were respondents' property. Others claimed the salvage was not sufficient. The libelant then began a proceeding in admiralty in which it sought possession of the wine and prayed an adjudication by the court of such salvage as the respondents deserved. Under this proceeding the wine was taken by the marshal from respondents and delivered to libelant; the latter giving bond to pay the salvage adjudg-

ed. The wine recovered was examined and appraised at New York at above $1,900 some two months after the wreck. The libelant, having recovered the property, took no steps to follow up its proceeding, and we think the subsequent delay is fairly chargeable rather to them than to the respondents. The court below allowed $600 salvage and interest.

We have carefully examined the entire proofs in this case, and we find nothing to convict the court below of error. The case was one which called for sound judgment and sensible discretion in adjudging the rights of these parties. The price allowed by the court was fully warranted, in view of what the agent of the libelant had paid per barrel for that recovered along the shore, and without any such labor and time as these respondents gave in following the barrels to sea and along the coast. Indeed, the proofs show the picking up of these casks was attended by considerable danger; that the sea was rough, the casks had to be par-buckled into the catboats, and that considerable damage was done to the latter; and in view of the long delay an allowance in the shape of interest was not inequitable.

It is contended, however, these salvors were guilty of tampering with and embezzling this wine, and the court erred in awarding them any salvage whatever. That a salvor is bound to the most scrupulous fidelity; that embezzlement of a part may forfeit salvage to the whole; that a right to salvage presupposes faithful service, restoration of the goods, and vigilance in their protection—are principles recognized and enforced by courts. But we do not find the facts in this case are such as warrant an application of these principles to forfeit respondents' claims. The drilling of gimlet holes in these casks was not, under the circumstances, an act of spoliation. These casks were found floating at sea, salt water had leaked into some of them, and when drilled many of them were found to be impregnated thereby and were emptied. The proof is that some barrels were leaking when brought ashore; in some cases that the ground was stained with the wine; in others that leaks were caused by boat hooks; in some that the chines were burned. In view of these facts, and of the fact that from the time the casks were taken from the respondents and placed on the railroad cars until they were put in storage at Trenton there is no evidence they could not have been tampered with, we are not satisfied that the loss of wine found some two months thereafter, when the wine was appraised, was not due to leakage or other causes, or to persons other than these respondents.

Apart from all other grounds, in view of the many broken and opened casks, other than these in dispute that were along the beach, we see no motive to have led these men to take from the casks they had recovered. They claimed them as their own. They took the advice of counsel as soon as they could, and stood on what they averred was a right of ownership. After full consideration of the proofs, we are of opinion the action of the court below did substantial justice under the facts of this case.

The appeal is therefore dismissed.

STATE LIFE INS. CO. v. MURRAY.

(Circuit Court of Appeals, Third Circuit. February 13, 1908.)

No. 59.

1. INSURANCE—PAYMENT OF INITIAL PREMIUM—EFFECT—FORFEITURES.
On payment of the initial premium on a life policy there is a contract of insurance for the whole life of the insured, and the insurer's right to terminate such contract for nonpayment of premiums is a forfeiture, which is not favored in law.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 891–904.]

2. SAME—ESTOPPEL.
Any agreement, declaration, or course of conduct on the part of an insurance company which leads a party honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting on a forfeiture claimed under the express letter of the contract.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 941–946.]

3. SAME—PREMIUMS—PAYMENT—AUTHORITY TO RECEIVE—QUESTION FOR JURY.
In an action on a life policy, evidence held to warrant a finding that the insurance company was estopped to deny that its soliciting agent, to whom payment of premium had been made, had authority to receive the same on the company's behalf.

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

For opinion below, see 151 Fed. 539.

W. A. Way, for plaintiff in error.

A. B. Reid, for defendant in error.

Before DALLAS and GRAY, Circuit Judges.

GRAY, Circuit Judge. The case brought before us for review by this writ of error was a suit by Mary Murray, the beneficiary under a policy of life insurance, and defendant in error (hereinafter called the plaintiff), against the State Life Insurance Company, the plaintiff in error (hereinafter called the defendant). The defense is, nonpayment of the third semiannual premium, which matured prior to the death of the insured. The terms of the policy provided, among other things, as follows:

"Premiums. In case any premium should not be paid when due, according to the terms of this contract, at the office of the company in the city of Indianapolis, or to agents when they produce receipts signed by the president or secretary, then and in every such case, this policy shall cease and determine, except as otherwise herein expressly provided."

The pertinent facts, as disclosed by the record, are, that the policy in suit was taken out by the plaintiff on the life of her husband; the business was transacted with her son, who was soliciting agent of the defendant company; the policy was for $2,500, which was delivered to her by her son, as agent of the company, and the first six months' premium of $39.90 was paid to him as such agent, for which she received a receipt from the company, signed by its secretary and coun-

tersigned by her son, J. E. Murray, as agent, dated the 31st day of October, 1903; the premium for the next six months falling due on the 29th day of April, 1904, was also paid by the plaintiff to her son, as agent, for which he gave her a temporary receipt, which was replaced shortly after by a receipt from the company in the same form as previously, signed by the secretary and countersigned by the assistant cashier. When the third semiannual payment fell due, the general manager of the company's Pittsburgh office called the attention of the son, who was still the soliciting agent of the company, to that fact, who thereupon applied to his mother for its payment. As there were nearly 30 days' grace yet to run under the policy, the payment was not made until the days of grace had nearly expired, and, on November 26th, the plaintiff paid to her son, as agent, the amount of the premium, for which no receipt was then given her. Upon her repeated request for a receipt, he gave her one out of a book, which she says was marked "binding receipts," signed by the secretary of the company who had signed the previous receipts, and countersigned by J. E. Murray, her son, as agent, who had countersigned the first regular receipt. This receipt was a printed blank, filled in with the name of the insured, the amount of the premium and the date of payment, and numbered in red ink 49,571. At the top and under the name of the life insurance company, was printed in red ink, but not otherwise conspicuous, the following:

"The agent collecting on this receipt has no authority to collect for more than the first year's premium."

The plaintiff testifies that she put this away with the other receipts without observing this notice, and that she knew her son was an agent of the company and he had countersigned a previous receipt as such. It appears by the testimony that Murray was supplied by the company with buisness cards, describing him as special agent, and that these were shown to the mother; also, that he was recognized as such agent by the insurance department of the state of Pennsylvania, on the certification to that effect by the company to the Insurance Commissioner. It is also uncontroverted that the said Murray solicited and wrote the risk, and received, as above stated, the first semiannual premium, and that he was permitted to countersign, as agent, the regular receipt therefor by the company; also, that he received the second semiannual premium, for which no receipt was given for a period of several days, but the payment was thereafter ratified by the company's second official receipt, countersigned by the assistant cashier of the defendant, as above stated. There was ground, therefore, for the inference by the plaintiff, that said receipts might properly be countersigned by her son, as well as by some other officer of the company.

The plaintiff's testimony is not disputed, that no notice had been given to her that her son was without authority to receive the third payment, or that she did not read the first temporary receipt, but supposed that all the receipts were alike. The son never transmitted this third premium to the company, or to any representative thereof, and about two weeks after the payment had been made, as above stated,

the insured died. The company declined payment on the policy, on the ground that the same had been forfeited by the nonpayment of the third and last premium, due prior to the death of the insured; the ground upon which such forfeiture is asserted, is that the son was not authorized to collect premiums after the first year.

The general principles of law applicable to such cases, are not in dispute, and they were correctly stated by the court below in its charge to the jury. Undoubtedly, on payment of the initial premium on a life insurance policy, there is a contract for insurance for the whole life of the insured, and the insurance company's right to terminate such contract for nonpayment of premiums is a forfeiture. Such forfeitures are not favored in the law, and "any agreement, declaration or course of action, on the part of the insurance company, which lead a party honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon a forfeiture, though it might be claimed under the express letter of the contract."

Counsel for the defendant company contend that there was no evidence in this case to warrant a jury in finding that said company was estopped from claiming the forfeiture of the policy. We think, however, the court below were right in submitting to the jury the question, whether, under all the circumstances of the case, the plaintiff was not justified in paying the third and last premium to her son, as agent of the company, who had solicited the insurance, delivered the policy and received payment of the first two premiums, as the duly accredited and recognized agent of the defendant. The whole question is well stated by the court below in its charge to the jury, as follows:

"Now the first question for you to determine under the evidence is: Did she actually pay him the $39.90? Did she pay this money in good faith, believing it was a payment to him as agent of the company? In considering that question, you will determine whether the payment was made by her to him as the agent of the company, or whether the money was entrusted by her to him as her son and her agent to transmit and forward it to the company. This is the first question for you to determine: Whether Mrs. Murray paid this money to him as agent of the defendant company, or whether she gave the money to him as her agent, to pay it to the company through the proper channels? If she paid the money to him as her agent and he failed to pay it over to the company, that would be the end of the case. If she paid it to him as agent of the company, you then pass on to the further question: Whether the course of dealings between Mrs. Murray and this company, in the payment of the other premiums, was such that the company misled or induced her to believe that he was an agent of the company to receive the premiums and thereby misled her into believing that a payment to him was a payment to an agent of the company on the company's behalf."

We do not think the court could have properly withheld these questions from the jury.

The judgment of the court below is therefore affirmed.

BELDING v. KING.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 147.

1. WRIT OF ERROR—REVIEW—RULINGS NOT EXCEPTED TO.
   Rulings to which, as appears from the record, no exception was taken will not be reviewed on writ of error.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1432–1468.]

2. FRAUD—MISREPRESENTATIONS—PROOF—SUFFICIENCY.
   In an action for fraudulent representations respecting property sold, plaintiff must prove that the statements were false when made, that defendant knew that they were false, and that plaintiff relied upon them.

3. SAME—ACTION FOR FRAUDULENT REPRESENTATIONS—APPLICABILITY OF REMEDY.
   That after selling corporate stock to plaintiff, defendant abstracted part of the assets of the company does not strengthen plaintiff's action against him for alleged fraudulent representations in the sale.

4. SAME.
   Where plaintiff agreed with defendant's agent and others for the purchase of the stock of a company, and that stock in another company held by such company should be sold and it was sold to defendant, plaintiff may not complain of such sale, in an action against defendant for alleged fraudulent representations in a subsequent sale to plaintiff of stock of the first-mentioned company.

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

Robert B. Honeyman, for plaintiff in error.
Boothey & Baldwin, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The only question to be considered upon this review is presented by the fourth assignment of error—namely, "That the court erred in dismissing the plaintiff's cause upon the merits." The first two assignments of error relate to rulings to which, as appears from the record, no exception was taken. The third assignment relates to a ruling regarding the measure of damages which is, of course, immaterial if the court was correct in holding that no cause of action was established. Has the plaintiff proved the cause of action stated in the complaint?

The complaint alleges that in May, 1899, the plaintiff purchased from the defendant 1188 shares of the capital stock of the Eureka Silk Company for $13,379. That prior to this sale the defendant, who was president of the Eureka Company, represented to the plaintiff that the company was solvent and in a sound financial condition and that it owned 1225 shares of the common stock of the Summit Thread Company, which was worth its par value—$122,500. The complaint alleges further, on information and belief, that at the date of the purchase of the stock of the Eureka Company by the plaintiff, that company was insolvent and its stock worthless and in the latter part of the year 1901 it was placed in the hands of receivers by the United States Circuit

Court for the District of Massachusetts, and in due course its business was wound up and its assets distributed among its creditors, the stockholders receiving nothing. That the representations made by the defendant regarding the value of the stock of the Eureka Company and of the Summit Thread Company were false and were made knowingly by the defendant with intent to deceive the plaintiff and to induce him to purchase the stock of the Eureka Company. That the plaintiff believed the said representations and placed his sole reliance thereon in purchasing the stock as aforesaid. Judgment is demanded for $13,379, the amount paid for the Eureka stock. In short, the action is one to recover damages for false representations in the sale of stock. We think there has been a total failure to prove the cause of action stated in the complaint.

There is testimony that, in the spring of 1899, the defendant told the plaintiff that the Eureka Company was in good financial condition and that the Summit Thread Company was a good concern paying dividends and having at least $90,000 in quick assets. The difficulty is that there is no proof of the falsity of these statements when made, or that the defendant knew them to be false, or that the plaintiff relied upon them.

Conceding, for the moment, that the defendant subsequently abstracted part of the assets of the Eureka Company, the situation is no more favorable to the plaintiff. Of course an action would lie under such conditions, but it would not be one based on fraudulent representations. If A sells his furnished house to B for $5,000 on the truthful representation that the real property is worth $3,000 and the personal property $2,000, and subsequently removes the furniture, it is manifest that although B can enforce several remedies against A, an action for false and fraudulent representations is not among the number. It is, then, a sufficient answer to the proposition that the plaintiff was damaged by the sale to the defendant of the Eureka Company's stock in the Summit Company, that no cause of action based on this transaction is alleged.

The negotiations between the parties culminated in the agreement of March 11, 1899, which is signed by the plaintiff, Dimmock, Armstrong and Thompson, who represented the defendant, and is entitled, "Memorandum of agreement in lieu of all previous agreements." Clause No. 1 provides that the parties are to buy each, substantially, one-quarter of the preferred and common stocks of the Eureka Company for $25 per share for the preferred stock, the common stock to be given as a bonus. Clause No. 2 provides that when the stock is so acquired the Eureka Company will sell its plant and all its property except merchandise, bills receivable and Summit Thread stock, to the American Silk Manufacturing Company for $240,000. Clauses Nos. 3 and 4 relate to unimportant matters of detail. Clause No. 5 is as follows:

"The stock of the Summit Thread Co., owned in the Eureka Co., will be treated separately from the silk business of the Eureka Co. Whatever amount said parties may receive from the disposition of said stock above

the sum of ten thousand ($10,000) dollars, shall be so divided that said Thompson shall receive one-half and each of the other parties one-sixth thereof."

In this agreement the sale of the Summit stock for $10,000 was clearly contemplated and the plaintiff, who signed the paper, must have been aware that the sale was, to say the least, a possible contingency.

The defendant, pursuant to a resolution of the board of directors of the Eureka Company bought the stock for $10,000, Armstrong, one of the parties to the agreement of March 11, offering the resolution for the sale. The plaintiff when asked to give his understanding of the clause No. 5 of the March agreement, testified as follows:

"Mr King was to pay—I don't remember particularly about this, but I have this idea—that Mr. King was to pay $10,000, and then whatever it may have sold for, over and above $10,000, one-half of it was to go to his representative, Mr. Thompson, and the other half to go to Armstrong, Dimmock and Belding."

We are unable to see how the completion of a transaction of which the plaintiff was aware and in which he acquiesced by becoming a party to the agreement, can now be construed as a fraud upon his rights, and particularly are we unable to see how it can be available in an action based upon false and fraudulent representations.

We deem it unnecessary to characterize the sale of the Summit stock to King further than to say that in our opinion it is not relevant to any issue, upon which liability depends, which is raised by the pleadings.

The judgment is affirmed with costs.

In re WENTWORTH LUNCH CO.

(Circuit Court of Appeals, Second Circuit. March 16, 1908.)

No. 213.

1. BANKRUPTCY—PERSON SUBJECT TO ADJUDICATION—RESTAURATEUR.

A corporation engaged in operating a restaurant is not subject to adjudication as a bankrupt, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing an adjudication against any corporation engaged principally in "manufacturing"; a cook not being regarded as a manufacturer within the meaning of the term as so used.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4346–4358.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank of Mattoon, Ill., v. First Nat. Bank of Mattoon, Ill., 42 C. C. A. 4.]

2. SAME—"TRADER."

A corporation engaged in operating a restaurant is not a "trader," within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing an adjudication against a corporation engaged in trading; a "trader," within such section, being a person who buys goods to sell again without change of form or condition by combination and cooking, as in the case of a restaurateur.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 18.

For other definitions, see Words and Phrases, vol. 8, pp. 7048–7053.]

3. SAME—"MERCANTILE PURSUITS."

A corporation operating a restaurant is not subject to adjudication as a bankrupt under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing an adjudication against corporations engaged in "mercantile pursuits"; the dishes furnished not being merchandise, nor the proprietor a merchant engaged in "mercantile pursuits."

Noyes, Circuit Judge, dissenting.

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

R. R. Billington, for appellant.

M. P. Davidson (Alfred Yankauer, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. To an involuntary petition in bankruptcy against the Wentworth Lunch Company, the alleged bankrupt answered:

"That such Wentworth Lunch Company is and has ever been authorized and permitted by its certificate of incorporation to manage and conduct and carry on a restaurant and saloon. That the said Wentworth Lunch Company for the greater portion of six months next preceding the date of the filing of said petition has been engaged in carrying on a restaurant and saloon at Nos. 86 and 88 Fulton street, wherein are distributed foods and liquors at retail, and that said foods and liquors were consumed on the premises. That the said Wentworth Lunch Company is not and has never been engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, nor has it ever been engaged in any pursuit or business or trade or enterprise that would bring it within the purview of the bankruptcy act and any or all of its amendments."

The district judge held that the corporation was engaged principally in trading and mercantile pursuits, within the meaning of the act, adjudged it an involuntary bankrupt, and the bankrupt appeals.

The act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides that "any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits" may be adjudged an involuntary bankrupt. Obviously it was the intention of Congress to restrict by definition the kinds of corporation which might be so adjudged. All corporations for profit were not included; for example, such as operate bathing establishments, barber shops, billiard saloons, bowling alleys, circulating libraries, pawnshops, shooting galleries, etc. The fact that the language of the act of 1898 is much narrower than that of the act of 1867 which applied "to all moneyed business or commercial corporations and joint-stock companies," and that it was amended in 1903 by inserting the word "mining," is additional evidence of the intention of Congress to restrict the corporations falling within it. This court has so construed the act in Re New York & New Jersey Ice Lines, 147 Fed. 214, 77 C. C. A. 440.

The specific categories of the section are corporations engaged principally in printing, publishing, and mining, under which, clearly, a restaurant company does not fall. It remains to inquire whether it falls within the general categories of the section, viz., corporations engaged principally in manufacturing, trading, or in mercantile pursuits.

In one sense of the word transformation of raw provisions into cooked dishes is manufacturing; but no one would ever speak of a cook as a manufacturer, and that category may be excluded. A trader is one who buys to sell again, a definition which might apply to a saloon, but not to a restaurant, where the proprietor does not sell the provisions he buys in the form in which he buys them, but changed by combination and cooking into edible dishes.

The word "mercantile," though including trade, is larger, being extended to all commercial operations, so that we speak of shipping merchants, commission merchants, and forwarding merchants. Still we do not think that the dishes of a restaurant would ever be described as merchandise, or the proprietor as a merchant, or as engaged in mercantile pursuits. Printing and publishing companies were specified, presumably because they did not fall within the general categories, and we think the same reasoning applies to a restaurant company. The act has been most satisfactorily discussed by Judge Brown in Re New York & Westchester Water Company (D. C.) 98 Fed. 711 and by Judge Jenkins in Re Sureties Guaranty & Trust Company, 121 Fed. 73, 56 C. C. A. 654; and the precise question involved has been decided in accordance with the foregoing views by Judge Hallett in Re Chesapeake Oyster & Fish Company (D. C.) 112 Fed. 960.

The judgment is reversed.

NOYES, Circuit Judge, dissents.

LOVELESS v. SOUTHERN GROCER CO., Limited, et al.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1908.)

No. 1,701.

1. BANKRUPTCY—TRUSTEE—ACCOUNTS—HEARING.

Where, after one qualified as receiver of a corporation in an action in a state court and received and disbursed money, bankruptcy proceedings were brought against the corporation, and he qualified as trustee and filed his accounts in the state court to close the receivership, it was improper in the bankruptcy proceeding to summarily order him as trustee to pay into the registry all moneys received by him as receiver in the state court, since he is entitled to an opportunity to present his accounts to a court and have his claim for credits for payments as receiver passed on.

2. SAME—ACTION IN STATE COURT—EFFECT OF SUBSEQUENT BANKRUPTCY PROCEEDINGS.

Though bankruptcy proceedings brought against a corporation in the hands of a state court receiver suspended further administration of the corporation's estate in the state court, it remained for that court to transfer the assets, settle the receiver's accounts, and close its connection with the matter, and any errors committed in so doing could be rectified in due course and in the designated way.

Petition to Superintend and Revise Proceedings in the District Court of the United States for the Western District of Louisiana.

Frank P. Stubbs, Jr., and Geo. Wesley Smith, for petitioner.

John M. Mulholland, for respondents.

Before McCORMICK and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. On March 27, 1905, John F. Loveless, the petitioner herein, was appointed receiver of the Hemler-Thomason Company, Limited, a commercial corporation, by the district court of the parish of Richland, La. He qualified as such receiver and gave bond, with surety, in the sum of $5,000. He took possession of the assets of the corporation, sold the merchandise under the order of the state court, and made collections of claims, and from these and other sources he received about $2,100. He paid out as receiver about $700 in court costs, keeper's fees, taxes, attorney's fees, and receiver's commissions. On July 23, 1905, after the receiver had made these payments, creditors of the Hemler-Thomason Company, Limited, filed in the bankruptcy court below an involuntary petition in bankruptcy against the corporation, and it was duly adjudicated a bankrupt on August 26, 1905. On October 10, 1905, Loveless, who was receiver in the state court, was elected trustee in the bankruptcy court, and duly qualified as such trustee on October 17, 1905. For the purpose of closing his receivership in the state court, Loveless filed his accounts in that court on January 25, 1906. Objections to the account were made by the Southern Grocer Company, Limited, and other creditors of the bankrupt. The opposition was tried, and was under submission, when on April 26, 1907, the Southern Grocer Company, Limited, and other creditors of the bankrupt, filed a petition in the court below praying for a rule on Loveless, as trustee, requiring him to pay into the registry of the bankruptcy court all moneys received by him as receiver in the state court. The prayer of this petition was granted by the referee in bankruptcy, and, on petition for review, was affirmed by the bankruptcy court. The record shows, without dispute, that the trustee, as such, had paid out in costs and dividends about $1,300 under orders of the bankruptcy court. The summary order requiring him to make payment into the bankruptcy court raises a controversy as to $660.34. This sum, or most of it, petitioner claims that he paid out legally and properly while he was acting as receiver in the state court, and his contention is that he should not be required to pay the money again, and, at least, that he should not be required by a summary proceeding to pay the money into the bankruptcy court without a hearing, either in that court or in the bankruptcy court, on the question as to whether or not he is entitled to credits for the payments made by him as receiver. The question as to the correctness of these disbursements has not been passed on by the state court, nor by the court below, and, of course, is not before this court for decision.

We are asked to review and vacate or correct the summary order of the court below requiring the payment of the sum in dispute into court before the petitioner has had a hearing on the correctness of his accounts and the legality of the contested disbursement.

If the order to pay the money into court stands, the summary proceeding against the trustee can be made the basis of proceedings for contempt if he fails to obey the order. It seems to us just and right

that he should have an opportunity to present his accounts to a court and to have his claim for credits for payments made by him while receiver in the state court passed on. He should not be required to pay the money into court by a summary proceeding that deprives him of the right to a hearing on the disputed items of his account.

It is true that the bankruptcy proceedings operated to suspend the further administration of the insolvent corporation's estate in the state court; "but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way." In re Watts and Sachs, 190 U. S. 1, 35, 23 Sup. Ct. 718, 47 L. Ed. 933.

The petition for revision is granted, the decree of the court of bankruptcy is reversed, and the cause remanded for further proceedings consistent with the opinion of this court.

The costs of the proceedings in the court below and in this court will be taxed against the respondents, who moved for the rule in the lower court.

And it is so ordered.

WICHITA R. & LIGHT CO. v. DULANEY.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1908.)

No. 2,653.

1. WRIT OF ERROR—REVIEW—SCOPE.

On a writ of error the Circuit Court of Appeals can only consider errors of law committed by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3893-3896.]

2. SAME—REFUSAL TO DIRECT VERDICT.

Before the Circuit Court of Appeals, on writ of error in a personal injury action, can reverse a judgment for plaintiff on the ground that a verdict should have been directed for defendant on the theory that plaintiff's contributory negligence caused the injury, it must clearly appear that the evidence as to plaintiff's negligence was such that no verdict in his favor could have been sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3938-3943.]

3. SAME.

On writ of error from a judgment for plaintiff in a personal injury action, a statement in defendant's brief showing that the Circuit Court of Appeals is asked to pass upon the weight and credibility of testimony upon an issue as to plaintiff's contributory negligence precludes a reversal on the theory that a verdict should have been directed for defendant on the ground of such negligence, since it was the jury's province to pass upon the weight and credibility of the evidence, and not the trial judge's.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

4. SAME—VERDICT—CONCLUSIVENESS.

A verdict for plaintiff in a personal injury action on an issue of contributory negligence is conclusive on writ of error, where there is evidence on which to base it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

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

Kos Harris and V. Harris, for plaintiff in error.

Houston & Brooks, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Dulaney sued the railroad and light company to recover damages for personal injuries received by himself on August 9, 1905, at the city of Wichita, Kan., by reason of the carriage in which he was riding colliding with a car of the company. At the trial Dulaney recovered a verdict against the company, upon which a judgment was subsequently entered. To reverse this judgment a writ of error was sued out from this court. One of the defenses urged in the court below, was contributory negligence on the part of Dulaney. At the close of all the evidence counsel for the company made the following motion:

"Comes now the defendant, at the conclusion of all the evidence in the above-entitled action, and moves the court to direct a verdict in favor of the defendant in the above-entitled action, for the reason that all the evidence in said cause, taken together, establishes that the said plaintiff was guilty of contributory negligence, and but for which contributory negligence the injuries to said plaintiff would not have been received."

This motion was overruled by the court, and an exception taken. The only assignment of error argued in this court is based upon said ruling. We must bear in mind that on this writ of error we can only consider errors of law committed by the trial court, and before this court can reverse the judgment below on this record it must clearly appear that the evidence introduced at the trial in regard to the contributory negligence of Dulaney was such that no verdict in his favor could have been sustained, if rendered. We have carefully read the evidence in the record, and find that there is a conflict of testimony upon every point bearing upon the question of contributory negligence. It would serve no useful purpose to discuss in a lengthy opinion the evidence which tends to sustain or disprove this issue, as the very necessity of discussing it only serves to show that the action of the trial court, in submitting this issue to the jury, was without error. We think the language used by counsel for plaintiff in error in concluding a brief of 40 pages upon the question of Dulaney's contributory negligence precludes the plaintiff in error from asking this court to reverse the judgment below for the error assigned. The language referred to is as follows:

"Counsel for plaintiff in error insist that an examination of the testimony in this case discloses the contributory negligence of Dulaney; that his statement, made at the time he was hurt, stated the facts with regard to his own negligent acts; that the persons on the car, and in charge of the car, know better as to the speed of the car and the ringing of the gong and the conduct of Dulaney than any other person; that the testimony of the other witnesses, given long after the accident, as to the distance between the car and Dulaney's vehicle, is not entitled to as much weight as the testimony of the other witnesses; that the testimony of those who did not hear the gong or bell is entitled to but little weight, when you consider the fact that part of

the plaintiff's witnesses did hear the gong—did state that the car ran but a car length, and that the motorman 'hollered' to Dulaney to get off the track."

From this statement it plainly appears that we are asked on this writ of error, which raises only questions of law, to pass upon the weight and credibility of testimony, which it is unnecessary to say we have no authority to do. It was the province of the jury to pass upon the weight and credibility of the evidence taken in the court below, and not of the trial judge. So far as the statements of Dulaney made at the time of the accident are concerned, they would only affect his credibility as a witness on the trial, and he denied at the trial ever making the same. A careful examination of the whole evidence has convinced us that there was evidence upon which the jury would have been justified in finding that Dulaney was not guilty of contributory negligence. By their verdict the jury upon such evidence found in favor of Dulaney, and the question is therefore closed.

Finding no error in the record, the judgment of the court below should be affirmed; and it is so ordered.

HARVEY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 3, 1908.)

No. 36.

INDICTMENT—AIDER BY VERDICT—GOOD AND BAD COUNTS.

Where accused, a national bank clerk, was indicted under several counts for making false entries in the bank's books, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], and on conviction on several counts was sentenced to imprisonment for a term less than the maximum provided for a single offense, and at least one of the counts in the indictment was sufficient, the sentence would be applied to such count, and the validity of the remaining counts regarded as immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 651–654.]

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

R. H. Jackson, for plaintiff in error.

John W. Dunkle and R. M. Gibson, for the United States.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff in error, Thomas W. Harvey, a teller and clerk in the Enterprise National Bank, was indicted for making 12 false entries in the bank's books, contrary to Rev. St. 5209 [U. S. Comp. St. 1901, p. 3497], which provides:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or willfully misapplies any of the money, funds or credits of the association; or who, without authority from the directors issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond.

draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

Each of the entries was made the subject of three counts, the charges being respectively laid: First, with intent to injure and defraud the banking association; secondly, with intent to deceive the agent who might be appointed to examine the affairs of said association; and, thirdly, with intent to deceive the directors thereof. The verdict found "the defendant guilty in manner and form as charged in the first 33 counts of the indictment, and not guilty in counts 34, 35, and 36 of the indictment." The court having sentenced the defendant to seven years' imprisonment, he sued out this writ.

No question is raised as to the fairness of the trial or the sufficiency of the evidence to warrant the verdict. The two assignments of error, viz.:

"(1) The verdict of the jury being as follows: 'We, the jury in the case of the United States v. Thomas W. Harvey, do find this defendant guilty in manner and form as charged in the first 33 counts of the indictment and not guilty on counts 34, 35, and 36 of the indictment'—is erroneous in this: That it is a conviction for three separate and distinct offenses for the commission of but one act, and in the aggregate is a conviction for 33 separate offenses for the commission of but 11 separate acts, namely, the making of 11 false entries.

"(2) The court erred in entering judgment and pronouncing the following sentence: 'And now, to wit, July 9, 1907, the sentence of the court is that you be imprisoned in the Western Penitentiary of Pennsylvania for and during the term of seven years and be subject to the same discipline and treatment as convicts sentenced by the courts of the state, and while so confined therein you shall be exclusively under the control of the officers having charge of the said penitentiary; that you pay the costs of this prosecution, and stand committed until this sentence be complied with'"

—in effect simply challenge the sufficiency of the indictment and verdict to warrant the sentence imposed.

It will be noted the sentence of seven years was less than the limit of ten years which could be imposed for any single violation of this act. Now when a sentence is imposed generally and without application to any special count, and any particular count warrants such sentence, the sentence is applied to such warranting count. Thus in Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. E. 839, it is said:

"As the verdict was rendered upon all the counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good, if any such count is found sufficient."

This was but a restatement by the Supreme Court of the law as laid down in its earlier case of Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966, and followed in its later case of Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297. In this indictment three counts were based on each entry, to meet the three

provisions of the act, viz., intent to defraud the bank, intent to defraud an agent to examine, and intent to defraud directors. These three counts, involving the same subject-matter, were, as provided in Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], joined in one indictment, and each of them, standing by itself, charged the defendant in the exact words of the statute with a crime thereunder. But such count—for example, the one based on an intent to defraud the bank—follows the exact wording of the statute, and, being sufficient to warrant the sentence of seven years imposed by the court, the question whether the court could have imposed further sentence on the counts based on the same entry, which in one case charged an intent to deceive an agent appointed to examine, and in the other an intent to deceive a director, becomes unimportant, and, without expressing any opinion thereon, it suffices to say it is not here involved, and this renders of no practical effect the question raised as to the verdict by the first exception, that it is a conviction for three separate and distinct offenses for the commission of but one act, for any single one of the thirty-three counts of this indictment warrant the seven-year sentence here imposed.

Finding no error in the court below, the writ of error is dismissed, and the case remanded to the court below to enforce sentence.

GERALD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1908.)

No. 1,472.

ALIENS—EXCLUSION—CHINESE—OFFENSES—EVIDENCE.

In a prosecution for attempting to land certain Chinese laborers not entitled to enter the United States, evidence *held* to show a landing, an attempt to land, or the permitting of the landing of the Chinese by the defendant, and to sustain a conviction.

[Ed. Note.—Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Wm. J. Variel and J. Vincent Hannan, for plaintiff in error.

Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. Plaintiff in error was defendant in the court below to an indictment charging him with having at a certain stated time and place willfully, unlawfully, and knowingly brought within the United States on a certain named vessel, from the Republic of Mexico, certain named Chinese laborers, and did then and there land, attempt to land, and permit them to be landed within the United States, contrary to the provisions of the Chinese exclusion acts. The record shows, among other things, this stipulation:

"It is stipulated, by and between the parties hereto, that the evidence offered by the government showed that the defendant Gerald knowingly, and

with intent to violate the Chinese exclusion laws, took the eight Chinese mentioned in the indictment as having been brought into the United States by defendant on his boat Neptune, aboard his boat Neptune at a point in Lower California, Mexico, about eight or nine miles north of Ensenada, under previous arrangements made between said defendant Gerald and a Chinaman in Ensenada and certain parties in Los Angeles, through Fredrico Goldbaum, a witness for the government; that defendant took said eight Chinamen aboard his boat Neptune for the purpose and with the intent of landing them in the United States at a point on the coast of Orange county, California, and that defendant was to receive therefor the sum of eight hundred (800) dollars; that defendant knew the said Chinese persons were not lawfully entitled to enter or be in the United States."

The record shows, further, that the only point presented by the plaintiff in error is "the sufficiency of the evidence to show a landing, attempt to land, or the permitting of the landing, of these Chinese by the defendant." Since it was a conceded fact that the defendant, knowing that the Chinamen in question were not entitled to enter or be in the United States, took them aboard his boat Neptune at a point in Lower California, Mexico, for the purpose and with the intent of landing them in the United States under a previous contract entered into by him to violate its laws for a money consideration, the sole point of the plaintiff in error is fully answered by the following testimony of the witness John M. Ballou, who testified:

"That he was, on March 1, 1906, a Chinese inspector in the Immigration Department of the United States, located at San Diego. That on and previous to March 1, 1906, he had been on the watch for defendant Gerald and his boat Neptune, anticipating that defendant would bring in some Chinamen from Mexico. That on March 1st, early in the afternoon, he had hired a small launch with a man by the name of Francisco Mattos to run it, to take him around the Bay of San Diego to look for the Neptune. That he ran around the wharves in the launch, and was just coming home when he saw the two boats—Mike List's boat, the Skipjack, and the Neptune—coming down the bay in the ship's channel, about one-half to three-quarters of a mile from the quarantine station. The Neptune's sails were up, but were torn. There were three straight rents pretty near the length of the sail, but the sail could hold a good deal of wind. We were just off the end of the wharf, near the mooring place of the Neptune and Skipjack, and waiting for them to come up. When they had reached the mooring place of the Skipjack, we ran our launch alongside of the Neptune, and I went aboard the Neptune. The defendant and the woman were the only persons visible on deck. The woman was at the hatch, bailing out water from the hold with some kind of a cooking utensil. Gerald had hold of the rudder. I walked over to the hatch and spoke to the woman. She would not let me go down into the hold. I looked toward the defendant, and he told the woman to get out of the hatchway and let me go down. I then went down through the hatch into the hold. There were no Chinamen visible when I first went into the hold, and I concluded that there were no Chinamen on board, and had started to come out, when I noticed the bare ankle of a Chinaman projecting from under some wet rags and sacks. I then discovered that the eight Chinamen were lying, or crouched, on a bench or platform which ran around the side of the boat, about two feet from the floor or bottom of the hold. The floor was covered with water, which reached up to about where the Chinamen were lying. They were wet. I then came out of the hold onto the deck. Up to this time no one had spoken to me. I came up then, and asked Mr. Gerald if he was captain of the boat, and he said, 'Yes;' and I said, 'What is your name?' and he said, 'William Gerald.' I said, 'Tell the Chinamen to get out and dress and get into this boat of mine,' and he did, and I said, 'You seem to have some trouble here.' 'Yes,' he said, 'I got on top of Coronado Island, and I found these Chinamen. I do not know who left them there. I started to

bring them in, and give them over to the proper officer.' and he said, 'Are you the proper officer?' And I said, 'I am a Chinese inspector,' and I got them all in the little boat, eight of them. Gerald got in, and I got List and his partner, and we went over to the Star Boathouse. When I got to the Star Boathouse, I notified them that I put them all under arrest. I telephoned for a policeman and deputy marshal and put them in jail. From the first time I saw the Neptune until the time I went into the hold, I did not see any Chinamen. Nobody told me there were any Chinamen aboard until I went down into the hatch. I was very much surprised to find them. It is pretty hard to say how much water was in the hold. It was up to the seat of a sort of a platform in the hold where they were lying around. I guess some of them had got water on them. The defendant did not tell me before I went into the hold that he had eight Chinamen there. Francisco Mattos was with me in charge of the launch on which I was during the whole time. The Neptune is about 23 or 24 feet long, and the hold was not more than 4½ feet deep."

The judgment is affirmed.

SIMPSON v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. February 19, 1908.)

No. 68.

1. RELEASE—CLAIM FOR PERSONAL INJURY—ADMISSIBILITY AS EVIDENCE.
   In an action at law for personal injury, it was no valid objection to a written release of liability offered in evidence by defendant that plaintiff did not know, when he signed it, that it was a general release, or that he had sustained any physical or personal injury; it not appearing that the release was obtained by fraud or misrepresentation, or that plaintiff was not in full possession of his faculties when he executed it.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, §§ 30–32.]

2. WRIT OF ERROR—HARMLESS ERROR—JUDGMENT.
   Since a sealed release of defendant's liability for injury to plaintiff, not obtained through fraud nor misrepresentation, nor while plaintiff was not in full possession of his faculties, was a bar to an action for such injury, and entitled defendant to immediate judgment, plaintiff was not prejudiced by a reservation made and considered by the court before entering judgment.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4033–4036.]

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

Samuel J. Graham, for plaintiff in error.
M. W. Acheson, for defendant in error.

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

DALLAS, Circuit Judge. This was an action by the plaintiff in error to recover for personal injury which he alleged he had suffered by reason of the negligent operation of a train of the defendant railroad company, upon which he was a passenger. The defendant adduced an instrument under seal by which the plaintiff had expressly released unto the said railroad company all claims and demands which he had or might have against it "for or by reason of any matter, cause, or

thing whatsoever, and more especially by reason of all losses, damages, expenses of all kinds, and all claims arising in any way from personal injuries sustained by me [him] on account of the accident" referred to in the declaration. When this release was offered in evidence, its execution by the plaintiff was admitted, and his objection to its reception was put wholly upon two grounds:

"That the plaintiff did not know that he was executing a general release, and, furthermore, that he did not know at the time the release was executed that he was suffering from any physical or personal injury."

Neither of these supposed reasons for excluding the release was well founded in point of law. The proceeding was an action at law, and the court of trial was a court of law. There was no evidence that the writing in question had been obtained by fraud or misrepresentation, or that the plaintiff was not in the full possession of his faculties when he executed it; and as "it is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument" (George v. Tate, 102 U. S. 570, 26 L. Ed. 232), the learned judge was clearly right in admitting the document in evidence.

Moreover, it might properly have been made the basis of a direction to the jury to render a verdict for the defendant, and consequently the case may now be disposed of precisely as if such direction had been given. As the release was a bar to the action, it entitled the defendant to immediate judgment; and hence no substantial wrong to the plaintiff could result from the reservation that was made and considered by the court prior to its entry.

The judgment is affirmed.

In re BACON.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 69.

BANKRUPTCY—JURISDICTION—ESTOPPEL TO DENY.

On a petition to review an order affirming a referee in bankruptcy's order holding the title to personalty claimed by bankrupt's wife to be in the trustee, she cannot question the referee's jurisdiction to examine into her claim, where she took no steps to review previous orders of the District Court ordering the bankrupt to deliver the property to the trustee, subject to the wife's right to establish her title thereto, the bankrupt complying with the order, and affirming the referee's order requiring her to forthwith assert her title, and where she appeared before the referee and answered his order, and much testimony was taken.

Petition to Review Order of the District Court of the United States for the Western District of New York, in Bankruptcy.

This cause comes here upon petition to review an order of the District Court affirming an order of the referee in bankruptcy which held that the title to certain property was in the bankrupt, instead of the claimant, his wife Pauline M. Bacon.

Hammond & Hammond, for petitioner.
George E. Zartman, for respondent.
Frederick L. Manning, for trustee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The property consisted of a certificate of stock for 200 shares of Steel common, a certificate for 100 shares of Southern Railway, and a check of Haven & Clement, brokers in New York City, for $2,053.69. The certificates stood in the name of third parties, and transfer thereof had been executed in blank. The name of the bankrupt was filled in, for safety in transmission, when the brokers sent them to him in April, 1904. The check was to his order and represented a balance of account which the brokers had carried on for some time in his name. Immediately upon receipt of the property Bacon indorsed the check to his wife and placed it and the certificate in a safe in his house. He was adjudicated a bankrupt on May 4, 1904. In the summer of 1904 he took the property from the safe, inclosed it in an envelope marked to be delivered to his wife or himself, and placed it as a special deposit in a bank. His wife and himself both testify that the stock was bought with her money by him as her agent, and that the transactions with Haven & Clement were really her own, with her own money conducted by her husband as her agent.

On September 6, 1904, after hearing the attorneys for the trustee and the bankrupt and filing an affidavit of the wife setting up a claim to the property, the District Court made an order which directs that the bankrupt forthwith deliver the property to the trustee, and that he also execute such indorsements of the check and transfers of the stock as would enable the trustee to collect the check and make good delivery of the stock. It further provides that the trustee shall hold the property or its proceeds "as a special fund until the said Pauline M. Bacon shall by a final order or decree of this court, or by a final decree of some other court of competent jurisdiction, establish her title to said property as the owner thereof; * * * this order being without prejudice to the right of Mrs. Pauline M. Bacon to establish the title which she claims to said property and to recover the same or the value thereof." This order was never appealed from, nor was any petition to review it filed. In compliance with its terms the bankrupt went with the trustee to the bank and there turned over the property to him on September 9, 1904. Subsequently, on November 3, 1904, the referee made an order requiring the wife to "forthwith assert and propound to the referee any right, title, claim, or interest which she has or claims to have in said check, or in said certificates of stock, or in either or any of them." This order was reviewed by the district judge, who affirmed it July 15, 1905, filing the following memorandum:

"The property was in the possession of or under the control of the bankrupt at the time of filing the petition, and accordingly the bankruptcy court has jurisdiction to determine the title to the check and certificates of stock in question. The right to litigate the bankrupt's title is not interfered with.

The direction of the referee that Mrs. Bacon have leave to prove her superior claim to the property before him was proper. The report is approved."

No steps were taken to review this order of the District Court. The wife appeared and filed an answer, much testimony was taken, the referee held that the title to the property was in the trustee, and his order to that effect was sustained by the District Court February 19, 1907. The petition now before us is to review said last-mentioned order.

The property in question was in the actual custody of the trustee, having been turned over to him by the bankrupt himself, when the claim of title was examined into. Having elected to go on with such examination without taking any steps to review the orders under which it was conducted, petitioner cannot now be heard to question the jurisdiction. If consent were necessary to give jurisdiction, such consent will be inferred from the circumstances that she proceeded under the order of July 15, 1905, without seeking to review it. In disposing of the case on this ground, however, we are not to be understood as expressing the opinion that such consent was necessary. The situation of the case as presented renders it unnecessary to decide that question, to which the briefs and arguments were mainly addressed.

The order of the District Court is affirmed.

In re WATERLOO ORGAN CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 154.

BANKRUPTCY—CLAIMS—COLLATERAL BONDS.

A bank having taken $10,500 of bankrupt's bonds to secure indebtedness to it on bankrupt's own and indorsed negotiable paper, holding $11,000 of bankrupt's own and $49,000 of its customers' notes when the petition in bankruptcy was filed, and the Circuit Court of Appeals having directed that the bank must elect whether it would make the bonds good by allowing the notes for which the bonds were collateral to be covered into the estate, or would press its claim as a general creditor on the notes, leaving the bonds without consideration, the District Court properly ordered that the bank might, before dividend, account with the trustee for the bonds by delivering to him notes in equal amount "made" or "indorsed" by bankrupt and discounted by the bank for bankrupt before bankruptcy; it appearing that part of the $11,000 worth of bankrupt's own notes have passed out of the bank's possession.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York, in Bankruptcy.

See 154 Fed. 657.

This cause comes here upon a petition to review an order which provided that the First National Bank of Waterloo might, before dividend, account with the trustee for 21 bonds of the organ company by delivering to him notes made or indorsed by said organ company which were discounted by said bank for said company prior to its bankruptcy, and which the bank still holds unpaid as valid obligations of

the company. Upon delivery of such notes to the amount of $10,500, the par value of the 21 bonds, the bank was to retain the same, with right to prove claim upon them. If the bank should be unable to deliver such notes to that amount, it was to retain bonds only to the amount actually delivered, returning the balance of the bonds to the trustee.

Frederick L. Manning and George E. Zartman, for petitioner.
J. N. Hammond, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The explanation of this order is found in earlier decisions of this court, made in this same proceeding. 134 Fed. 341, 67 C. C. A. 255; 154 Fed. 657, 83 C. C. A. 481. At the time of bankruptcy the bank held 21 $500 bonds of the bankrupt corporation. It was contended that they had been issued without consideration and were void. It was shown that they were taken as collateral security at a time, when the company was indebted to the bank on its own and indorsed negotiable paper in the amount of about $30,000; that the company wanted a larger amount of discounts, and that under an agreement then made and upon collateral then furnished (including the bonds) the bank increased the discounts by much more than $10,500, so that at the time of filing petition in bankruptcy it held $11,000 notes of the corporation and about $49,000 of customers' notes indorsed by it.

This court held on the first appeal that consideration for the bonds was sufficiently shown and that the bank could prove them as a claim. On the second appeal the trustee contended that the bank should deliver to him $10,500 of the notes which the bank produced, made or indorsed by the organ company; and it was held that the same notes could not be used to make out a valuable consideration for the bonds and also be independently proved upon as existing indebtedness, and we directed that the bank must elect whether it would make the bonds good by allowing the consideration it gave for them (these notes) to be covered into the bankrupt estate, or would press its claim as a general creditor on the notes, leaving the bonds without consideration. In discussion of the question the phrase was used "the $10,500 represented by these company notes"; but it is quite apparent from both opinions that no differentiation was made between organ company paper and customer's paper indorsed by it, upon which the bank had advanced money subsequent to the transfer of the bonds. It now appears that some of the corporation notes (part of the $11,000) have passed out of the possession of the bank; but that is immaterial, so long as the bank can deliver the $10,500 in notes made or indorsed by the organ company.

The order is affirmed, with costs.

KERR v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. November 7, 1907.)

No. 1,379.

1. COURTS—CIRCUIT COURTS OF APPEALS—MODE OF REVIEW—FORFEITED RECOGNIZANCE—CERTIORARI.
   A judgment at law in a federal court on scire facias on a forfeited recognizance is reviewable by the Circuit Court of Appeals, alike with the Supreme Court, only on a writ of error, and not by appeal.

2. SAME—AMENDMENT.
   Where a judgment on a scire facias on forfeited recognizance was sought to be reviewed on appeal, instead of a writ of error, the objection could not be waived by appearance, nor cured by amendment, under Rev. St. § 1005 [U. S. Comp. St. 1901, p. 714], authorizing amendment of a writ of error to cure certain objections therein.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

William J. Lacy and Seward S. Shirer, for appellant.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. In this appeal review is sought of a judgment entered at law upon scire facias on a forfeited recognizance, with no writ of error issued. The doctrine is well settled that the Circuit Court of Appeals, alike with the Supreme Court, can review such proceedings at law only when brought by writ of error, and that no jurisdiction to that end arises through an appeal. See opinion of this court, in Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379, reviewing the authorities; also Muhlenberg County v. Dyer, 65 Fed. 634, 13 C. C. A. 64. The objection, therefore, cannot be waived by appearance, nor be cured by amendment. In the absence of a writ of error, the cases of City of Wilmington v. Ricaud, 90 Fed. 212, 32 C. C. A. 578, and Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655, and the provisions of section 1005, Rev. St. [U. S. Comp. St. 1901, p. 714], which are cited as authority for amendment, are inapplicable.

The appeal must be dismissed, and it is so ordered.

HILDRETH v. NORTON.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 150.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Where a patent is a very recent one, and its validity has not been adjudicated, and both validity and infringement are denied, a preliminary injunction against its infringement should not be granted, but the issues should be left for determination at final hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 474, 475.

Grounds for denial of preliminary injunction in infringement suit, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

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

For opinion below, see 154 Fed. 82.

H. A. Touilmin (J. H. Dyer and Henry A. Williams, of counsel), for appellant.

F. P. Fish, William A. MacLeod, J. Lewis Stackpole, and William A. Copeland, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. We think that a case for preliminary injunction was not made out. The patent was a very recent one—issued only a few weeks before the motion was made. It had never been adjudicated. The decision in interference was not the equivalent of adjudication as to patentability and infringement; and sufficient time had not elapsed to present proof of general acquiescence. Validity and infringement are vigorously disputed, and we think both questions should be left for determination at final hearing. Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907, 82 C. C. A. 653; Newhall v. McCabe, 125 Fed. 919, 60 C. C. A. 629.

AMERICAN GRASS TWINE CO. v. CHOATE et al.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1907.)

No. 1,333.

PATENTS—INFRINGEMENT—MACHINE FOR MAKING GRASS TWINE.

The Lowry patent, No. 524,423, for an automatic feeder for twine making machines, is merely for an adaptation of old elements for use in connection with a machine for making grass twine, and must be limited to the particular form of adaptation shown. Neither such patent nor the Lowry patent, No. 654,991, for a machine for making grass twine, is infringed by the machine of the Monahan and Kieren patent, No. 785,070.

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

The decree appealed from dismissed appellant's bill for want of equity. Infringement was charged of patent No. 524,423 issued on August 14, 1894, to Lowry for an automatic feeder for twine making machines, and of patent No. 654,991 issued on July 31, 1900, to Lowry for a machine for making grass twine.

The following claims of the first patent are relied on:

"1. In a machine of the class described the combination, with the feed box or hopper, of a revolving wheel or disk, provided at its periphery with jaws adapted to grasp a portion of the contents of the hopper, substantially as and for the purpose set forth.

"2. In a machine of the class described, the combination of a feed box or hopper, the revoluble feed wheel having jaws adapted to grasp a portion of the contents of the hopper and a receiving trough to receive the material carried from the box or hopper by the jaws of the feed wheel, substantially as set forth."

Four claims of the second patent are presented:

"13. In a machine of the class described, a carrier provided with gripping-jaws, a feedway, plates having feeding-fingers for feeding the material

through said feedway and into the path of said gripping-jaws, and means for yieldingly opposing the action of said fingers, and means for actuating said carrier and plates, as and for the purpose set forth.

"14. In a machine of the class described, a carrier provided with gripping-jaws, a feedway, means for feeding the material through said feedway and into the path of said gripping-jaws, and a door for the end of said feedway, said door being yieldingly held in closed position, and means for actuating said carrier, as and for the purpose set forth."

"44. In an organized machine for making grass twine, a twisting mechanism, means for delivering the grass, straws, or stalks thereto one after the other in uniform succession and at uniform distances apart, a wrapping mechanism arranged to receive the twisted material from said twisting mechanism and adapted to apply a wrapping-thread thereto, a feeding mechanism arranged to feed the twisted or wrapped material through said wrapping mechanism, in combination with a winding-reel arranged to receive the twisted or wrapped material and means for actuating said several mechanisms in unison, as and for the purpose set forth.

"45. In an organized machine for making grass twine, a twisting mechanism, means for delivering thereto the stalks or stems of grass, one after the other in uniform succession, a wrapping mechanism arranged to receive the material from said twisting mechanism, and to apply a wrapping thread thereto, and a feeding mechanism for feeding the twisted and wrapped material through the machine, in combination with a winding-reel arranged to receive the twisted and wrapped material, and a deployer for guiding the material to and along said reel, and means for actuating said several mechanisms in unison."

Frank F. Brown, for appellant.

Robert H. Parkinson (C. T. Benedict, on the brief), for appellees.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). No one reference of the prior art is sufficient of itself to rebut the presumption of the novelty of the claims of the first patent. Whether invention was involved is a question we find unnecessary to determine on this appeal. In view of the prior automatic feeders, the inventive genius of Lowry was displayed, if at all, in modifying, combining, and adapting old elements to work successfully upon the materials used in making the twine described in cause No. 1,332, herewith decided. "There is room for such an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same general field." Loew Supply & Mfg. Co. v. Fred Miller Brewing Co., 138 Fed. 886, 71 C. C. A. 266. Appellees' automatic feeder is made under patent No. 785,070, issued on March 14, 1905, to Monahan and Kieren, assignors. Considering Lowry and the patentees of appellees' feeder "as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. The presumption from the grant of the letters patent is that there was a substantial difference between the inventions." Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. This presumption, far from being overcome, is rather confirmed by a comparison of appellees' feeder with the claims of appellant's patent. The vital element of both of Lowry's claims is the revolving wheel provided at its periphery with jaws adapt-

ed to grasp a portion of the contents of the hopper and carry it to the receiving trough. Lowry states in his patent that other forms of jaws or nippers than those he then described might readily be employed; but the whole idea and the only idea of conveying stalks of grass to the twisting mechanism was that they should be picked up by the biting action of jaws or nippers and carried along thus to the desired point and then dropped by the opening of the jaws. In appellees' feeder the stalks are carried forward by friction between moving surfaces below and above—below, a belt and a rubber roller across the bottom of the feedway; above, thin roller segments with grooved peripheries adapted to press against a few stalks at a time. Only the general results are the same; the ideas of means differ radically.

In the thirteenth and fourteenth claims of the second patent a material and indispensable element is "a carrier provided with gripping-jaws." As already found by us, appellees' machine is not provided with such a carrier or with its equivalent within Lowry's expressed idea of means.

In the forty-fourth and forty-fifth claims two essential elements are "a twisting mechanism" and "a wrapping mechanism." This machine produces the Lowry twine in which the stalks are first twisted together and then wrapped. Appellees' machine has no separate and independent twisting mechanism; and it is claimed that the product of their machine is without twist. Our examination leads us to conclude that the only twist is such as unavoidably would come from wrapping spirally the long stalks of marsh grass that are brought to the wrapping mechanism in straight and parallel relation to each other. The element of "a wrapping mechanism" in appellees' machine cannot also be the element of "a twisting mechanism" in the sense of appellant's claims merely because the wrapping mechanism inevitably tends to give a slight twist to the pliable strands. See Ajax Forge Co. v. Pettibone, 125 Fed. 748, 753, 60 C. C. A. 516. Appellees are therefore not guilty of infringing the claims.

The decree is affirmed.

RAINEAR v. WESTERN TUBE CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

No. 47.

1. PATENTS—INVENTION AND INFRINGEMENT—PIPE COUPLING.

The Hewlett patent, No. 640,197, for a pipe coupling, which consists essentially in the combination in a union 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 sealing joint at the opposing ends of tailpiece and spud, thereby avoiding the rusting of the joint and securing a closer sealing joint, was not anticipated and discloses invention. Also *held* infringed.

2. WORDS AND PHRASES—"UNION."

A "union" is a coupling nut, provided at one end with an internal shoulder, adapted to engage a pipe, called a spud, sleeved through the nut

and adapted to engage such internal, by its external, shoulder; the other end of the nut being internally threaded and adapted, as it is screwed up, to draw in and seat the beveled end of the spud.

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

For opinion below, see 156 Fed. 49.

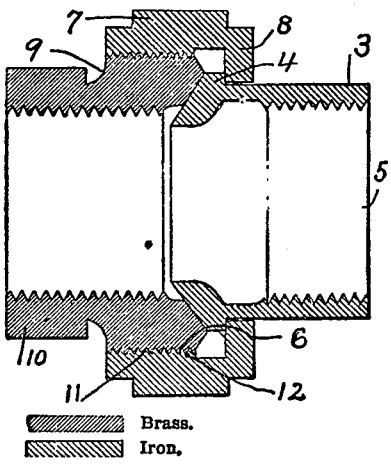
Philip C. Dyrenforth, for appellant.

Bakewell & Byrnes and Charles MacVeagh, for appellee.

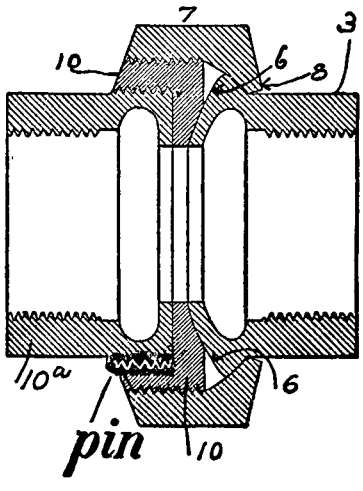
Before DALLAS and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

BUFFINGTON, Circuit Judge. In the court below, the Western Tube Company, the owner of patent No. 640,197 to Alfred M. Hewlett for a pipe coupling brought suit for infringement thereof against Charles W. Rainear. That court decreed the patent valid and the three claims thereof infringed. From such decree Rainear appealed. This patent concerns what are called "unions" or pipe coupling, which in steam and water practice are liable to be often opened. A union is a coupling nut, provided at one end with an internal shoulder, adapted to engage a pipe, called a spud, sleeved through the nut and adapted to engage such internal, by its external, shoulder. The other end of the nut is internally threaded and adapted, as such nut is screwed up, to draw in and seat the beveled end of the spud. These three pieces—nut, tailpiece and spud—were ordinarily made of the same metal; that is, all iron or all brass. The latter metal was expensive, and the seating faces thereof had to be carefully ground. When the union was all iron the screw threads of the joint rusted and the union was disconnected with difficulty. When subsequently recoupled, the sealing faces, being rustpitted, were likely to leak. Leaking was prevented by inserting gaskets, but these gathered rust and decayed. Being articles of very common use, unions must be inexpensive, and the cost of all brass was prohibitive for such common use. The object of this patentee was to make a union which could be uncoupled without injury, which would not rust and at the same time be inexpensive. In solving that problem, he, in common with the plumber's art, was aware that brass and iron in contact will not rust; and that iron being harder than brass, sealing surfaces of those metals grind and seal into each other. In the face of these facts long and well known to the plumber's art, it is remarkable that no one took advantage of them to make a brass-to-iron contact in the simple and effective way Hewlett did to produce a union for common plumbing use. There are instances where an iron nut was used to screw onto brass whereby a rustless joint was secured; there are instances where sealing faces of brass and iron were used, but even these uses and others we might add of even greater suggestiveness, led no one prior to Hewlett to utilize these known facts to devise a common, cheap, and rustless plumber's union which could be repeatedly uncoupled and recoupled without injury. Hewlett's inventive act consisted in so placing in novel combination one brass and two iron pieces that he was able to secure as rustless a connection as where all brass

was used, and without grinding as tight a seal as where a gasket was inserted. His device, the brass in yellow and the iron in black, is shown in the accompanying cut:



The two members, 3 (iron) and 10 (brass), are internally threaded to engage the pipe to be connected. The pipes are drawn together by the nut 7 (iron) screwed to 10, whereby a rustless joint is secured. The advance of 10 brings a soft-faced brass edge against the hard-faced iron edge of part 3, and this diversity of metal makes both a rustless and a tight, gasketless seal. The merits of such a device are obvious. The joined ends require no accurate grinding as in all brass joints; the differing hardness of these metals make them self-sealing; while the fewness of parts, and but one of them brass, makes a union in which increased efficiency is had at lessened cost. It brought the desirable features of the expensive, all-brass union into common service. The device went into wide and rapid use. We are of opinion the court below properly held the device was novel and patentable. So, also, was it right in holding respondent's union, shown in the accompanying cut, was an infringement.



While literally composed of five members, two of them, viz., 7 and 3, are the identical 7 and 3 of Hewlett's device; and the remaining three, viz., 10, 10a, and the pin which makes 10 and 10a operatively integral, are either mechanical equivalents or claim-evading substitutions for the brass number 10 of Hewlett's device. The part 10a being integrally fastened to part 10 by the pin, is but an extension of that part, and, being without the zone of material functional service in the patented device, its form or constituents are matters of indifference. So regarding the two devices, the decree of the court below should be and is affirmed.

LOCKLIN et al. v. BUCK.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 41.

PATENTS—INVENTION—WOVEN WIRE FABRIC.

The Locklin and Fox patent, No. 655,253, for an improvement in woven wire fabrics, which consists of coiled wire springs having the ends flattened to a common plane, and bound by a metallic strip folded longitudinally so as to inclose the ends of the strands and then folded again upon itself, the purpose being to hold the strands in place and to keep the fabric in place under strain, while for a useful improvement, is void for lack of invention in view of the prior art.

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

For opinion below, see 148 Fed. 715.

O. R. Barnett (Alfred W. Kiddle, of counsel), for appellants.

William Parmenter Martin (C. Lodd-Davis, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patent in suit is No. 655,253, and was issued on August 7, 1900, to the complainants for improvements in woven wire fabrics. The improvement relates primarily to the woven wire fabrics used in bed bottoms. They are formed of parallel coils of wire, spirally wound, forming springs capable of withstanding great tension.

The specification points out the difficulties previously existing in handling and shipping this coiled wire fabric on account of the tendency of its strands to spring out of place, separate, and entangle. For this reason, it is stated, it was necessary to employ experts to handle the fabric, and to market it only when permanently attached to frames. This added to the expenses of shipping and storage. Moreover, the prior methods of attaching the fabric to the frames were said to produce lack of uniformity in the tautness, and to be otherwise objectionable. To remedy these difficulties the patentees devised a bed bottom of coiled wire fabric, the raw ends of which should be subjected to these processes: (1) Flatten the ends to a common plane; (2) bind these flattened ends with a metallic strip folded thereon; (3) again fold this metallic binding upon itself; or, as stated in the claim:

"As a new article of manufacture, a woven wire fabric comprising woven coiled-wire springs having the ends thereof flattened to a common plane and bound by a metallic strip folded longitudinally so as to inclose the flattened ends of the coiled strands of the fabric and then folded again upon itself, substantially as described."

The proof fairly supports the statements of the specification. It also shows that articles manufactured under the patent have gone into general use. We may, therefore, start with the assumption that what the patentees devised was a useful improvement. But every improvement is not invention. The important inquiry is whether the patent discloses invention in view of the prior art. If no invention is found, the examination of other questions is unnecessary.

In the first place, then, was there invention in flattening the ends of the coiled springs to a common plane, so that the binding could be attached? The sketches in the record, made by the complainant Locklin, illustrating the earlier methods of attaching coiled wire fabrics to frames, show that the coils were always flattened for such purpose. The illustrations in the Brothers patent, No. 454,027, granted in 1891 for improvements in spring beds, show the coiled springs flattened and clasped between two pieces of metal. Clearly, therefore, the flattening of the coils in itself discloses no invention.

Was there invention in binding the flattened wire with a folded metallic strip, and then folding this binding upon itself? The patentees state in the patent:

"We are aware that wire netting for window screens and like purposes has been bound upon its edge."

The Rich patent, No. 507,844, issued in 1883, describes and illustrates wire cloth used in a window screen bound by a metallic strip, and the strip then folded upon itself, precisely as in the present patent. In this Rich patent the screen is to be raised and lowered upon a roller at the top, but without a separate spring. The netting is wound upon the roller under tension which gives it a permanent spiral set and thus enables it to act as its own spring. The metallic strip is bound over the lower edge of the screen and fits in a frame which moves up and down in standards. The application of the metallic folded strip to the woven wire fabric is the same in the Rich as in the present patent. The only difference is in the kind of woven wire. In the one case the strands of the wire are always upon a common plane. In the other, they are coiled and require flattening. But, as we have seen, no invention is involved in this flattening. The function of the metallic strip in the present patent is, as shown in the specification, to bind the edges of the fabric, and to hold the strands in place—in other words, to prevent unraveling, and to keep the fabric from pulling out under strain. Stress is laid upon the necessity of strength for holding the fabric under great strain. The metallic strip is said to be an anchorage as well as a binder. Its hold is said to be uniform, and not dependent upon other fastenings. But all these things are really but incidents of the functions of binding and holding. The evident function of the metallic strip in the Rich patent is likewise to bind the netting, and keep it from pulling out under the strain of the spring. That there would be a strain when the screen is lowered is manifest. And that the purpose of the strip was to stand that strain, as well as to bind, is evident from the patent, which points out particularly that the netting is secured by doubling it upon itself. There would be no especial object in this if a binder alone were desired. Now, manifestly, coiled spring fabric is more refractory than wire netting. Unquestionably mattresses must be capable of standing far more strain than window screens, even of the self-winding kind. But the real function of the metallic strip—to bind and to hold—is the same in the Rich patent as in the patent in suit. The difference is only in degree. These being the facts, the governing legal principles upon the question whether the Rich patent anticipates are clearly stated in the complainants' brief:

"When two analogous devices are found in arts remote one from another, when circumstances under which they are used are different, when they subserve different purposes and perform different functions, so that the earlier device would not naturally suggest to a mechanic skilled in the art of the other device the utility or applicability of the earlier device in the latter art, the earlier device cannot be used as an anticipation or as a limitation of the claims of a patent upon the later device."

The difficulty in this case is not in the principles, but in their application in favor of this patent. Here, the analogous devices are not found in remote arts. Both relate to woven wire fabrics. The manufacture of window screens from one kind of woven wire may be a branch of industry distinct from the manufacture of mattresses from another kind of woven wire, but the relationship is by no means remote. Here, we have seen that the analogous devices do not subserve different purposes and perform different functions. Here, we cannot say that the Rich device, if brought to the attention of a skilled mechanic, working upon the problem of binding and holding bed bottoms, would not naturally suggest to him its use for such purpose. On the contrary, it would seem that such use would readily occur to him. Of course, as the judge at circuit points out, it was six years after the Rich patent before the new application was made. But we cannot assume, as a matter of fact, that any one but the complainants did have both the problem and the Rich patent before him.

The commercial success of the article manufactured under the complainants' patent is also pointed out as indicating invention. But this is only one element to be considered, and then only when patentability is doubtful. Moreover, it is not entirely clear that this commercial success is not in some measure due to the machines used by the complainants and their licensees for attaching the binder.

For these reasons, we hold the patent in suit invalid for want of invention in view of the prior art.

The decree of the Circuit Court is affirmed, with costs.

RUMFORD CHEMICAL WORKS v. HYGIENIC CHEMICAL CO. et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 148.

1. EVIDENCE—PATENTS—SUIT FOR INFRINGEMENT—PRIVIES—FORMER TRIAL.

Where the defendants in a suit for infringement of a patent participated in and contributed to the defense in a prior suit on the same patent, which was in fact a test case, they became privies to such suit, and the testimony of a witness therein, since deceased, is admissible against them to establish infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2411–2413.

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

2. PATENTS—EVIDENCE OF INFRINGEMENT.

In a suit for infringement against the Hygienic Chemical Company of New York, where it was shown that defendant was a selling company only, while the Hygienic Chemical Company of New Jersey was a manufacturing

company only, the testimony of a witness that he purchased an article shown to be an infringement from the "Hygienic Chemical Company" in New York is sufficient, prima facie, to establish infringement by the defendant.

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

On appeal from a decree dismissing the bill in an equity suit based upon letters patent No. 474,811, granted to Charles A. Catlin for an improvement in baking powders. The patent was sustained by this court in a suit by complainant against New York Baking Powder Company et al., 134 Fed. 385, 67 C. C. A. 367. The bill was dismissed because of the failure to prove infringement, the Circuit Court being of the opinion that a decision of the Circuit Court for the District of New Jersey in Rumford Chemical Works v. Hygienic Chemical Company (C. C.) 148 Fed. 862, was controlling upon the question of infringement.

Philip Mauro and C. A. L. Massie, for appellant.

Whitridge, Butler and Rice (W. P. Butler and E. T. Rice, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The defendants charged with infringement are Hygienic Chemical Company of New York, James E. Heller and Adolph Hirsh, the first two defendants contributing to the defense in the so-called test case against the New York Baking Powder Company in which the validity of the Catlin patent was upheld by this court. In that case Heller testified that he was interested in the defense financially and otherwise and that the Hygienic Chemical Company located at Elizabethport, N. J., manufactured acid phosphate for baking powder and other purposes. He testified further as follows:

"We are manufacturers of granulated acid phosphate, and are selling it to the trade in the same way as the parties who are sued in this case, the Provident Chemical Works of St. Louis."

Heller was sworn in the case at bar and says his answers in the former case were true. Whether intended to be so or not, there is no doubt that the suit against the New York Baking Powder Company was, in fact, a test case and is controlling in this court upon all questions there decided. If there were any doubt as to what those questions are we could take judicial notice of the records of our own court for the purpose of informing ourselves, but there is no doubt upon any issue now in controversy.

We are of the opinion that their participation in the defense of the test suit made the defendants, Heller and the New York Hygienic Company, parties privy to that suit and that the testimony of Clotworthy given therein may properly be read against these defendants —Clotworthy having died prior to the hearing. From this testimony it appears that March 13, 1901, the Clotworthy Chemical Company bought of the Hygienic Chemical Company a barrel of special phosphate and paid for it March 25, 1901, the receipt being signed by

the Hygienic Company. It is true that the billhead describes the Hygienic Company as "of New Jersey, Manufacturing Chemists, Offices 62 & 64 William St., New York City." But in view of the undisputed fact that the New Jersey Company manufactured and did not sell and the New York Company sold and did not manufacture, we think enough appeared to put the defendants upon their proof. The presumption is that the sale was made by the New York Company. The defendants say in their brief that:

"The Hygienic Chemical Company of New York is a selling company as distinguished from a manufacturing company, and sells the product of the defendant and of other manufacturers."

Clotworthy testified in the former suit that he was a baking powder manufacturer at Baltimore and that he purchased a barrel or two of granular phosphate from the Hygienic Chemical Company of New York and sold it to the complainant, the price being about 8½ cents per pound for the granular and 5½ cents for the ordinary commercial phosphate.

The Catlin patent was upheld because the inventor had succeeded in getting rid of the fine powder which was supposed to be indispensable to success, and used a powder in a uniformly granulated condition. It is, therefore, the use of such powder which constitutes infringement and when a manufacturer of acid phosphates sells a manufacturer of baking powder a barrel of granular acid phosphate the presumption is not unfair that he expects it to be used for baking powder. There is testimony tending to show that "special" phosphate is specially adapted for use in making baking powder.

It is unnecessary to pursue the subject further, as we are of the opinion, in view of all the facts and circumstances of the case, that a prima facie case of contributory infringement is established. The case differs from the New Jersey suit in the very important particular that the New Jersey corporation made no contribution to the defense of the test case and is not privy thereto.

The incorporation of two companies under the same name has tended to create confusion, but for this the complainant can hardly be held responsible. In the case of Hutter v. Stopper Co., 128 Fed. 283, 62 C. C. A. 652, this court having under consideration a somewhat similar situation said, at page 286 of 128 Fed., page 655 of 62 C. C. A.:

"If the complainant's witnesses were mistaken, a few words of denial would have saved years of protracted and expensive litigation. The fact that no denial was vouchsafed is persuasive that it could not have been made truthfully."

The decree is reversed with costs against the defendants Heller and Hygienic Chemical Company of New York and the cause is remanded to the Circuit Court with instructions to enter a decree against these defendants for an injunction and an accounting with costs.

HILLARD v. FISHER BOOK TYPEWRITER CO. et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1903.)

No. 88.

1. PATENTS—ANTICIPATION—PRIOR APPLICATION IN PATENT OFFICE.
Statements in a prior application for a patent, relied on as an anticipation of a patent granted while such application was pending, must be so clear and explicit that those skilled in the art will have no difficulty in ascertaining their meaning.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 77.]

2. SAME—PRIOR PATENT—ACCIDENTAL FUNCTIONS.
Although a new function appears in a machine made under a patent, if it was accidental, unrecognized by the patentee, and no disclosure thereof made to the public, it is not an anticipation of a subsequent patent.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 70.]

3. SAME—INFRINGEMENT—CHANGE IN FORM AND MANNER OF OPERATION.
Although devices may differ in form, in appearance, and in the manner of operation from those combined in a patent, if they combine to do the same work in substantially the same way, they are an infringement.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 380.]

4. SAME—TYPEWRITER ESCAPEMENT.
The Hillard patent, No. 580,281 for an improvement in typewriter escapements, was not anticipated, and discloses an invention of more than ordinary merit, which entitles the patentee to a fair range of equivalents; also *held* infringed by the machine of the Fisher patent, No. 573,868.

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

On appeal from an interlocutory decree holding valid and infringed claims 30 to 35 inclusive and claims 37, 38 and 41 of letters patent No. 580,281 granted to the complainant April 6, 1897, for improvements in typewriter escapements. The opinion of the Circuit Court is reported in 151 Fed. 34.

William A. Redding and D. Walter Brown, for appellants.

Thomas B. Kerr and John C. Kerr, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is an infringement action founded on letters patent granted to the complainant for improvements in typewriter escapements. We do not understand that the defendants deny patentability, the defense, briefly stated, being that if the claims are construed in accordance with the statements of the specification and file wrapper, they are not infringed, and, on the other hand, if a construction broad enough to cover the defendants' machines is placed upon the claims, they are for functions only and are anticipated by complainant's prior patent and by the prior art. The patent deals with the most minute details and is exceedingly voluminous, containing 12 pages 8¾ inches long and 5½ inches wide of description and claims and 4 pages of drawings, containing 20 figures. To attempt to describe the invention in detail would serve no useful purpose as the questions involved are of little general interest and are already thoroughly understood by the parties to this action. Should others

wish to familiarize themselves with the intricacies of the patent they will find its essential features, together with the claims involved, quoted in the opinion of the judge of the Circuit Court.

The main objects of the invention were to attain a uniform and certain feed at high speed by controlling the moment of release of the paper platen to avoid blurring caused by the movement of the paper at the instant of printing, and to secure an escapement which polishes its contacting surfaces. The invention covered by the claims in controversy "comprises, broadly, means for bringing the carriage-propelling power into action with the key while the key is depressed and for thereby employing the force of the propelling power to aid in lifting the key and re-engaging the disengaged members in the escapement and in restoring the printing member to normal position synchronously and in unison with the feed of the paper-carriage." The gist of the invention is the employment of the mainspring, which had previously been used to move the paper-carriage only, to move the escapement rocker and key levers back to their normal positions, after the finger key is depressed by the stroke of the operator; thus insuring greater speed, accuracy and neatness in printing. The inventor says:

"My theory was that if I could arrest that depression (pushing the keys down too far) after the blow on the key had started the type bar to the printing cylinder with sufficient force so that its own momentum would cause it to complete its excursion to the cylinder, even after the depression of the key had been arrested, that then all the advantages of the reversed escapement could be utilized without incurring the defect in blurring."

His improvement which he called "a repulser" on Webb's reversed escapement (patented in No. 577,982) remedied, but did not cure the existing defects, and subsequently he succeeded in producing an escapement, designed to remedy some of these defects, which is covered by his patent No. 554,874.

The patent in suit, which, as we have seen, utilizes the mainspring to return the moving parts to their position of rest and relieves the key of its heavy action, was, as he says, "the culminating point" of his work up to that time. It is true that this use of the mainspring may be shown in the first four figures of No. 554,874, but it is not covered by the claims of that patent which are confined to the two features which the patentee regarded as the essence of his invention —the buckle-joint and the cam for camming the carriage back. The feature which gives vitality to the patent in suit was expressly carved out of No. 554,874 and reserved for patenting in No. 580,281. The specification expressly says so. On page 8 at line 6 are these words:

"I do not in this specification make any claim specifically to the mechanism shown in Figs. 1 to 4 and 9 and 10, nor to any swinging-rack form of escapement * * * and the swinging-rack form is merely shown herein to present adequately the full scope of my invention. I claim these forms in my other application for typewriter escapements filed January 9, 1893"—the application for the patent in suit.

The patent is thus clearly within the protection of the rule followed by this court in Thomson-Houston Co. v. Elmira Co., 71 Fed. 396, 404, 18 C. C. A. 145.

The patent granted to Arthur W. Cash December 30, 1902, is also relied on by the defendants. The application was filed September 1, 1886, 16 years and 3 months before the patent was granted. It is important, therefore, that the examination of what Cash accomplished should be restricted to a period anterior to January 9, 1893, the date of Hillard's application. It is argued that Cash described a reversed escapement in which there can be no effective repulsion of the key by the mainspring because the rack rests upon the unsupported limber dog when the key is depressed. The Circuit Court so found and held that the Cash patent when limited to the original application did not disclose the Hillard invention. We incline to the opinion that this finding is correct, but even were it doubtful it would not aid the defendants. Statements in a prior application relied on to prove anticipation must be so clear and explicit that those skilled in the art will have no difficulty in ascertaining their meaning. Where they are so vague, involved, intricate and contradictory that experts disagree radically as to their meaning and, following the instructions given, construct devices differing in fundamental features, it is safe to reject such a document as an anticipation. The question is—did Cash, prior to January 1893, invent a machine embodying the improvement of the Hillard claims in suit? We are, on this proof, unable to answer this question in the affirmative.

The same observation is applicable to the Hammond machines in evidence. Although it is argued by the defendants that the feature of which anticipation is predicated is present in the machine, it is admitted by their expert that it is not found in the specification. He says:

"I do not find in the specification of the said Hammond patent any reference to the said positive repulsion of the dog."

Assuming Hillard's improvement to be present in the machines in evidence, it is difficult to believe that Hammond had an intelligent conception of the invention and failed to make the slightest allusion to it in his patent. If the new function existed in the machines made under the patent, and this is vehemently disputed, it was accidental, unrecognized by the patentee and no disclosure thereof made to the public. Mr. Justice Bradley says:

"If the acids were accidently and unwittingly produced, whilst the operators were in pursuit of other and different results, without exciting attention and without its even being known what was done or how it was done, it would be absurd to say that this was an anticipation of Tilghman's discovery." Tilghman v. Proctor, 102 U. S. 707, 711 (26 L. Ed. 279).

It is unnecessary to pursue the subject further as we agree with the judge of the Circuit Court that Hillard has made an invention of rather more than ordinary merit which has very materially improved the work of the typewriter, increased its speed and enhanced the neatness and accuracy of its work. We do not understand that the utility of the invention is disputed; but if it were, it is enough to say that it is difficult to imagine an instance where a patent should be defeated on this ground at the instigation of one who is himself persistently using the very thing which he denounces as useless.

The claims should be construed with sufficient liberality to protect the improvement which Hillard has actually made; he should hold what he has invented and nothing more; less than this would be unjust to him, more than this would be unjust to the public. In the narrow field of invention he is entitled to a fair range of equivalents.

One who produces the same result by the use of devices operating in substantially the same way is an infringer. It matters not that the devices may differ in form, in appearance and in the manner of operation; if they combine to do the same work in substantially the same way it is enough. The defendant's machine is made under letters patent No. 573,868 granted to Robert J. Fisher, December 29, 1896, application filed April 30, 1896, for improvements in book-typewriters. To this machine is added a feature which employs the mainspring to return the members of the escapement to their normal positions after the finger key is depressed. In short, the complainant contends that after his invention had been made public and was in actual use by the Remington Company, the defendants introduced bodily into their machines devices, which, while operating in a different manner, enable them to appropriate all the advantages and accomplish all benefits of Hillard's invention.

For the rack of the patent the defendants substitute a toothed wheel and a detaining dog and spacing dog, which alternately engage with teeth on the opposite sides of the wheel. The dogs are rocked by a lever connected by a train of mechanism with the type key, which, when pressed downward by the operator, causes the dogs to rock on their pivot disengaging the detaining dog and engaging the spacing dog on the opposite side of the wheel—the wheel being moved by the pull of the mainspring. The tension of the mainspring is communicated through the wheel to the spacing dog, the inclined surface of which, coming in contact with the tooth of the wheel pushes the dog out of engagement with the wheel, and, at the same time, causes the re-engagement of the detaining dog on the opposite side of the wheel. This operation is set in motion by pressure upon the finger key and, through a combination of connecting devices, causes the mainspring to aid in lifting the key towards its normal position of rest. Both the Hillard structure and that of the defendants have a printing carriage propelled by the mainspring, an escapement for controlling the speed of the carriage, a type bar with type carried thereon, and key, all properly connected and a connection between the dog member of the escapement and the key for disengaging and engaging the dogs. When the escapement is in its disengaged position the pull of the mainspring in both structures, tends to force the spacing dog out of engagement with the rack and to re-engage the detaining dog. This power is exerted on the printing member, while it is still at the printing point, so that it starts the type-bar back toward its normal position. In both machines, the spacing dog in moving out of engagement moves on a line oblique to the direction of the tooth in spacing.

To a layman the defendants' apparatus seems very different from that employed by the patentee, but to a mechanic who looks to results rather than appearances, it probably appears quite similar. It may be that the defendants' machine shows the simpler and better con-

struction, but that it accomplishes the same results in substantially the same manner, we have little doubt. It is the substitution of one form of escapement for another, with the Hillard improvements added.

In the recent case of Wagner Co. v. Wyckoff, Seamans & Benedict, 151 Fed. 585, 592, 81 C. C. A. 129, we had occasion to examine a somewhat similar situation, where the parts of the infringing device had been so skillfully manipulated and transposed that it required the most careful analysis to discover, what we held to be the fact, that it contained every element of the patented structure and accomplished the same result. The broad claim, No. 41, is as follows:

"In a typewriter, the combination, of a key, carriage-propelling power, an escapement, and means for bringing the propelling power into action with the escapement to lift the key when the key is depressed, substantially as described."

It was thought at the argument that the fourth element of the claim — "means for bringing the propelling power into action with the escapement to lift the key when the key is depressed"—was too broad and general and might cover any means for accomplishing this result. Subsequent reflection has, however, led us to conclude that if the claim is construed to cover only such means as are described and shown, and the plain equivalents therefor, it may be sustained. The means described in the specification though too technical and complicated to be reproduced here are, it is thought, stated so plainly that those skilled in the art will have no difficulty in understanding them.

Bearing in mind the character of the specific improvement covered by the claims in controversy, namely the utilization of the mainspring for the purpose described, which we believe was new with Hillard, we find nothing in the prior art or in the file wrapper which requires a construction of the claims which will enable the defendants to escape the charge of infringement.

The decree is affirmed with costs.

YAWMAN & ERBE MFG. CO. v. VETTER DESK WORKS.

(Circuit Court of Appeals, Second Circuit. January 14, 1908.)

No. 101.

PATENTS—INFRINGEMENT—CARD INDEX CLAMP.

The Yawman patent, No. 717,490, for a drawer for card indexes, claims 4, 5, 10, 11, and 12, which relate to a clamping device to hold the card follower in adjusted position, while not for a generic invention, but for a new combination of old elements, cover a device which remedies former defects and supplies a simple, efficient, durable, cheap, and easily manipulated card index clamp, and were not anticipated and disclose invention; also held infringed.

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

On appeal from a decree holding valid and infringed letters patent No. 717,490, granted December 30, 1902, to Philip H. Yawman for an improvement in drawers for card indexes, and granting an injunction and an accounting.

Osgood & Davis, for appellant.
Church & Rich (Frederick F. Church, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The object of the invention of the Yawman patent is to provide an improved form of drawer for card indexes having suitable means, movable therein, to adjust the longitudinal space in the drawer for a greater or less number of cards or papers and to permit their being readily handled and inspected. The claims in controversy are 4, 5, 10, 11 and 12. They all relate to the clamping device whose office it is to hold the follower in the adjusted position. The defenses are lack of novelty and invention and noninfringement.

The clamp of the patent is a cheap and simple device; indeed its freedom from complexity is one of its principal claims to patentability. It may be conceded that the device is on the border line between invention and mechanical skill. But, because of its simplicity, efficiency and cheapness and the persistency with which the defendant insists upon using it, we are inclined to resolve any doubt which we may entertain in favor of the patent. The judge of the Circuit Court has carefully stated and analyzed the claims in controversy and differentiated the devices of the claims from those of the defendant's best references. He has also compared the defendant's devices with those of the claims and has demonstrated that the changes made by the defendant are colorable and inconsequential and do not avoid infringement. In all this, we agree and deem it unnecessary to add to what he has so clearly stated upon these subjects.

The invention is not a generic one, far from it. Every element of the claims, considered separately and in different invironment, was old, but Yawman was the first to assemble them in the combinations in controversy. By so doing he made an advance, which, though it did not go far, entitled him to protection. The parts of the patented clamp are few, simple, durable and easily assembled and manipulated. The follower may be stopped at any desired point and is not dependent upon engagement with holes, notches or teeth on the track or slots in the clamp. The Yawman clamp makes a broad, frictional connection with the track, the edge of the clamping plate "being adapted to engage the upper faces of the edges or guides on the track-plate," thus making a firm biting grip, which holds the follower against rearward movement. We do not find these attributes combined in any structure of the prior art. The patent is well within the principles enunciated in following decisions: Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; Davis v. Perry, 120 Fed. 941, 57 C. C. A. 231; Hutter v. Stopper Co., 128 Fed. 283, 62 C. C. A. 652. Indeed, the language of this court in the latter case might be paraphrased to fit the present case, as follows:

"The Yawman device seems to have remedied former defects and supplied what was needed, namely, a simple, efficient, durable, cheap and easily ma-

nipulated card index clamp. The fact that this result was accomplished by a simple change does not detract from its patentability."

The decree is affirmed with costs.

NOTE.—The following is the opinion of Hazel, District Judge, in the court below:

HAZEL, District Judge. The bill alleges infringement by the defendant corporation of claims 4, 5, 10, 11, and 12 of the complainant's patent, No. 717,490, issued to Philip H. Yawman December 20, 1902, which relates to improvements in that class of files for card indexes which consist of a wooden drawer or receptacle with a movable follower block adjusted to the bottom thereof, a longitudinal track plate, and a clamping lever or locking bar capable of coming in biting engagement with the track. We are concerned in this cause with the clamping device which retains the follower in position to keep the cards in compact relation. The object of the patentee was to enable easy and rapid assembling of the parts in the manufacture of the file. The answer of the defendant challenges the validity of the patent for want of patentable novelty, alleges anticipation, and denies infringement. Claim 4 reads as follows:

"4. In a file, the combination, with a receptacle having a guide thereon and a follower mounted on the guide and movable in the receptacle, of a hook on the follower, a clamping plate normally resting upon the guide having the lip engaging beneath the hook, co-operating means between the hook and lip to prevent lateral movement of the clamping plate, and a spring arranged between the upper end of the plate and the follower to cause the engagement of the former with the guide."

Claim 5 has the same elements and includes a slide attached to the follower. Claim 10 includes open bearings on the follower block, instead of a hook, and specifies "a clamp pivoted on the bearings and held thereon by engagement of its free end with the track." Claim 11 embraces a spring by means of which the lower end of the clamp comes in contact with the track. Claim 12 has the addition of a movable plate at the bottom of the follower, and specifies that the bearings are open on the side towards the track. Claims 4 and 5 are specific, and the other claims mentioned broadly cover the invention. An analysis of the claims in suit shows that there is a groove in the bottom of the drawer or receptacle, in which is placed a metal strip or track, with a flange bent inwardly along each edge to form grooves and adjusted to retain a slide which is firmly attached to the bottom of the follower. The locking or clamping device is attached to the follower on its rear side, and when it is in position its lower or free end abuts on the track or guide. A spring is placed between the upper end of the lever and the follower, and is so adjusted that by pressure thereon from the lever the latter will be raised at its free end from the guide upon which it normally rests. By this operation the follower block is released and can be easily shifted in the desired direction. Attached to the rear portion of the follower and extending upwardly above the guide is a plate, the upper ends of which are turned over in the form of a hook. The clamping plate of metal is so stamped as to produce a "forwardly projecting lip upon the upper edge of which is a tongue," adapted to engage between the hooks and enable the lip to engage said hooks, thus constituting an open bearing. Manifestly the aim of the inventor was to accomplish the construction of a clamp lever from a single piece of metal appropriately stamped to form a projecting lip and tongue adjusted to engage the bearings in the follower, whereby the clamp is thrust downward upon the track plate coming in frictional contact with it without the use of pindles, pins, or rivets. That the Yawman clamping plate was stamped from sheet metal in the manner described probably is unimportant, as the invention is not predicated upon the manner in which the form or configuration of the clamping plate is produced. The important question for determination is whether the open bearings on the follower, which made possible the engagement with the clamp, in combination with the other elements specified in the claims, was a new principle, producing a functional result not previously attained.

The defendant contends that the patent is void, and in support of this claim

has introduced in evidence a number of exhibits. It is not thought necessary to have recourse to all the patents claimed to anticipate the patent, and only a few will be discussed. The prior patents to Hunter and Macey and the two exhibit Richter followers are thought to be the best references, and stress was placed upon them at the hearing. It appears from such publications that files for card indexes with a wooden drawer, track plate or rod at the bottom thereof, and clamping device, together with a follower block for maintaining the cards in position, were well known in the art before the date of the Yawman patent. In the patent to Hunter, No. 657,415, dated September 4, 1900, a card receptacle is shown having a follower block adapted to slide on a track plate and a spring operated by a clamp adjusted to engage with the track plate on the top or on the underside thereof. The clamp engages or grips the track plate by means of a small recess or slot at its lower end. I do not think this device discloses the principle of the patent in suit, by which the entire free end of the clamp is thrust against the track and lifted therefrom when the lever is pressed against the spring. It is true the binding action of the lever in the Hunter patent is released by pressing its upper portion against the spring inserted in a recess between the follower and the lever bar; but the functional result is due simply to unlocking the lever at the point where it is cut out to engage the track. In the Macey patent the clamp lever extends downward through an opening in a metal projection, evidently not unlike the hook in the Yawman patent, and contact is made with the rod that passes through an aperture underneath the projecting plate. In its normal position the lever is tilted by spring action and by a downward pressure locks the follower upon the rod. It is shown that the binding action is not upon a fixed plate or track, as in the Yawman patent, but is dependent upon the gripping of the upper and lower edges of the rod. In this respect the principle of operation would seem to be similar to that of the Hunter device. Moreover, the open bearing of the Macey structure is concededly not on the side toward the track, as in the patent in suit. This citation, in my opinion, does not meet the claims in controversy.

The prior Richter exhibit followers employ locking devices which do not come in frictional engagement with the track plate. The inventor thereof provided a series of holes lengthwise in the track plate for engagement with a dog in the bottom of the lever; the adjustment of the clamp with the track depending wholly upon connection of the dog with one of the holes in the track. I do not deem it necessary to discuss these exhibits in detail, as they would seem to be sufficiently differentiated by the fact that the locking member is not thrust against the track, holding the follower firmly thereto, although the track plates probably are not essentially different from the track plate of the patent in suit. Moreover, they have no open bearings toward the track to enable thrusting down the clamping lever to engage the track. The novelty of the Yawman structure consists essentially in the adjustment of the clamping plate contiguous of the follower in such manner as to furnish open bearings, so that the free end of the clamp in normal position will press against the track and hold the follower in the desired position. The claims, thus construed, render it unnecessary to refer to any of the other patent exhibits introduced in evidence by the defendant. They do not embody the principle of the Yawman patent, though it may be conceded that they contain separate parts of the invention or methods of operation similar in part.

The substance of the Yawman invention is not found in prior patents; hence the defense of anticipation cannot prevail. Upon this point the rule stated by the Supreme Court in the case of Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945, would seem to apply: "Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, * * * and another part in another prior exhibit, and still another part in a third exhibit, and from three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement." Accordingly the combination of elements described in the claims, although some or all of them were old, produced a new functional result, and therefore the invalidity of the Yawman

patent is not fairly established. The proofs show that in a modest way the patentee advanced the art. He did not simply produce an advantageous form or configuration of the clamping plate to enable easily assembling the parts. He did something more than simplifying the details of construction. The art had been variously developed, and would seem to have excluded further invention. Yet the patentee evolved a principle of construction which went a step beyond a mere improvement in degree, and accordingly, in my opinion, the patent is entitled to the protection of the patent laws.

As to infringement: The proofs show that the clamping plate and bearings employed in the device of the defendant are somewhat differently constructed from complainant's; but they are not essentially dissimilar. Each of the infringing exhibits has a hook on the follower and clamping plate thrust against the track and a cross-bar in the clamping plate (corresponding to the lip in complainant's plate) engaging the lower side of the hook, a movable follower, and spring between the follower and the clamping plate at its upper end. In addition to these elements the defendant employs a slide attached to the follower block and clamping plate, which by equivalent means engages the guide "having the lip lying in the hook." The open bearing or hook on the follower, or its equivalent, also is found in the defendant's structures. A thrust bearing is formed in defendant's earlier structure by engagement of the hook and clamping plate; the clamp being pivoted in the bearings and held therein by the contact of its free end with the track plate. In defendant's later structure, a portion of the slot which engages the hook or bent-over part of the plate on the follower is closed, and the clamping plate cannot, as in defendant's first structure and in that of complainant, be readily removed and released from the follower. But the frictional result of the claims in suit are obtained in this later structure, notwithstanding the utilization of a single open bearing in connection with the clamp and hook in the follower plate. The alteration is a detail of construction, and, performing as it does, the same function, it cannot be held to differentiate the patent in suit. The Yawman invention, though simply an improvement in prior files, is nevertheless of sufficient breath to prohibit avoiding it by colorable imitations or by equivalent means which are nonessential changes in form or structure, and which do not alter the principle of operation. Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652; Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 121, 74 C. C. A. 310.

My conclusion is that the defendant's structures embody the elements of the specific claims (4 and 5) and the broad claims (10, 11, and 12) in suit. A decree for an injunction and an accounting, with costs, may be entered.

CUTLER-HAMMER MFG. CO. v. AUTOMATIC SWITCH CO. OF BALTIMORE.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 29.

PATENTS—INFRINGEMENT—AUTOMATIC ELECTRIC SWITCH.

The Blades patent, No. 453,032, for an automatic electric-switch mechanism, in view of the prior art cannot be construed to cover broadly all switch mechanism in which the starter magnet is located on an independent shunt-circuit. As so limited, *held* not infringed.

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

For opinion below, see 153 Fed. 197.

This cause comes here upon appeal from a decree dismissing the bill in a suit for infringement of U. S. letters patent, No. 453,032, granted May 26, 1891, to Harry H. Blades for automatic electric-switch mechanism.

Keene H. Addington, Robert Lewis Ames, Seward Davis, and W. Clyde Jones, for appellant.

Philip Mauro, Reeve Lewis, and C. A. L. Massie, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The patent in suit relates to an automatic switch for electric motors, commonly known in the art as an automatic starting box or self-starter, by means of which a shunt motor may be started safely from rest, by merely closing the main switch, the self-starter so regulating the cutting in or out of resistances in the armature-circuit that the sudden application of full current at the main switch, which connects with the main generator circuit, will not operate disastrously. The regulation generally of current flow in any circuit by the use of resistances was old in the art. The specification states that the "invention has for its object the production of a switch which shall operate automatically, and which shall at the same time guard properly the gradual introduction of current into the armature circuit or circuits. It is shown as connected with a water-tank, and designed to turn on or off at proper times the current of the motor used to pump water into the tank, and to do the same automatically as water is wasted from the tank, although of course it will be understood that it is applicable in any of the various localities where such alternate turning on and turning off of the current is required. It is also equally applicable where the switch-lever is operated by hand to turn off or turn on the current, and in that event serves to govern the gradual admission of current into the armature-circuits regardless of how quickly the operator may move the hand-lever." So far as the automatic regulation of the switch to generator circuit by the action of water in a tank is concerned, the device is covered only in claims 3 and 4, infringement of which is not charged.

Generally speaking, the mechanism which governs the gradual admission of current into the armature-circuit consists of a contact arm or switch-lever in that circuit, which sweeps over a succession of terminals governing resistances, thus damming up or letting loose the flow of current in the armature-circuit. That contact arm is set in motion, through certain connections by the armature of an electric magnet (or magnets), which armature moves towards or from the magnet as the latter is energized or de-energized. A dash-pot acts as retarding mechanism to retard the movement of the contact arm; and a spring restores parts to position. Current passes to the magnet when the main switch is closed and current brought in from the main (generator) circuit; when that switch is opened and the current from generator cut off the magnet is de-energized and the parts return to normal position—slowly, by reason of the motor acting momentarily as a generator while it is running down.

It will not be necessary to set forth in detail the several parts of the Blades mechanism nor to discuss their action. There are old devices included in the structure; there are differences of form in defendant's device. It is understood that complainants concede that there is no infringement unless the claims relied upon can be so interpreted as to

cover broadly a regulating or self-starting mechanism of the general character shown in the patent (and, indeed, in the earlier art) when the magnet whose energizing and de-energizing is the automatic inspiration of such mechanism is located on an independent shunt-circuit between the terminals of the motor. If we are in error in assuming that so much is "conceded," there need be no motion for reargument, because we are satisfied that the prior art necessitates such a concession. The detailed parts of defendant's mechanism more closely resemble the detailed parts of Fig. 4 of the Whittingham prior patent (415,487, November 19, 1889) than they do anything shown or described in the patent in suit; and complainant undertakes to show invention over such prior patent solely by insisting that in Whittingham the self-starter magnet was located either in the field circuit in the armature-circuit, or in a circuit which had an independent source of supply, while Blades' self-starter is located in an independent shunt-circuit. In this particular suit complainant would accomplish nothing by establishing inventive novelty merely in the structural details of the precise mechanism employed, because defendant's structural details are different. The mere mechanism may or may not be patentable; on that we express no opinion, because in view of the differences in defendant's mechanism that would be an academic question here.

The three claims relied upon are:

"1. An automatic switch mechanism for an electric motor, the same consisting of a switch governing the admission of current to the motor, an electro-magnet on an independent shunt-circuit, an automatic switch-lever on the armature-circuit, a series of resistances with their terminals arranged to successively engage the said switch-lever, and a dash-pot to retard the motion of the lever, said lever actuated by the armature of the said electro-magnet, substantially as and for the purposes described.

"2. An automatic switch mechanism for an electric motor, the same consisting of a switch for admitting current to the motor, an electro-magnet on an independent shunt-circuit, an automatic switch-lever in the armature-circuit, a series of resistance-terminals in contact with which said automatic switch is adapted to traverse, an armature to said electro-magnet adapted to operate said automatic switch, a dash-pot adapted to retard the motion of the automatic switch, and a spring or springs for restoring the automatic switch to its initial position when the current is cut off from the machine, substantially as described."

"5. The combination with a shunt-wound electric motor on a constant-potential circuit, of a magnet on an independent shunt-circuit between the terminals of the motor, a switch adapted to open and close the armature-circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessations of the current, substantially as described."

Claim 2 differs from claim 1 by the addition of the "spring or springs for restoring." Claim 5 includes hand-starters.

When application was filed in the Patent Office (September 19, 1890), the phrase "an independent shunt-circuit" in claim 1 read "the main circuit through which current is shunted." Defendant's counsel insist that this indicated that at that time Blades had no idea of locating the starting magnet on an independent shunt-circuit, and in their brief reiterate the statement that he originally claimed lo-

tion "on the main circuit." That is error; what Blades wrote in original claim 1 was "on the main circuit through which current is shunted." That phrase would not accurately describe the main (generator) circuit, because no current is shunted through it; it would fairly describe the wires of the circuit which led from the main switch because through them current shunted from the main (generator) circuit flows. Moreover, before the Patent Office took any action Blades' attorneys wrote to it (October 1, 1890) inserting claim 5, and stating that Blades was already patentee of patent 418,678 of January 7, 1890 (for a hand-starter); that in that patent he claimed a switch held in closed position by a magnet on the field circuit; that he has "now found that he can get as good result when the magnet is on an independent shunt from the main circuit. He therefore wishes to protect himself in this other manner of locating the magnet, hence the additional claim." The drawings and specification remained unchanged from start to finish. Fig. 1 shows details of mechanism with no suggestion as to wiring; Fig. 2 is "a diagrammatic view to illustrate the operation of the said switch"; it is apparent from tracing the circuits shown thereon that there are three, including field, armature, and starting magnet, respectively. There are several statements in the patent which show plainly that Blades intended to use three circuits—"the circuits of the fields and armatures and the circuit of the electro-magnets of the switch." There can be no possible doubt that he shows in his patent a starter-magnet on independent shunt-circuit, nor that he showed a like location for such magnet when he filed his application. Whether the locating of the starter magnet on such circuit, however, constituted patentable invention in view of the prior state of the art is another question.

The lines of wire which conduct electricity from the main supply or generator circuit to the motor where that electricity is to be used are generally referred to as the main circuit of the motor. Diagrammatically they may be represented as two parallel lines between which the different parts of the motor and its adjuncts (if any) are situated. When such parts are connected in series, there will be but a single line of circuit between the two parallels; if the motor be what is known as a "shunt motor" there will be two such lines, one supplying the field and the other supplying the armature. Diagrammatically these are represented as two rungs of a ladder of which the two parallel lines of the main circuit are the sides. It has long been the common knowledge of the ordinary electrical workman that if he wished to put additional electrical devices between the parallels he could either connect them up in series with the electrical device on one or the other rung, or could insert one or more additional rungs on which to place them. Such additional rung would be called an "independent shunt-circuit. Combinations for regulating the cutting in and out of resistances in the armature-circuit by the energizing and de-energizing of an electro-magnet were old in the art. There were mechanical differences between these combinations, and several of them were patented. Such combinations are known generally as "starting boxes" and may be divided into two classes "hand-starters" and "self-starters." Much

is made in argument of this division; much is said of the "self-starter art" as distinguished from the "hand-starter art." But if they can fairly be considered as two arts—and it is difficult to accept that proposition—such two arts are clearly analogous. It would be stretching the doctrine of "special art" altogether too far to hold that the electrical mechanic or engineer who is trying to devise improvements in self-starters is not to be charged with knowledge of what has been done in the way of improvement on hand-starters. It is significant of the close relations between both kinds of starter that the patentee, Blades himself, asked for and secured a claim (No. 5) which includes both hand-starters and self-starters, and was drawn and inserted as an amendment for the express purpose of including them.

Reverting now to the time when Blades applied for his patent, we find that it was common knowledge in the general electrical motor art to put additional electrical devices either on one of the rungs already in use, or upon a new, separate, and independent rung. In setting up starting boxes for shunt motors and generally in regulating motors and generators the art prior to Blades had not confined itself to any one location for the controlling or regulating electro-magnet.

In Fig. 3 of Whittingham (415,487) it had been shown on an independent circuit which either drew its current directly from the generator circuit, or was supplied from some outside source, such as a storage battery or additional generator. In other devices it had been placed on the field circuit, on the armature-circuit, and on an independent "across-the-line" connection or shunt. Apparently each location had its advantages and its disadvantages, and the designer of each particular combination of detailed parts placed it wherever he thought best. It was a question of wiring, it being desirable to locate the magnet in such a place in the system as to call for the least amount of extra wiring and to avoid interference with the functions of the other members of the system. Before Blades it had been located, either in practice or in published patents, in every conceivable location. Under these circumstances, can Blades, by contriving a combination of mechanical parts which will work most efficiently when wired so as to place the switching magnet on a third rung, take out a claim which will cover defendant's combination of mechanical parts —somewhat different from Blades' and precisely shown in a patent prior to Blades' (Whittingham, 415, 487)—merely because defendant, out of the choice which the prior art afforded, elects to wire his combination so as to place the magnet on the third rung? Defendant's expert and counsel concede that cases might arise in which the choice of a location for a particular magnet would involve, not merely the judgment of the skilled electrical engineer, but the exercise of the faculty of invention. But where all locations had already been suggested it will require strong evidence to warrant the issue of what would be in effect a pioneer patent.

In a very long and highly detailed discussion complainant's experts undertake to support the claim to a broad patent upon the theory that the selection of location on an independent shunt-circuit solved a troublesome problem, and is far removed from everything

in the prior art, "by the width of the broad gulf between failure and success." We have the portrayal of an art without an efficient self-starter, man after man skilled in the art suggests the trying of some particular location to overcome existing difficulties, but the adoption of each new location creates difficulties greater than those overcome. For years skillful electrical engineers struggle with the problem where to locate the magnet so that known disadvantages may be eliminated; but all are baffled until Blades discloses to the world that by placing the magnet on independent shunt, so many difficulties are removed that practical success is secured; and, thereupon recognizing its great merit, the art seizes upon Blades' improvement and devices, with the ideal location he has pointed out, achieve a commercial success that practically displaces all other self-starters. If this were an accurate history of the progress of development in that art, it is certainly strange that it should have passed without leaving any trace of its events in the literature of the art. Nowhere is there anything to show that the problem of location was one which occupied the attention of those skilled in the art, or indeed that there was any such problem. From beginning to end of Blades' patent there is no statement, no suggestion, no hint or intimation that location was a baffling problem; that the use of this, that, or the other location was unsatisfactory in result, that by selecting the independent shunt such problem would be solved. He came into the patent office with application for an "improvement in automatic switch mechanism," his specification sets forth his mechanism in careful detail, but calls no attention to what is now claimed to be the great discovery—location on independent shunt. It is true, as was stated above, that there are a few statements in the patent from which and a careful study of Fig. 2 it may fairly be inferred that he did place his electro-magnet on independent shunt; but when, upon criticism by the Patent Office that his first two claims were obscure, he made location "on an independent shunt-circuit" an element of these claims, he writes to the Office:

"Applicant reserves the right to claim in a separate application similar mechanism in which the armature of the electro-magnet actuates the switch lever where the electro-magnet is [in] the field circuit."

It is inconceivable that the applicant who could make this reservation for a field circuit was the man who had just discovered that the solution of all difficulties was to be found, not in mere mechanism, but in location on independent shunt. We find nothing in the record to satisfy us that Blades knew anything about the location problem of which the experts have so much to say, or disclosed any solution of it to the world. Moreover, there is no persuasive evidence that the art hailed Blades as the solver of any such problem, and, by adopting his combination of parts in preference to earlier ones, accorded to it commercial success. Since Blades', self-starters have the starting magnet located on independent shunt, but except some half dozen or so they all have the additional element of a high resistance which can be cut in and out of circuit with the starting magnet, which was the invention covered in the second Whittingham patent (subsequent to

Blades) passed upon by Judge Townsend in Automatic Switch Co. v. Cutler-Hammer Co. (C. C.) 139 Fed. 870, and the introduction of which makes it essential to locate both magnet and resistance on independent shunt. Upon the whole case we are satisfied that Blades disclosed nothing which would entitle him to hold the self-starter art tributary to his patent whenever it uses the magnet of a self-starter on a third independent shunt.

The decree of the Circuit Court is affirmed, with costs.

CAMERON SEPTIC TANK CO. v. VILLAGE OF SARATOGA SPRINGS et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1908. On Rehearing, February 7, 1908.)

No. 81.

PATENTS—INVENTION—PROCESS AND APPARATUS FOR TREATING SEWAGE.

The Cameron, Commin and Martin patent No. 634,423, for a process of and apparatus for treating sewage as to the process claims, the essential feature of which is the securing of the separate and successive action of anaërobes and aërobes on the organic matter of the solids in a flowing current of sewage by secluding it before its passage into the aërating tanks in a septic tank, where it is excluded from light, air, and agitation until by the anaërobic action generated therein all organic matter is dissolved and the entire current liquefied, was not anticipated and discloses patentable invention in the discovery and utilization of a process of nature for a practical purpose. The apparatus claims, which cover the construction and arrangement of the series of tanks, disclose nothing broadly new and are void for lack of novelty. The process claims also *held* infringed.

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

This cause comes here upon appeal from a decree of the United States Circuit Court, Northern District of New York, dismissing a bill for infringement of United States patent No. 634,423, granted October 3, 1899 (on application filed March 15, 1897), to Donald Cameron and others for "Process of and Apparatus for Treating Sewage." The opinion of the Circuit Court is found in 151 Fed. 242.

Gifford & Bull (Livingston Gifford, of counsel), for appellant.

J. J. Healey, Jr. (C. L. Sturtevant and Ephraim Banning, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The opinion below has quoted at great length from the specifications. Since it may fairly be assumed that no one is likely to read this opinion without also examining that of the Circuit Court, those voluminous excerpts need not be repeated here, although in the progress of this discussion it may be necessary to quote many passages from such specifications. There are two groups of claims—those for a process, and those for an apparatus. The subject of discussion may be best introduced by reciting the five process claims which are relied upon as follows:

"(1) The process of purifying sewage, which consists in subjecting the sewage under exclusion of air, of light and of agitation to the action of anaërobic bacteria until the whole mass of solid organic matter contained therein becomes liquefied, and then subjecting the liquid effluent to air and light.

"(2) The process of liquefying the solid matter contained in sewage, which consists in secluding a pool of sewage having a nondisturbing inflow and outflow, from light, air, and agitation until a mass or micro-organisms has been developed of a character and quantity sufficient to liquefy the solid matter of the flowing sewage, the inflow serving to sustain the micro-organisms, and then subjecting said pool under exclusion of light and air and under a nondisturbing inflow and outflow to the liquefying action of the so-cultivated micro-organisms until the solid organic matter contained in the flowing sewage is dissolved.

"(3) The process of liquefying the solid matter contained in sewage, which consists in secluding a pool of sewage having a nondisturbing inflow and outflow, from light, air and agitation until a mass of micro-organisms has been developed of a character and quantity sufficient to liquefy the solid matter of the flowing sewage, the inflow serving to sustain the micro-organisms, then subjecting said pool under a nondisturbing inflow and outflow and under exclusion of light and air to the liquefying action of the so-cultivated micro-organisms until the solid organic matter contained in the flowing sewage is dissolved, and then subjecting the liquid overflow to an aërating operation.

"(4) The process of liquefying the solid matter contained in sewage, which consists in secluding a pool of sewage having a nondisturbing inflow and outflow from light, air and agitation until a mass of micro-organisms has been developed of a character and quantity sufficient to liquefy the solid matter of the flowing sewage, the inflow serving to sustain the micro-organisms, then subjecting said pool under a nondisturbing inflow and outflow and under exclusion of light and air to the liquefying action of the so-cultivated micro-organisms until the solid organic matter contained in the flowing sewage is dissolved, then subjecting the liquid outflow to an aërating operation, and then to a filtering operation."

"(21) The process of liquefying the solid matter contained in sewage, which consists in secluding a pool of sewage having a nondisturbing inflow and outflow from light, air and agitation until a thick scum is formed on the surface thereof and a mass of micro-organisms has been developed of a character and quantity sufficient to liquefy the solid matter of the flowing sewage, the inflow serving to sustain the micro-organisms, and then subjecting said pool under the cover of said scum and under a nondisturbing inflow and outflow to the liquefying action of the so-cultivated micro-organisms until all the solid matter contained in the flowing sewage is dissolved."

The apparatus for carrying on this process consists of a tank constructed of any suitable material, such as cement-concrete, shallow in comparison with its other dimensions, and in which the "pool of sewage" is located. It may be provided with an air-tight cover, for temporary use only, because after the tank has been in operation for two or three days a peculiar brown scum begins to form at the top and eventually becomes two or three inches thick and serves as an air-tight cover for the sewage. The pool which is secluded in the tank is secured against disturbance from inflow or outflow by having inlet and outlet so located and constructed that the sewage will flow through in a quiet manner. From the tank the effluent passes into an aërator, where it is exposed to the action of the air and afterwards passes on to an ordinary filter bed. By reference to the claims it will be perceived that the second and twenty-first cover only so much of the process as takes place in the secluded pool, the first and third cover also the aërating operation, and the fourth adds the final filtering operation.

To a proper understanding of what the patent shows, it will be nec-

essary to postulate certain definitions. Anaërobes are bacteria (micro-organisms) that are killed by air; they can neither act, multiply, nor even exist in contact with free oxygen. They are also called the germs of putrefaction. Aërobes are bacteria that die without air or oxygen. They are also called the germs of oxidation or of nitrification, and their action is often called decomposition or fermentation. That both these families of bacteria are potent in breaking up the solid parts of sewage matter was a fact long known to those skilled in the art. The patentee introduced a new word to the art—"septic"; he calls his tank a septic tank. Defendant's expert concedes that the term was first used by Cameron, and applied to the tank which he constructed and put in operation at Exeter, England. However this word may have been used subsequently by others, it should, in construing this patent, be given the meaning which the patentee gave to it. Examination of the specification and claims shows that the definition contained in complainant's brief is in accord with them. Septic action is the action of a colony of anaërobes preventing the accumulation of solids, unhampered by the presence of aërobes or oxygen or agitation. The septic tank is the home and workshop of such anaërobic colony, and its structural characteristic, as distinguished from other tanks, includes the roof of septic scum which is built by the anaërobes over the sewage current and remains as a permanent part of the tank.

The essential features of Cameron's process are these: He secures separate and successive action of anaërobes and aërobes on the organic matter of the solids in the flowing current of sewage. He first sets the anaërobes to work under such conditions that whatever aërobes were present in the flowing current as it enters the anaërobes' workshop are quickly destroyed, because without air or oxygen they cannot live, and at the outflow end of his septic tank there is absolutely none; tests mark free oxygen as zero. He cultivates this colony of anaërobes under conditions most favorable for their growth and activity, eliminating light, air, and agitation while the slowly moving current is exposed to their activities. There is some oxygen present when the sewage flows in, although it has all disappeared before it flows out; and the current is not completely at rest, it flows in a quiet manner—were it stagnant, the desired bacterial action would be disturbed and retarded. But there is a substantial absence from the current of oxygen and agitation. A curious result of setting the anaërobes to work under such conditions, after the septic scum has formed, is pointed out in the specifications. "The micro-organisms increase at a fabulous rate, being fed by the incoming solid matter of the sewage until a mass of bacteria is developed sufficient to liquefy substantially all the solid organic matter contained in the sewage passing through the pool: * * * and the outflow is in the form of a liquid without solid particles of sewage * * * The liquefied sewage as it leaves the septic pool has a slight odor, * * * and to relieve it of this slight odor it is subjected to an aërating operation." It is contended by the complainant that such effluent is peculiarly adapted for further treatment on a filter bed.

Thus treated, the colony of bacteria is continually recruited from incoming solid matter, maintaining such numbers as are sufficient at all times quickly to transform the sewage solids and the wastes of bacterial energy into a liquid effluent. This action is thus described by one of defendant's experts:

"In my opinion from six to eight weeks is required in which the liquefying action will be established to the extent of creating an equilibrium beyond which the solids will not accumulate on the bottom of the tank or on the top thereof; * * * an equilibrium between the accumulated solids in the tank plus those being constantly added thereto by the inflow of the sewage, and the bacterial activities whereby further accumulations are prevented."

Moreover, as the patentee states, "by this invention crude sewage can be treated for long periods without practically any sludge at all forming in the tank." In the plant at Saratoga, which treats sewage by the process above described—infringement of these process claims is not denied in defendant's brief—"the tanks have never been emptied since they were put in service July, 1903, a period of 2½ years, and no solid matter has been taken from them." In consequence this equilibrium between the solids and the solid-destroyers, when once established, need not be disturbed, it will continue indefinitely. Having passed his sewage through the secluded pool, where it was exposed to anaërobic action only, it is aërated and then subjected to aërobic action.

It is this method of dividing the process which complainant claims to be novel. Of its essential features the experts for complainant point out that separate action is necessary because the anaërobes cannot successfully act in conjunction with the aërobes, which are inimical to their multiplication and even existence; that successive action is necessary because the anaërobes prepare the organic matter for succeeding purification by the aërobes; that the flowing current is essential, because it makes a continuous process, takes the matter out of the way of the anaërobes as fast as they are through with it, and prevents the formation of toxins which would impair the value of the anaërobic product for the purifying action of aërobes. That the process possesses utility is beyond dispute; it eliminates the problem of removing "sludge," the solid matter which accumulates in the bottom of some sewage tanks and the disposition of which is often troublesome. Moreover, the defendant uses it and thus practically concedes that it is useful.

The process which has been described is the process which the patent indicates. The trial judge, however, reached the conclusion that the statements of the patent constituted a misdescription. He says:

"The patentee declares: 'The invention consists in certain methods of developing in a flowing current of sewage bacteria capable of dissolving the mass of solid organic matter contained therein, and of subsequently utilizing the so-developed bacteria in liquefying the mass of organic matter contained in the flowing current.' If this means what it says, nothing of the kind is done. The bacteria or micro-organisms are not developed in the flowing current of sewage, and cannot be effectually. They are developed in that part of the sewage which is at rest and which has been brought to a 'standstill,' secluded in a pool, and which must remain at a 'standstill' below the flowing current until the bacteria are developed and have actually liquefied it."

In our opinion this is error, and we believe the trial judge was misled by a diagram introduced by the complainant and made quite prominent in the argument. It gave us a misconception of the so-called "septic action" until in the course of the hearing it was corrected by counsel. It is an illustrative diagram showing the Cameron tank, shallow in comparison with its other dimensions, with inlet and outlet arranged so as to avoid agitation; arrows at inlet and outlet mark the direction of the flowing current. It displays shaded portions at top and bottom of the contents of the tank, representing the surface scum and the deposit. Such shaded portions occupy more than one-half the entire depth, and are of about equal thickness at top and bottom. This is wrong, because the evidence shows that the total solids, when condition of equilibrium is established, vary between 20 per cent. and 25 per cent. of the total depth, and the scum is only a few inches in thickness; the total depth being about 8 feet. The diagram further displays a succession of wavy lines from top and bottom towards the center, each terminating in an arrowhead before reaching the center; they would seem to indicate the existence of a neutral zone of flowing current between them, in which whatever action the arrowheaded lines indicate does not take place. The condition of things indicated by this illustrative diagram is in accord with Judge Ray's description above quoted, but is not in accord with the testimony. The evidence as to what takes place in the septic tank of the patent is exceptionally persuasive. It appears that, when Cameron announced his process to the world and built his tank at Exeter to put it in practice, he at once challenged the attention of the art. Sewage experts in England and elsewhere discussed his contribution as a startlingly novel one, and some of them came to Exeter to study its workings. In order to facilitate such study a glass inspection chamber was constructed in the tank, wherein an observer might place himself, and, through its transparent walls with the aid of a lamp, study the process which was going on. One of complainant's experts made observations from such chamber, and has testified to what he saw. Without indicating specific quotations, it may be stated that the conditions within the septic tank are as follows: The deposit consists of a black peaty matter apparently solid at the bottom, but gradually merging to a lighter or more mushy or frothy consistency on the upper strata. The upper surface of the scum is a brown leathery substance, immediately underneath it somewhat resembles axle grease, grading off to a mushy substance beneath. The current flowing between the sludge (deposit) and the scum consists of an already liquid portion in which are suspended particles of organic matter which because of their specific gravity remain suspended in the liquid and flow therewith. In this liquid portion also are particles which are detached by the anaërobic action from the floating or settled solids, and which particles cross the liquid in an interchange from top to bottom, and from bottom to top. The arrowheads in the illustrative diagram indicated these particles, but did not show them crossing the liquid. This interchange is constantly going on, each particle flowing a certain distance with the current at each crossing, each particle being more finely divided at each successive crossing un-

til it is finally merged in the liquid. The expert who had occupied the inspection chamber thus sums up the contention of complainant:

"Every particle of solid organic matter suspended in the liquid current of the septic tank finds itself closely surrounded by anaërobes already cultivated in the scum and sediment and completely at their mercy, because every other influence is excluded by the 'exclusion of light, air, and agitation' which the patent so frequently repeats. Its liquefaction, therefore, does not have to wait for the cultivation of anaërobes, but commences immediately and proceeds with great rapidity. Afterwards the liquefied particles find the aërobes all ready for them in the filter, where they in turn have full sway and oxidize and nitrify them, thus completing the purification. The complete separation of the anaërobic and aërobic actions is still further emphasized in the Cameron process by interposing between them the aërating operation, the action of which is to eliminate all the remaining traces of the anaërobic operation in the septic tank which might interfere with the aërobes."

It is not necessary to cite the evidence which complainant's counsel has collated to show that the action which takes place in the septic tank—"the workshop of the anaërobes"—is correctly set forth in the patent. One of defendant's experts, not incidentally, but in a carefully phrased answer to a specific question, says:

"I believe further that the action [anaërobic] which, as I have stated nearly always in my opinion, has already begun before the solids have reached the tank, is continued in every portion of the tank, both in the surface scum and the bottom deposit and in the liquid contents."

Our attention has been called to nothing in the record which controverts or qualifies this admission in any way, and it must be accepted as true.

The question of anticipation is greatly simplified by a clear understanding of precisely what the Cameron process is. The crux of the question is stated in complainant's brief as follows:

"In all processes of the prior art the aërobic or oxidizing action was continuous from the time the matter left the house as house waste until the end of its purification as sewage. Cameron's separate anaërobic colony was the first break that was ever made in such aërobic action."

It is not disputed that anaërobic action was present to a greater or less extent in prior processes, but it is contended that Cameron was absolutely the first to instruct the art that the problem of removing sludge could be practically eliminated (irrespective of securing other advantages) by providing the anaërobes with a workshop in which they might act upon the solid contents of the flowing current, unhampered by the presence of air, oxygen, agitation, or aërobes. With the question so closely limited, the burden of comparing prior patents and publications with the Cameron process is materially reduced.

The process which, apparently, has been most relied on as an anticipation is that of Louis Mouras, who took out a French patent September 22, 1881 (No. 144,904), an English patent (in the name of W. R. Lake), No. 5,391 of 1881, and a patent in this country November 28, 1882 (No. 268,120). A study of these patents discloses what it was that Mouras contributed to the art. He did not undertake to treat the sewage of a system of sewers at the purification end, but to provide at each individual building a cesspool or scavenger for preparing the house waste before it passes on to the sewer. His tank or scavenger

might be of any form or any kind of material, its inlet and outlet pipes are to be located below the surface of its contents, and the tank hermetically closed so that the outer air cannot enter the tank. The tank does not begin to operate until it is completely full of water. If, then, there is let in through the receiving pipe any volume whatever of water or feces, immediately an equal volume of water is expelled by the discharge pipe; the "discharge pipe never passes anything but turbid water, holding in dissolution [in the English and American patents the phrase is 'holding in suspension or solution'] a certain quantity of matter coming from the decomposition and disaggregation of matter going on at the bottom of the tank." By flushing the tank, as pointed out in a later quotation, it is cleansed without having recourse to the usual means of cleansing. Mouras says nothing about any bacterial action, but undoubtedly there was in his tank, as in all sewage tanks, some anaërobic action going on. That he made no provision, however, for securing conditions favorable to the action of the anaërobes, nor for separating their field of action from that of the aërobes is manifest from the directions he gives as to operation—directions wholly incompatible with the exclusion of oxygen and of agitation upon which Cameron insists. He says:

"For the proper working of the apparatus it is expedient to discharge into the receiving pipe, as much as possible, rainwater and dishwater—in short, all water that can be disposed of—in order to facilitate in the tank the decomposition and disaggregation of feces and all other decomposable matters which may chance to be there. * * * It will happen even in heavy showers that the current occasioned by the falling water will produce an eddy which will make itself felt at a great depth in the tank, and which will expel from it, by the discharge canal, a great quantity of matter in dissolution, so that the cleansing of the tank will be accomplished up to the height of the eddy. [Manifestly this is a macerating process.] Furthermore, if the shower lasts a certain time, nothing but clear water will come out of the discharge pipe."

The tank has been simply flushed out. The promotion of this agitation and formation of eddies is facilitated by Mouras' directions to bring in the inlet pipe perpendicularly. Whether or not the object of this copious supply of water was to supply oxygen, such undoubtedly was its effect. It is not disputed that fresh water brings with it free oxygen. "Dilution," says one of defendant's experts, "consists in bringing the sewage into contact with a sufficient quantity of fresh water so that the dissolved oxygen which such water always contains can promote bacterial action. * * * Up to a certain point, with an admixture of fresh water enough dissolved oxygen is available for the purpose." Elsewhere he says "aërobic fermentation will take place in sewage to the exclusion of anaërobic so long as the supply of oxygen is present." As we have seen, the only bacterial action which oxygen promotes is that of the aërobes; to the anaërobes it is a handicap and, in sufficient quantities, fatal. That oxygen is present in the Mouras tank is further shown by actual tests of tanks built, as defendant admits, according to the teachings of his patent; at their outlets it was found in large and varying quantities, while at the outlet of the Saratoga plant, built according to Cameron's teachings, there was none. The cesspool, therefore, described in the Mouras' patents differs materially from that described by Cameron, since it discloses no workshop

for anaërobes separated from the aërobes, and maintained in anaërobic condition by the careful exclusion of oxygen and agitation.

Besides the three patents above cited, there is a mass of Mouras literature in the record, consisting of the observations of text-book writers and newspaper men upon his apparatus and process. The articles most relied upon in argument are those published in a periodical called "Cosmos" by a French abbé, one F. Moigno, who describes himself as "one of the common herd," quotes from Deuteronomy and two of the Evangelists, and announces the invention of M. Mouras as "a complete solution of the problem, which for centuries had been an insolent menace hurled in the face of all humanity." He conjectures that "in the heart of the scavenger, the great agent of dissolution, of liquefaction, would be hydrosulphate of ammonia or one of its congeners"; or "may it not be the vibriones or anaërobic bacteria which are destroyed by oxygen, and which manifest their destructive activity only in vessels from which the air is excluded?" Of all these publications it is sufficient to say that, so far as they correctly describe the process which Mouras indicated, they point out only a tank in which aërobic action takes place, accompanied in some measure, in the deeper parts of the pool, by anaërobic action. So far as they contain suggestions, which Mouras did not indicate, they are (in the language of the Supreme Court in Seymour v. Osborne, 11 Wall. 555, 15 L. Ed. 557) "mere vague and general representations * * * [not] sufficient to enable those skilled in the art or science to understand the nature and operation of the invention and to carry it into practical use." We find in them nothing to indicate that by changing Mouras' inlet so as to avoid agitation, by eliminating his large influx of fresh water with the eddies and the oxygen which it brought, one could establish a separate workshop for the anaërobes, and by that change modify the Mouras' process with beneficial results. None of them present "an account of a complete and operative invention capable of being put into practical operation" by establishing purely anaërobic conditions in a septic tank and maintaining them till an equilibrium was established which would permit an indefinite retention of the solids. Nor is this conclusion the mere inference of one unskilled in the art. This Mouras literature was published in the early 80's, but no septic tank such as Cameron describes was built until his first experimental structure was set up at Exeter in 1895.

The next reference is to the patents and work of Scott-Moncrief and of Dibdin, which, as complainants admit, are the nearest approach in principle to Cameron's, because they contemplated utilizing anaërobes, and announced that "there is no need for the same amount of oxygen as has hitherto been believed to be necessary." But they fell short of Cameron's process, since they did not provide for having the anaërobes cultivated and worked separately from aërobes, oxygen, and agitation. Two quotations from the Scott-Moncrief United States patent (530,622) are sufficient to demonstrate this statement. "Sludge or deposit (which merely represents that portion of the organic matter which the organisms have not had time to liquefy) * * * may be removed from the concentrating compartment B when required by

simply opening the penstock and raking out or flushing." The agitation resulting from such an operation would destroy the septic conditions, which it takes weeks under the Cameron process to produce, and which if left undisturbed would continue indefinitely. "In order to provide for the * * * aëration of the filtering material without stopping the continuity of the treatment * * * I provide a pumping apparatus as shown at R * * * for forcing air into the liquid contents of the filter at work, * * * so as to supply oxygen to the organisms when necessary or advisable." Dibdin, in his Report to the London County Council, says: "Firstly, the organisms must be supplied with plenty of air." But it is the distinctive teaching of the Cameron process that anaërobic conditions must be maintained in his septic tank, and, since oxygen is fatal to anaërobes, he states in his patent that "it is of the utmost importance that means be provided for preventing contact with the air," while every one of his process claims include a pool secluded from air.

The next reference is to a German patent to Muller (9,792 of 1878). His process is mainly intended for disembarrassing beet-sugar works from liquid waste; he says it may with slight modification be applied even to the treatment of household slops in towns. The only passage in the patent which is at all relevant reads as follows:

"Whereas the former disinfecting methods had for their essential object to obviate as far as practicable any phenomena of putrefaction (corruption or decomposition), the process herein described on the contrary aims at the methodical cultivation of those small 'leavenlike' organisms to the viability of which modern science has traced the so-called 'self-unmixing' processes, namely acidification, fermentation, putrefaction, decay, or the like, in accordance with the rules of physiology, with a view to bringing them into requisition in the task of precipitating out the liquid waste-substances or bringing about their complete mineralization; i. e., reduction to simple inorganic compounds. * * * Only in very few cases will it be necessary to actually sow the seed of these 'leavenlike' organisms; they will mostly develop in simply sufficient quantities from the numberless germs in suspension in the atmosphere which are at all times ready to settle or 'colonize' in a suitable soil, while their growth is further induced by the organic admixtures which are added for the purpose of supplying an adequate proportion of nutritive substances, in the form of meat, blood, glue, gluten, or human excreta," etc.

From the enumeration "acidification, fermentation, putrification, decay, or the like," it is apparent that Muller had in mind both groups of bacteria, for the result of aërobes' activity is fermentation, and the result of anaërobes' activity is putrefaction. Indeed, the last quotation referring to germ colonization with atmospheric surroundings would seem to indicate that it was the aërobes which he expected to colonize. The description of his process is even more vague than the preliminary statement. There are no drawings, but, since he directs the use of three or four basins of at least one meter's depth, provided with a floating top cover of porous material such as straw, etc., it is manifest that his patent did not suggest the establishing of anaërobic conditions in a septic tank.

The English patent to Adeney and Parry (3,312 of 1890) provides for keeping "the liquor [sewage] to be treated under suitable conditions for the rapid multiplication of micro-organisms." But they point out three methods only, one by chemical treatment, the other two

by thorough aëration, for the "purpose and object of developing and multiplying the micro-organisms in the sewage"—which certainly is not Cameron's process.

Besides the patents and literature above referred to, defendant contends that anticipation is found in certain tanks which were built and used for sewage purification in this country prior to Cameron's date of invention. So far as their structural details are concerned, some of them at least closely resembled Cameron's apparatus; having the shallowness in comparison with other dimensions and inlet and outlet so arranged as to reduce the amount of agitation. Without stopping to consider some minor criticisms which complainant's counsel makes on these alleged anticipations, we may dispose of them in two ways. Tests for oxygen were made at all such as were still in operation when the testimony was being taken, with the result that there was found at the outlets free and absorbed oxygen in quantities varying from 24 per cent. to 45 per cent. while at the Saratoga plant, embodying the Cameron process, the record for oxygen at the outlet was zero. It further appears from the testimony that of these tanks those most resembling Cameron's were all cleaned and the sediment on the bottom removed, some of them frequently, some once a month, the one most relied upon "at least seven times per year, and probably oftener." When it is remembered that all the experts on both sides agree that it takes from six weeks to two months to produce the anaërobic conditions which Cameron prescribed for his septic tank, with the scum and deposit of the proper thickness and the condition of equilibrium established which admits of an indefinite retention of the solids, it is quite apparent that these are not Cameron septic tanks; the prescribed conditions are swept away by the hands of the cleaner before they reach practical efficiency. On the contrary, at Saratoga there has been no removal of sludge, and therefore no destruction of septic conditions, for two years and a half.

Reference has been made to opinions in the First Circuit in American Sewage Co. v. City of Pawtucket (C. C.) 132 Fed. 35; Id., 138 Fed. 811, 71 C. C. A. 177; Id., 146 Fed. 753, 77 C. C. A. 234. Inasmuch as that litigation related to a different patent (United States, 559,522, May 5, 1896, to Glover), the validity of which was not disputed, and the record before the courts in the First Circuit was different from the one presented here, we do not find those decisions helpful to a conclusion upon the questions raised in the case at bar.

It is further contended by defendant that these five claims are void because the process they cover "is a process of nature, and one which cannot be covered by any one." As we have seen before, the distinctively novel feature is the septic tank or separate workshop for the microbes. The Circuit Court, influenced as it seems to us by the conclusion which it reached that Mouras and Moigno disclosed all that Cameron claims, decided that the process claims could not be sustained, citing O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601, and other cases. We, however, are satisfied that Cameron was the first one to subject a flowing current of sewage to the action of anaërobes and aërobes under conditions which secured their separate and successive action,

the action of the seggregated anaërobes fitting the effluent for subsequent filtration and aërobic action; and by reason of such careful seggregation he was the first to secure such specified condition in the anaërobic colony that its capacity for its natural work was increased to such an extent that it became capable of disposing of practically all future inflowing sewage that entered its workshop without accumulating such a deposit of sludge as would require removal. This certainly involved "the use of one of the agencies of nature for a practical purpose." Risdon Locomotive Works v. Medart, 158 U. S. 77, 15 Sup. Ct. 745, 39 L. Ed. 899. The process is one which puts a force of nature into a certain specified condition and then uses it in that condition for a practical purpose. Bell Telephone, 126 U. S. 1, 534, 8 Sup. Ct. 778, 31 L. Ed. 863. Within the principles enunciated in the two cases last cited, we are satisfied that Cameron's process as set forth in these five process claims is patentable. Infringement is not disputed.

The Apparatus Claims.

These are Nos. 5, 6, 7, 8, 11, 12, 20, and 22. Infringement is denied of 6, 7, 8, and 12. It is not necessary to quote them; they are set forth in the opinion of the Circuit Court. Each one of them contains as an element of its combination "a septic tank." Speaking generally and disregarding some minor variations of detail, it may be said that the several structural elements of each combination are old, and that tanks with covers and with inlets and outlets arranged so as to avoid agitation were not broadly new. The contention of the complainant is this: Cameron introduced the word "septic" into the art, he defined it, and it is used in the claims with the meaning he gave it. The septic tank, therefore, of these claims is the septic tank in which the septic scum and deposit are found, in which the eliquilibrium above referred to is established, and in which the solids may be indefinitely retained. This is a peculiar structure, produced in part by the hand of man, in part by the forces of nature. After the labors of the mason, the plumber, and the ironworker are over the microorganisms are set to work, and in the course of from six weeks to two months they add an inside floor and a roof of scum to the masonry structure, whereupon its temporary iron cover may be discarded, and then, for the first, we have the septic tank of the claims. And, because in the prior art there is no masonry (or other) structure which has been thus improved and modified by the action of anaërobic bacteria, this single element of "a septic tank" is sufficiently novel to uphold each combination into which it enters. The question presented is a most curious one; nothing analogous is found in any authority to which we are referred. The argument is ingenious and forceful, but in this case we do not find it convincing. The tank of the apparatus is, as the specifications state, "a suitable tank for carrying out [the] invention," i. e., a tank suitable for the colonization and cultivation of the anaërobes so that they may in time reach the stage of equilibrium with the solids. The apparatus claims were never, in our opinion, intended to cover any tank other than that which Cameron's human workman built. And this opinion is fortified by the following excerpts from the specifications:

"[The sewage] then passes through * * * the inlets into the tank A, in which it may be treated either chemically, bacteriologically, or otherwise, as desired; but it is preferable to treat it bacteriologically."

"The invention also relates to a special form of tank in which a liquid is to be treated for the removal of solid matter by subsidence, flotation, or otherwise. * * * This form of tank is illustrated in Figs. 4, 5, and 6. * * * In the arrangement shown in [these figures] the sewage or other liquid * * * passes into the tanks A, where, as in the previous arrangement, it may be treated either chemically, bacteriologically, or otherwise, as desired."

We concur with the Circuit Judge in his conclusion as to these apparatus claims.

The decree is reversed, without costs, and cause remanded to the Circuit Court with instructions to decree in favor of complainant upon claims 1, 2, 3, 4, and 21, and in favor of defendant as to claims 5, 6, 7, 8, 11, 12, 20, and 22, without costs.

On Petition for Rehearing.

This petition for rehearing is a re-presentation of propositions advanced upon the original argument. If counsel would bear in mind that it is the practice of the court to examine the briefs and consider the arguments of both sides before announcing its decision, there might be fewer applications for rehearing.

Petition denied.

INTERNATIONAL TIME RECORDING CO. v. W. H. BUNDY RECORDING CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 119.

PATENTS—VALIDITY AND INFRINGEMENT—WORKMAN'S TIME RECORDER.

The Cooper patent, No. 528,223, for a workman's time recorder, covers only a time recorder in which both the faces of the printing wheels and the position of the abutment on which the card rests are regulated by the clock movements through appropriate mechanical connections. Claim 1 is void as too broad under such construction, and claim 4 as either too broad or, if qualified by the words "substantially as described," so as to make the clock movement of the abutment an element as a mere duplication of claim 3. Claims 5, 7, and 10 *held* infringed by a machine in which, while the raising of a cover by hand is necessary to bring the abutment into position, the position proper for that particular day is automatically determined and fixed by the clock mechanism.

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

This cause comes here upon cross-appeals from a final decree of the Circuit Court, Northern District of New York, which held one claim of a patent valid and infringed, and dismissed the bill as to four other claims. The patent is No. 528,223 granted October 30, 1894, to D. M. Cooper for Improvement in Workman's Time Recorder. The opinion of the Circuit Court is reported in 152 Fed. 717.

D. W. Cooper and Thomas B. Kerr, for complainant.

A. E. Parsons, W. A. Redding, and William F. Hall, for defendant.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The Cooper patent was before this court in International Time Recorder Company v. Dey, 142 Fed. 736, 74 C. C. A. 68. For a detailed statement of the patented structure the voluminous excerpts from the specifications which are found in our former opinion and in the opinion now under review may be consulted. At this stage of the discussion a brief summary will be sufficient.

Cooper's invention relates to machines known as workmen's time recorders and has for its object to produce a form of apparatus by means of which a workman personally records the time whe.. he enters or leaves the factory or both. This record, moreover, is made not on some continuous slip which contains the records of several workmen, but on individual cards appropriated one to each workman. These cards are kept in a rack (or racks) near the instrument; the workman coming into the factory takes it from the rack and inserts it in a card receptacle. He then moves a lever to the right (toward the word "In") thus positioning the card laterally, the card receptacle being movable laterally in front of the printing devices, and then by the upward movement of a lever releases the latter devices so that an imprint is made on the card. He then removes his card and places it in a rack, from which he takes it on leaving the factory, again inserts it in the receptacle and repeats the operation, moving the lever to the left (to "Out") and accomplishing the same result—an impression of the printing device on the card. The printing devices are so connected by mechanism with the time movement of an ordinary striking clock that at every minute from 12 m. or m. n. to 11:59 p. m. or a. m., the printing wheels will present towards the paper to be impressed the proper figures to denote the hour and minute. As shown in the specification and drawings the card-holder has an open mouth accessible through a suitable aperture and engaging the card at the sides only, being open at front and back. "It is not" says the patentee, "provided with a stationary bottom for engaging the end of the card when inserted, but in lieu thereof a movable abutment is employed for limiting the distance the card can be inserted, and in the present embodiment this is formed by a lever, 40, pivoted loosely on the arbor, 27, and having a vertically extending lifting rod, 41, by means of which it is raised every twelve hours an amount equal to the distance between the centers of the horizontal spaces on the card—that is, at half-past twelve, the abutment, 40, is raised permitting the introduction of the card in the holder only far enough to bring the center of the next horizontal space below the one previously marked in line with the marking wheels of the time stamp." Each card is ruled or divided by horizontal lines into the days of the week commencing with Sunday at the top and ending with Saturday at the bottom, and each of these daily divisions is divided into two horizontal sections by a line indicating a. m. or p. m. The "lifting rod" which thus raises the abutment terminates upwardly in a yoke through which there plays a cam, 56, secured to an arbor which is itself secured to a gear which receives movement intermittingly from the striking part of the clock mechanism. The connections and relative arrangements of the parts are such that the cam, 56, will be given a complete revolution once a week, and at half-past 12 o'clock Saturday night the

end of the yoke will be dropped from the highest part of the cam to the lowest, causing the abutment, 40, to return to the lowest part of the card-holder. These connections are also so arranged that the partial rotation of the cam by the release of the train (i. e., the train of gears constituting the modified striking mechanism) every 12 hours will cause the abutment to move upward in the card-holder the distance between the centers of two of the horizontal spaces on the card, thereby decreasing the depth of the card receiver, every 12 hours or half day, until Saturday night, and then on Sunday morning leaving it of maximum depth so that the card may be inserted nearly its full length, in position to print on the top line of the card. The operating devices for the entire apparatus, as shown above, are those employed in ordinary striking clocks, that is to say two springs and gear trains, one for operating the time movement proper, and the other the striking mechanism. The specification states:

"The specific construction of the machine shown for operating the time stamp and the movable abutment, 40, is not essential, but I have shown one form of device which I find is well adapted to the purpose."

Reviewing the above description, we find in the apparatus of the patent these characteristics. (1) The rotary movements of the printing wheels are so actuated and controlled that they are at all times in proper position, so that when they are, by the workman's moving the lever, 28, thrown into engagement with the card they will print thereon the true hour and minute. This regulation and control is effected by the mechanism itself, clock and connecting, without the intervention of the human mind. It is not necessary for some one to remember that it is 9:57 or 10:18, and by observation and manual operation to place the wheels in the position appropriate for that hour and minute. So far as the proper positioning of the printing wheels is concerned, the apparatus is automatic. (2) The abutment of the card-holder is moved upward, intermittently, every half day (it might as easily be so moved each day) by means of a cam on which through a connection it rides up day by day till the end of the week is reached, when it falls to its original position. This cam movement is so actuated and controlled that the workman's card when placed by him in the holder will at all times fall into proper position, so that when, by the workman's moving the lever, 28, the printing wheels are brought into engagement with the card, they will so engage on that portion of the card which is appropriated for entries of the particular day when such engagement is effected. This regulation and control of the abutment (and, therefore, of the card) is accomplished by the mechanism itself, clock and connecting, without the intervention of the human mind. It is not necessary for any one to remember that it is Tuesday or Friday, and, by observation and manual operation to place abutment (and card) in the position appropriate for that particular day. So far as the proper positioning of the abutment (and card) is concerned, the apparatus is automatic.

In the former appeal in the Dey suit the claims considered were Nos. 2, 3, 4, 5, 7, 8, 10, and 12. In the present appeal the claims presented are Nos. 1, 4, 5, 7, and 10. The Circuit Court found infringement of

claim 4 only, and dismissed the bill as to the others. The claims now before us read as follows:

"1. In a time recorder, the combination with a time stamp, of a card guide or receiver adjustable relatively to the stamp in one direction, an actuating device for causing the stamp to mark a card in the receiver, an abutment for limiting the movement of a card relatively to the stamp, said abutment being independent of the stamp actuating device, and adjustable in a direction at an angle to the before-described movement of the guide, whereby the card may receive two or more marks in the same or different planes, substantially as described."

"4. In a time recorder, the combination with a time stamp and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp, and intermittingly operated mechanism for actuating the abutment, substantially as described.

"5. In a time recorder, the combination with a time stamp, and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp, and intermittingly operated mechanism controlled by a time movement for actuating said abutment, substantially as described."

"7. In a time recorder, the combination with the stamp embodying marking wheels, and a time movement, of a card guide or receiver, an abutment limiting the movement of the card relative to the marking wheels, actuating mechanism for moving the abutment and controlled from the time movement of the stamp, substantially as described."

"10. The combination with the time stamp embodying marking wheels, and a time movement operating them, of the card receiver open at front and rear, and movable relatively to the marking wheels, the movable abutment at the bottom of said receiver, actuating devices for moving said abutment intermittingly toward the marking wheels, a time mechanism for controlling it, a movable hammer co-operating with the marking wheels and operating devices therefor, substantially as described."

It will be observed that claim 1 is manifestly broad enough to cover apparatus in which the abutment is moved into proper position by the hand of some one who will remember what day it is, and will place it at the height appropriate for that particular day. In other words, it will cover a nonautomatic abutment-moving mechanism. The judge who heard the cause at circuit thought that he was "compelled by the decision of the Circuit Court of Appeals to hold this claim valid." He reached this conclusion apparently because in discussing the construction of the claims the opinion of this court contained the statement "Claim No. 4 is the same as No. 3, except that by the omission of the word 'time' before the word 'mechanism' any intermittingly operating mechanism is within its terms," and held claim 4 valid and infringed. Commenting on this, Judge Ray remarks:

"But the Circuit Court of Appeals did not say that the movement or actuation of the abutment in claim 4 must be by intermittingly operated mechanism moving or acting automatically. I can discover no difference, except in the mere wording between claims 3 and 4 aside from the fact that in claim 3 the abutment is actuated, that is, moved by a 'time mechanism,' while in claim 4 it is actuated or moved by a mechanism other than a time mechanism. A mechanism operated by the hand of the operator and at his will is not a time mechanism."

It may fairly be said that under these specifications "intermittingly operated mechanism for actuating the abutment, substantially as described," means mechanism intermittingly operated by the clock movement described in the specifications; but Judge Ray's criticism,

that if so construed claim 4 is merely a duplication of claim 3, is sound; and claim 4 should not have been sustained in our former opinion. The error occurred because the distinction between automatic and nonautomatic devices cut no figure on the infringement side of the Dey Case, for the Dey machine was concededly automatic. Therefore, when construing the claims for the purpose of finding infringement, attention was concentrated on the Dey machine, which would infringe claim 4, whichever way it might be construed. When, however, our former opinion is considered as a whole, it is quite apparent that patentable novelty was found in Cooper because he showed an abutment whose movement was automatically controlled by a time mechanism. Thus in discussing the prior patent to Martin, No. 485,639, we differentiated his device, because "the gauge or abutment was movable by hand, and was in no way moved or controlled by the clock mechanism." Again, in summarizing the prior art we said:

"A fair deduction to be drawn from the prior art is that if a mechanic were requested to construct a card machine on the card of which the workman's time is accurately printed, and if he were given the patents above named, plus the card receiver with the movable abutment automatically controlled, he might be able to produce the Cooper device."

And again referring to the infringing machine we said:

"It has the card receiver * * * with the movable abutment limiting the movement of the card, and it has the connection with the clock motor, by means of a power shaft and beveled driving gear, which operates a cam giving the necessary intermittent motion to the movable abutment."

A motion for rehearing was made in the Dey Case supported by a 30-page brief. Counsel for defendant in that case evidently understood that the Cooper patent had been sustained by reason of its automatic features, as the following excerpt from his brief will show:

"If the complainant is entitled under its patent to monopolize any and all means for automatically controlling the position of the record," etc.

The Cooper patent covers only a time recorder, in which both the position of the faces of the printing wheels and the position of the abutment on which the card rests are regulated by the clock movements (time or striking) through appropriate mechanical connections. We so held on the first appeal; and found patentable novelty in such a device, holding that Cooper was the first to introduce into a time recorder means whereby the proper positioning of the card vertically is effected, not by the will of the operator, but by the mechanism of the clock. There is nothing in this record which induces any modification of the former ruling. Only two patents not in the former record are submitted. The first is Martin & McCoy British Patent No. 20,121 of 1892. It is not automatic as to shifting the position of the card for the different days of the week. The specifications state:

"In use the gauge will be set on Monday morning at the first position. * * * At noon the foreman will shift the gauge. * * * At the closing hour the gauge will be again shifted forward."

The other patent, Schulze, German patent No. 64,175 of 1892, contains no indication that the card is set for the different "work times" by any automatic mechanism. In view of this decision as to what Cooper's invention was, claim 1 is too broad, and cannot be sustained; and claim 4, being either too broad, or, if qualified by the words "substantially as described," a mere duplication of the earlier claim 3, cannot be sustained.

The question of infringement remains to be discussed. Three types of machine were complained of, but the first of these, defendant's Daily Time Recorder, apparently has no movable abutment and the charge against it was withdrawn. The second type is known as "Defendant's Exhibit, Defendant's Weekly Time Recorder No. 2." Complainant's brief states that this machine is alleged to infringe claim 1 only. Since claim 1 is not sustained, this type of machine need not be discussed. In it the abutment is raised to its proper place by a foreman who carries the key to a square-headed arbor on which the cam is located, an indicator enables him to see when he has turned the arbor far enough to bring the abutment to its position for Tuesday, Friday, or whatever day it may be. The third machine is known as "Complainant's Exhibit No. 2, Defendant's Weekly Time Recorder." Upon the question of infringement various points of difference have been pressed in argument. The abutment in defendant's machine is moved every day instead of every half day. Defendant's machine has a cover which closes the mouth of the card receiver, excluding dust, and which must be moved out of the way before a card can be inserted. After being moved out of the way the cover is replaced by the machine automatically when the close of the day is reached. Cooper's machine has no cover. Defendant's machine has a latch carried on the abutment which will be depressed by putting the card squarely on the abutment, thus releasing a detent and allowing the handle which operates the printing devices to be depressed. It also has an offset on the abutment and a cut-corner on the card which secures the card's always being placed in the holder with its proper face towards the printing wheels. Both these details are lacking in the Cooper machine. Defendant has three printing wheels instead of two. All these modifications and additions may be improvements, meritorious enough to secure a patent for them, but they will not negative infringement if a defendant uses the broad invention which a prior patentee has described and covered by his claims. Electric Smelting Co. v. Pittsburgh Reduction Co., 124 Fed. 933, 60 C. C. A. 636. In the Cooper patent the card receiver is movable laterally relatively to the time stamp; whereas, in defendant's machine the card receiver is rigid and the printing wheels are movable laterally. Such a transposition of parts or of motion will not negative infringement when the same result is obtained in substantially the same way. Consolidated Fastener Co. v. Hays, 100 Fed. 984, 41 C. C. A. 142. Having thus disposed of these minor objections it will be necessary to consider defendant's type of machine, as to the movement of its abutment; both machines, complainant's and defendant's have the old time printing stamp, and that side of the machine need not be discussed.

In defendant's third type the abutment is affixed to a lever which rises as a cam moves under a pin projecting from said lever. This cam is mounted on an arbor which terminates at the side of the machine in a cogged wheel or pinion, 28. The cam is not mounted directly on the arbor but upon a sleeve, which is so arranged that when the arbor rotates in a direction opposite the hands of a clock (anti-clock-wise) the sleeve slips over the arbor and no movement is imparted to the cam. But when the arbor rotates in a clock-wise direction it carries the cam with it. If the cam moves a short distance it will, through the pin and lever, raise the abutment the space required to shift from one day to the next; if the cam moves a longer distance it will raise the abutment still higher. It is apparent that the cam will move only when the cogged wheel, 28, at the end of the arbor moves in a clock-wise direction. The power which moves that cogged wheel is applied through a perpendicular toothed rack which meshes with the cogs. In this rack there is a slot in which plays a stud that is attached through connections, to a swinging arm, which arm is rigidly attached to the shaft which carries the cover of the card-holder. As the cover is swung outward the arm and stud are swung upward; a slot and pin rigidly limit the movement of the arm, and when it reaches its highest point, the cover then being furthest from the machine, the parts are latched in position. At the close of the day on which they were thus latched, portions of the mechanism actuated by the clock movement disengage the latch, the cover flies back to its place above the holder, and the stud returns to its normal position in the lower part of the slot in the toothed rack. With regard to the stud, which moves upward under the pull given to the cover by the workman seeking to place his card in the holder, this is to be observed. If it is in the lowest part of the slot of the rack at the time the pull comes it will move through the open slot and not lift the rack at all. This is its position when the machine has been used for stamping a card on any particular day and it remains such during the remainder of that day. If, when the pull comes, the stud is not so near the bottom of the slot, by reason of the perpendicular rack being depressed, it will, before reaching the limit of its movement, contact with the top of the slot and raise the rack as much as the latter was depressed before contact was thus made. Inasmuch as this rack meshes with the cogged wheel, 28, which when moving in clock-wise direction moves the cam, it is manifest that the greater the movement of the rack the greater will be the movement of the cam. In the exhibit submitted an upward movement of the toothed rack by the space of two teeth will revolve the cam so far as to lift the abutment the space for a single day, while a like upward movement the space of six teeth will revolve the cam so as to lift the abutment the space for three days. Therefore while the power that lifts the rack and, through cogged wheel, cam, etc., lifts the abutment is the hand of the workman, the position to which that power lifts it is determined by the position in which the rack stands, relatively to the cogged wheel, when the power is applied. In other words, while the abutment is lifted by the power exerted in pulling off the cover, the movement of the cam which pushes it up is controlled by the rack and the mechanism which puts the rack in proper position. It will be understood that all

these time recorders to be commercially useful must be so arranged that they will present the card at the true position for printing whether the factory is open from day to day or whether it is shut down for one or more days from any cause. This is accomplished in defendant's machine: Monday's work being over, if the cover is pulled off on Tuesday the abutment will be found in its proper place. If on the contrary no work is done Tuesday, Wednesday, or Thursday, and the machine stands unused from Monday to Friday the abutment will be found in its proper place when the cover is pulled off on the latter day. This adjustment of parts for the control of the mechanism of movement is in no way accomplished by the workman's pull on the cover. The cover is pulled off solely to make clearance for the card; the workman has no concern as to what day of the week it is or whether the rack is in one place or another; if he had he could in no way control the distance which the rack and cam should move the abutment as the result of his pull. His pull is always exactly the same, whether one night or several days have elapsed; it is limited absolutely by the pin and slot in the swinging arm and must be brought to that limit so as to latch, otherwise the cover will fly back. So far as the movement of the abutment is concerned it is an unconscious, unthinking act, and at the time it is performed thought in that regard is unnecessary, the machine has already done the thinking and through its control of the moving rack has put the abutment-moving parts in such position that the workman's pull, without thought or care of his, will accomplish the desired result. Practically the pull of his muscles is the equivalent of the pull of a coiled spring, it raises the abutment, but to what level it is raised is determined for him by the machine itself. The perpendicular toothed rack is placed in its proper position by the operation of the clock movement. A shaft, which transmits power from the clock, terminates in a gear, which drives two trains, one of which serves to operate the printing wheels. The other train terminates in a gear which makes one revolution per day. The shaft of this gear ends in a cam which engages a pin on a vertical sliding bar. As said cam rotates it lifts the bar until the pin falls off the point of the cam and the bar falls partly by gravity and partly by spring tension to its lowest position, this operation occurring once in 24 hours. It is not necessary to trace the details of the mechanism connecting this falling bar with the toothed rack; suffice it to say that its fall effects a downward movement of the rack for a predetermined amount, so much every 24 hours.

It will be remembered that anti-clock-wise movement of the cogged wheel which meshes with the rack may take place because the arbor on which it is fixed slides inside the sleeve which carries the abutment cam. If the machine is operated the day after the rack bar has been lowered the space predetermined for 24 hours such operation raises it again to normal. If several days elapse without operation of the machine the rack is lowered through several such spaces and when it is operated the rack returns that greater distance. As the rack, through the cogged wheel, controls the movement of the abutment cam and the clock movement controls the position of the rack it may properly be said to control the mechanism actuating the abutment. So far as it secures a position for the abutment proper for the particular day when

it is to be used the machine is automatic, although it needs the power of a man's pull to move the parts to the position thus secured.

The machine thus described seems to be fairly within the terms of the three claims not already disposed of. It has "intermittingly operated mechanism * * * for actuating said abutment," "controlled by a time movement." Claim 5. It has "actuating mechanism for moving the abutment and controlled from the time movement of the stamp." Claim 7. It has "actuating devices for moving said abutment intermittingly toward the marking wheels," and "a time mechanism for controlling it." Claim 10.

The decree is reversed, without costs of this appeal, and cause remanded to the Circuit Court with instructions to enter the usual decree, also without costs for injunction and accounting under claims 5, 7, and 10, and dismissing the bill as to claims 1 and 4.

SIEBER & TRUSSELL MFG. CO. v. SAUGERTIES MFG. CO.

(Circuit Court, S. D. New York. February 11, 1908.)

No. 9,339.

PATENTS—INFRINGEMENT—TEMPORARY BINDER.

The Trussell patent, No. 743,114, for a temporary binder for holding loose sheets of paper, is an improvement patent for a combination of old elements in a crowded art, and, in view of the prior art and the limitations imposed by the action of the Patent Office and acquiesced in, is limited substantially to the means shown and described. As so construed, it is not infringed by the device of the Phœnix patent, No. 782,986, which covers a different combination of old elements to accomplish the same result.

In Equity. Suit to enjoin alleged infringement of United States letters patent No. 743,114, of November 3, 1903, application filed September 22, 1902, to Sieber & Trussell, assignee of Emory A. Trussell, for a temporary binder.

Joseph A. Stetson (Louis K. Gillson, of counsel), for complainant.
Chester A. Weed, for defendant.

RAY, District Judge. The patentee, Trussell, says that his "invention relates to that class of temporary binders used for holding loose sheets of paper, and embodies means whereby the sheet-receiving prongs are actuated to move them together or separate them so as to confine the sheets or permit their removal. The construction provides for the actuation of a series of two or more pairs of sheet-holding prongs simultaneously by the operation of a single part." After describing the construction and operation of the device he further says:

"It will be seen that by the construction embodied in my invention I am able with the greatest ease to manipulate the sheet-receiving prongs into either open or closed condition, and simultaneously throughout the binder when either two or a greater number of pairs of mating prongs are made use of. It will also be seen that the prongs are held firmly in either open or closed condition at all times by reason of either the closing or opening cams being in engagement therewith, according to the position into which the slide that carries the cams has been moved."

This device belongs to an old and a crowded art as is readily seen by reference to the numerous patents in evidence. It is also a simple device, and easily understood. Each and every element of the combination is old in the art and in analogous arts. The covers and back of the binder need not be considered as they do not differ, materially, from the covers, united by a back, of any ordinary book. In fact, the patentee says, "These parts may be of any desirable construction such as usual in temporary binders." It is with the binder proper that we have to do.

This device consists of a back plate, 3, attached to the inside face of the back uniting the covers, called "binder-back 2." This is a flat piece of metal, it might be of wood, and it might be bent up on the edges, of substantially the same length as the back of the covers. This plate carries, attached thereto, a longitudinal rib, 4, of the same length as the plate, and this rib is preferably formed by a fold at the center of the plate. This rib is hollow and contains a pivot rod, 5, seated in this hollow—"pocket in the rib" the patentee calls it. As shown and described this pivot rod extends from end to end of the rib. We then have "the archsheet-receiving prongs, 6." These are mounted in pairs on said pivot rod. Each pair when so mounted and closed form a circle, not exactly, but substantially. Each prong is provided with "a heel, 7," which heel projects to the far side—that is, beyond the pivot rod—and is but a continuation of the circular prong. This end of the prong is flattened and perforated, at a little distance therefrom, so that when the pair is mounted on the pivot rod by running it through these perforations these heels lie side by side with the part of the prong on the other side of the pivot rod. The prongs of each pair are so formed at the point of mounting that the free ends when brought together meet. These heels furnish lever arms against which pressure may be brought to bear by suitable means for the purpose of moving the prongs to open them. When the pair of prongs is open to receive leaves these heels lie in substantially the same plane, the heel of the right hand prong projecting to the left of the pivot rod and the heel of the left hand prong projecting to its right. But when the pair of prongs is closed at the free ends thereof each heel projects downward thus furnishing the lever arm against which pressure may be brought to bear for the purpose of opening the pair of prongs. The pair of prongs is closed by pressure on each prong at another point. The arrangement is such that when pressure is applied to close the pair the pressure on these heels or lever arms is released. The free end of one of each pair of prongs is provided with a point, and the free end of the opposite prong has a socket or opening which receives this point when the pair is closed. This serves to keep the free ends together. On this pivot rod we may have one, two, or a dozen pairs of prongs. Two or three are sufficient for all practical purposes. The claims of the patent call for two sets of pairs specifically. The device may be light and small for small covers and leaves, or heavy and large for larger covers and leaves.

We now come to the means provided and described for opening and closing these pairs of prongs by one movement of the operator. Each and every pair is to open at the same instant and in the same manner.

Each right-hand prong is to open or turn back to the right and each left-hand prong is to open or turn back to the left. Before setting out the claims we will point out the means provided and the mode of actuating or moving the pairs of prongs. We have "a slide," 10, seated longitudinally on the rib, 4, of the back plate, 3, and adapted "to ride," move back and forth, thereon. This slide of metal, or it might be of wood, has side flanges, 11. Projecting upward from said flanges, and adjacent to the said prongs are "cams or lips," 12, which are so adapted as to be moved with the slide just mentioned longitudinally of the rib, 4, which rib carries or contains the pivot rod, 5, on which is mounted the pairs of prongs. These cams or lips on the outside edge of the flange of the slide, 10, are designed to exert pressure against the lower under sides of the prongs and to close them. The slide is cut away at the locations of the prongs so as to permit its limited longitudinal movement. It is evident that, if the slide is pushed or moved so as to bring these so-called cams or lips under the lower under sides, "rear faces," of the prongs, the prongs will be moved on the pivot, and the free ends of the prongs brought together, provided there is no obstruction. Now, it is necessary to provide means for bringing pressure to bear on the "heels" of the prongs so as to open them after being closed. Hence, on the inside edges of the flanges, 11, of slide, 10, and within the cut-away portion of such slide, we have attached to such slide cams or lips, 13, which, when brought, by the movement of the slide, underneath the "heels" and pressed against them, causes them to rise, the prongs turning on the pivot, and this throws the free ends of the prongs outwardly and causes them to open. But, as it would not do to have the cams or lips designed to close the prongs pressing the prongs to close them at the same time the cams or lips designed to open the prongs are pressing the "heels" or levers of the prongs to open them, they are so arranged with reference to each other on the flanges of the slide that the one set of lips backs away and releases its pressure as the other set moves forward and engages and causes pressure. It is perfectly obvious that, as each pair of prongs is constructed and mounted on the pivot rod in precisely the same way, if each pair is engaged, operated on in precisely the same way, by the same means, at the same instant of time, the movement of each pair, and of each prong of each pair, will be precisely the same, and that the movement of each pair and of each prong will occur at the same instant of time, precisely. As the movable slide extends from end to end of the plate, and rib and pivot rod, which remain stationary, and carries the cams or lips, and as the pivoted and mounted pairs of prongs also remain stationary, except as each prong moves or turns on its pivot, to open and close, it is also obvious that the movement of the slide, caused by pushing or pulling on either end thereof will engage "all of said prongs in multiple to move their free ends toward and away from each other simultaneously" accordingly as we move the slide the one way or the other. It is also obvious that we have "means for actuating all of said prongs in unison to move their free ends toward and away from each other simultaneously" accordingly as we move the slide the one way or the other. Also, that we have "a slide for engaging all of said prongs in unison to move their free ends towards and away from each

other, simultaneously" accordingly as we move the slide. Also, that we have "a slide and cams carried by said slide to bear against all of said prongs in unison to move their free ends toward and away from each other simultaneously" accordingly as we move such slide. Also, that we have "a slide and cams carried by said slide to bear against the rear faces of all of said prongs in unison to move their free ends toward and away from each other simultaneously" accordingly as we move the slide the one way or the other. Also, that we have "means for engaging said heels to move the sheet-receiving ends of said prongs away from each other, and means for moving the sheet-receiving ends of said prongs toward each other." The claims of the patent in issue here read as follows:

"1. In a temporary binder, the combination of a fixed pivot member, two sets of pairs of sheet-holding prongs swingingly mounted on said fixed member, and means for engaging all of said prongs in multiple to move their free ends toward and away from each other simultaneously, substantially as set forth.

"2. In a temporary binder, the combination of a fixed pivot member, two sets of pairs of mating sheet-holding prongs swingingly mounted on said fixed pivot member, and means for actuating all of said prongs in unison to move their free ends toward and away from each other simultaneously, substantially as set forth.

"3. In a temporary binder, the combination of a fixed pivot member, two sets of pairs of mating sheet-receiving prongs swingingly mounted on said fixed pivot member, and a slide for engaging all of said prongs in unison to move their free ends toward and away from each other, simultaneously, substantially as set forth.

"4. In a temporary binder, the combination of a fixed pivot member, two sets of pairs of mating sheet-receiving prongs swingingly mounted on said fixed pivot member, a slide and cams carried by said slide to bear against all of said prongs in unison to move their free ends toward and away from each other simultaneously, substantially as set forth.

"5. In a temporary binder, the combination of a fixed pivot member, two sets of pairs of mating sheet-receiving prongs swingingly mounted on said fixed pivot member, a slide, and cams carried by said slide to bear against the rear faces of all of said prongs in unison to move their free ends toward and away from each other simultaneously, substantially as set forth.

"6. In a temporary binder, the combination of a fixed pivot member, mating sheet-receiving prongs mounted on said pivot member, heels carried by said prongs and projecting beyond said pivot member, means for engaging said heels to move the sheet-receiving ends of said prongs away from each other, and means for moving the sheet-receiving ends of said prongs toward each other, substantially as set forth."

There is not a new element in either combination. The application for the patent had a hard time in the Patent Office. The claims were repeatedly amended and changed and revised and limited. We have no pioneer invention if we have any invention. The complainant must be limited to what is described and claimed, and the claims must be construed in view of the prior art and the self-imposed limitations growing out of the action of the Patent Office. There is no room for any considerable range of equivalents. With the art narrowed as it was all comers into the field at this time were mere improvers, and as such each is entitled to his specific improvement as described and claimed, and to no more. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 617, 621, 27 Sup. Ct. 307, 51 L. Ed. 645; Cimiotti U. Co.

v. American Fur Refining Co., 198 U. S. 399, 406, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100.

Before considering further the character and validity of the patent in suit, we will consider the alleged infringing device, as this, too, has the sanction of U. S. letters patent, viz.: U. S. letters patent to Fred Phœnix for Loose-Leaf Attachment, No. 782,986, dated February 21, 1905, application filed November 3, 1903. It will be noticed that Phœnix filed his application on the same day that the Trussell patent in suit was issued. As there is no proof or pretense that Phœnix ever saw the Trussell patent prior to its issue, there is no presumption he had any knowledge of it. However, if he was working on the same lines, and made the same invention or improvement on the prior art as did Trussell, assuming Trussell discloses invention, then, of course, he was anticipated and was not the first inventor. It is conceded that defendant's device, alleged to infringe, is made in strict accordance with the Phœnix patent, and protected by it if that patent is valid. Each patent has the presumption of validity to start with. It is presumed that the Patent Office found a patentable difference.

The claims of the Phœnix patent read as follows:

"1. An article of manufacture comprising an element bent upon itself to form a back-piece having two walls, a movable member mounted between said walls and provided with a plurality of cam-slots, located in pairs, and a plurality of leaf-holding devices provided with projections adapted to fit in said slots, said devices being opened and closed by the longitudinal movement of said movable member.

"2. An article of manufacture comprising a back-piece which is bent upon itself to form two walls, a movable member located between said walls and adapted for longitudinal movement with relation thereto and provided with a plurality of cam-slots located in pairs which for a certain distance are parallel, and a plurality of leaf-holding devices provided with projections which pass into said cam-slots and which are opened and closed by the movement of said movable member, the said parallel portions of said slots causing a positive locking of the leaf-holding devices when closed.

"3. An article of manufacture comprising a member bent upon itself to form walls, a plate fitted between said walls and provided with pairs of cam-slots, the slots of each pair being for a certain distance parallel and also converging, a plurality of leaf-holding devices mounted in slots in said member and having studs adapted to take in said cam-slots whereby upon movement of the plate a simultaneous movement of the devices takes place to either open or close the same, said parallel portions causing a positive locking of the devices when in closed position."

Resolving claim 1 into its elements, we have an article of manufacture comprising (1) a back-piece formed by bending a suitable element upon itself and having two walls, we will say, an upper and a lower wall; (2) a movable member mounted between said walls and provided with a plurality of cam-slots located in pairs; (3) a plurality of leaf-holding devices provided with projections adapted to fit in said cam-slots, and which leaf-holding devices are opened and closed by the longitudinal movement of said cam-slotted movable member.

Resolving claim 2 into its elements we have (1) the same back-piece; (2) the same cam-slotted movable member in the same location, but with the limitation that the cam-slots "for a certain distance are parallel"; and (3) a plurality of leaf-holding devices provided with projections, which projections pass into said cam-slots and which leaf-hold-

ing devices are opened and closed by the movement of said cam-slotted movable member, and the said parallel portions of said slots causing a positive locking of the leaf-holding devices when closed.

In claim 3 we find (1) the same back-piece; (2) the same cam-slotted movable member as in claim 2 in the same location, but the cam-slots, arranged in pairs and for a certain distance parallel, are also converging; and (3) a plurality of leaf-holding devices mounted in slots in said movable member and having studs (projections) adapted to take in said cam-slots, whereby, upon movement of the slotted plate—movable member—a simultaneous movement of the devices takes place to either open or close the same; said parallel portions causing a positive locking of the devices when in closed position.

Comparing the claims and elements of claims of the two patents, we find: (a) That each device has a back-piece, but that the back-piece of the Phœnix patent is bent upon itself so as to form two walls with an open space between while the back-piece of the Trussell patent is a single flat piece carrying the hollow longitudinal rib, 4. It can be plausibly contended that the one is the obvious equivalent of the other. For some purposes and to some extent this is true. (b) That each device has a movable member. (c) That each device has a plurality of leaf-holding devices—prongs. (d) That in each device the leaf-holding devices are provided with projections, "heels" in Trussell and "projections" or "studs" in Phœnix. (e) That in each the longitudinal movement of the movable member in engagement causes the leaf-holding devices—prongs—to open and close as desired, and that this movement of all the leaf-holding devices or prongs is simultaneous, and that they are "engaged in multiple" and "actuated in unison" and "engaged in unison" to move their free ends toward and away from each other simultaneously. That each has "means for engaging said heels"—"projections" and "studs" in Phœnix—"to move the sheet-receiving ends of said prongs"—"leaf-holding devices" in Phœnix—away from each other, and means for moving same toward each other. That this longitudinal movement of the cam-slotted movable member of the Phœnix patent, when in engagement with the projections or slots of the leaf-holding devices, not only opens, but closes the said devices simultaneously, cannot be denied. The result attained is the same as that attained by the longitudinal movement of the movable member in the Trussell patent, but the means employed are materially different. Trussell has no cam-slotted movable member. Trussell has a movable member—"slide"—with flanges, and attached thereto on the outer edges thereof are cams, not cam-slots, but lips (projections), which press directly against the outer side of the prongs themselves to close them, and on the inner edges of said flanges he has cams, or lips, projections upward, which engage and press upward the heels of the prongs or leaf-holding devices. Phœnix has studs extending downward from the lower part of the leaf-holding devices, one from each, and pressure is exerted on these sidewise and inwardly to open the leaf-holding devices, prongs, and sidewise outwardly to close them. There is no pressure on the outer sides, or faces, of the prongs for any purpose; no upward pressure on any heel or lever or projection of the prongs for any pur-

pose. It may be that both had the mental conception that it was a good thing to engage and actuate and open and close these prongs simultaneously and with one movement of the operator, but each went about accomplishing the result in a different way, and each obtained it by different means and by means operating in a different way. Trussell has no patent on his conception, or on the function performed by his combination of old elements. It may be that were Trussell a pioneer he would have covered all means for attaining this result, but as a mere improver he did not—as said, he is limited, substantially, to the means shown and described. Considering the back-pieces, we find that the opening between the two walls of Phœnix carries the movable member, elongated plate provided with the plurality of cam-slots for receiving the projections or studs of the leaf-holding devices, or prongs. The Trussell device carries on its back-piece, and on its upper surface, riding thereon, the movable member provided with cams or lips. The longitudinal hollow rib carried by the back-piece and attached thereto carries the pivot rod seated therein. The only office of the hollow rib is to carry the pivot rod, and the only office of the pivot rod is to hold and carry the prongs. It follows that the office or function of the open space between the two walls of Phœnix is entirely dissimilar from that of the hollow rib of Trussell. They are not equivalents in these devices or combinations in question. True, the back-piece of Trussell carries and supports the movable member and the prongs of his combination. True, the back-piece of Phœnix carries and supports the movable member and leaf-holding device, or prongs, of his combination. But each carries and supports these elements or members of the combination in different ways, and the elements themselves materially differ in construction and mode of operation. As said, the end to be attained by each is the same, but it is not attained by substantially the same means operating in substantially the same way. Again Phœnix has no pivot rod. He hinges his pair of leaf-holding devices, or prongs, or pivots them but at a different place and in a different manner; in a mode and manner very old in this and analogous arts, and one he had a right to adopt and use without infringing any patent. Phœnix makes no mention in his claims of the mode or manner of hinging or pivoting his leaf-holding devices. Trussell, in each claim, specifically calls for "a fixed pivot member," meaning the "pivot rod, 5, seated in a pocket in the rib," and the two pairs of prongs "swingingly mounted on said fixed pivot member."

Reference to the prior art demonstrates that there was no new conception or thought in seeking to provide for the engagement in multiple and the actuating in unison of said prongs so as to produce the simultaneous movement, or opening and closing, of the prongs or leaf-holding devices. See German patent to Friedrich, May 17, 1889, No. 49,389; French patent to Kuske, April 15, 1903, No. 331,206; English patent to Lindner, January 1, 1898, No. 9,339; Dunn patent of November 24, 1885, No. 330,967. In this English patent it is said:

"This invention relates chiefly to a paper-file in which the receiving parts of the holders and the closing parts thereof are moved simultaneously and positively away from each other for opening, and toward each other for closing."

The arrangement and construction for doing this were such that, whether we had one or a dozen pairs of prongs, leaf-holding devices, they were engaged, actuated and moved, opened and closed, in multiple, in unison, and simultaneously. Both Trussell and Phœnix were engaged in providing improved means for attaining this end, for doing something that had been done before, but in a simpler and a better way. In the Swiss patent, No. 15,443, November 12, 1897, we have duplicate pairs of prongs, but one of each pair is stationary on the back-piece. These are named "holder pipes." The other prong of each pair is pivoted or held so it will move on its pivot from left to right, and they are connected by a rod. Then we have a slotted movable member or slide moving longitudinally on the back-piece which has on its edge oblique slots which engage with the movable prongs. By pulling on the end of this movable member the far side of the slots engage the movable prongs, press against them, and they are engaged in multiple, and actuated in unison, and moved or opened simultaneously. Push on the end of this movable member and the other sides of the oblique slots engage the other sides of the prongs in multiple, and they are actuated in unison and closed simultaneously. Now, by mounting the other prongs in the same manner, so as to be movable, and extending and obliquely slotting the movable member opposite the other slots so as to engage the prongs in the same manner, we engage all the prongs in multiple, actuate them in unison, and open and close them simultaneously. This is such an obvious thing to do, and so simple, that a desire to have all the prongs open and close in the manner described would impel any ordinary mechanic skilled in the art to make the addition and change and accomplish the result.

In the Lindner patent, No. 27,298, this result is accomplished by different means from any to which attention has been invited. We have a back-piece of single sheet metal with a slotted cross-piece at each end. The slots are for the accommodation of the sliding or movable member which slides longitudinally on the back-piece. Midway of the ends this movable member has an elevated slotted projection. Pivoted in the end cross-pieces are two bars each carrying near its ends a prong. The prongs on these respective bars are opposite each other, so they engage at their free ends when closed. On its inner edge at a point midway its ends and opposite the slotted projection of the movable member and engaging with it each bar has a downwardly bent or sloping cam or lip. Pull on the movable member and the lips are raised carrying with them the inner edges of the bars which turn in their respective pivots, and the prongs are opened; reverse the movement, and they are closed by the pivotal action of the bars carrying the prongs or leaf-holding devices. The two bars would carry any reasonable number of pairs of prongs. All are engaged in multiple, actuated in unison, and moved simultaneously.

A careful examination of the prior art discloses that Phœnix has borrowed all his elements from the prior art, but has made a different combination to attain a given result. This is precisely what Trussell did. But Phœnix and Trussell did not take the same elements. Each changed the form of some of the elements taken, appropriated by him. Their combinations differ, and are easily and widely differentiated.

Phœnix has no cam-slotted movable member. He has no rib carrying a pivot rod seated therein. His prongs are not pivoted to any rod. As improvers in a crowded art each may be entitled to a patent on his improvement in means for accomplishing a given result, a question I will not assume to pass upon as it is unnecessary, for my conclusion is that there is no infringement. Phœnix has succeeded in making a device that does not infringe. The case is very similar to Universal Brush Co. v. Sonn, 154 Fed. 665, 667, 668, 83 C. C. A. 472; and Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 880, 75 C. C. A. 77, 88. In this latter case the court said:

"The defendant, by the elimination or modification of the claimed details of the patented construction, and a readjustment of relative size and location of supporting bars, diaphragms, and flow box, either permissible by reason of the disclosures of the prior art, or not covered by the claims in suit, has succeeded in constructing a noninfringing machine."

It is immaterial that this was done by Phœnix before he knew of the Trussell patent. It is a credit to his skill and integrity that he was not trying to evade a patent, but to invent a new and useful improvement in the art.

There will be a decree dismissing the bill, with costs.

WHITTEMORE BROS. & CO. v. WORLD POLISH MFG. CO.

(Circuit Court, M. D. Pennsylvania. February 8, 1908.)

No. 31, October Term 1907, In Equity.

1. PATENTS—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.
   An interlocutory decree adjudging infringement of a patent is not conclusive between the parties in another suit in a different court, and the question must be given independent consideration therein.

2. SAME—INFRINGEMENT—CAN OPENER.
   The Cleveland patent, No. 727,905, for a can opener, which consists of a lever device for attachment to cans or boxes having tight fitting covers to pry off the covers, was not anticipated and discloses patentable invention, but is limited by the prior art to the specific construction described and claimed. As so construed, *held* not infringed by a device which lacks an offset in the body of the can between that and the cover in which the lever is to lie, which is an element of the third claim; and in which the outside handle does not lie substantially parallel to the surface of the receptacle as required by the other two claims.

In Equity. Suit for infringement of letters patent, No. 727,905, for a can opener, issued to Newcomb Cleveland May 12, 1903. On final hearing.

Faust F. Crampton, for complainants.

Joseph R. Edson, for respondents.

ARCHBALD, District Judge. The patent in suit, of which the complainants are now the owners, was issued May 12, 1903, to Newcomb Cleveland for a so-called can opener, a device to assist in the removal of the covers of cans or boxes, which, on account of that which they are designed to hold, require a tight fit or closure, such as shoe and

stove polish boxes, baking powder cans, and the like. "The cover part of these receptacles," says the inventor, "is usually made with a very tight fit on the body portion, and often the contents of the receptacle is of such nature as to act somewhat as a glue between the body and lid or cover. In such cases a direct upward push on the lid or its rim has generally been found quite inadequate to open the receptacle." By the invention, as he explains, he provides a positively operating lever-opener adapted to so co-operate with the box, that the latter will act as the fulcrum-bearing, and at the same time hold the lever in operative position till the box is open, the mere closing of the box securing the cover to it. And, in carrying out the inventive idea, he makes the fulcrum and resistance points bear, one upon the body, and the other upon the cover of the receptacle, the lever preferably being partly inclosed in and partly projecting therefrom, the outside portion or handle being thus in position for ready manipulation. The power applied to the handle is greatly multiplied, as he claims, at the resistance point, as the device acts on the principle of a lever or inclined plane and wedge. And the lever having a portion adapted to be clamped between the body and the cover is thereby firmly secured to the box. This description, taken from the specifications, sufficiently shows the structure and character of the device, and the particular object sought to be accomplished thereby.

The patent has three claims, all of which are relied on, as follows:

"1. The combination with a receptacle and a cover fitting thereon, of a lever-opener comprising a portion lying within the receptacle, a portion lying between the receptacle and its cover, and a handle portion extending beyond the other portions substantially parallel with the surface of the receptacle.

"2. The combination with a receptacle and a cover fitting thereon, of a lever-opener comprising a portion lying between the receptacle and its cover, a portion turned over the rim of the receptacle, another portion turned out under the rim of the cover, and a handle portion extending beyond the other portions substantially parallel with the surface of the receptacle in position for operation to open the receptacle.

"3. The combination of a receptacle comprising a body and a cover, with a lever-opener partly inclosed and held between said body and cover when the receptacle is closed, said receptacle being provided with an offset in which the part of the lever between the body and cover of the receptacle may lie, to permit of a tight closure of the receptacle."

Numerous efforts have been made and not a little ingenuity exercised, from time to time, by different inventors, as the patents in evidence show, to secure a successful can or box opener, and a contrivance of the character of that in suit may therefore be regarded as patentably inventive; and there being nothing exactly like it in the prior art it is also new and unanticipated. At the same time, there is no great invention disclosed in it, and, whatever there is, is necessarily circumscribed by devices of a similar kind of which, as just intimated, there are not a few already existing. No broad range therefore is to be given to it, and the patent is to be simply taken for that for which in terms it stands. As will be noted the device is essentially a detachable lever, fulcrumed on the interior rim of the box by means of a saddle or hook like lug-end, which extends under the cover and is hung on the rim of the box body, by which, when the cover is shut, it is kept

in operative position, the pressure required to force off the cover being brought to bear on the edge of the cover rim when the exterior arm or handle is moved upwards, the points of resistance and pressure being reversed when it is moved in the opposite direction. The use of a lever attachment to pry off a cover or lid is not new, being found in the Fliehr Lid Lifter (1890), in the Eldredge Steam Cooker (1891), and in the Baker Cover Lifter (1903), in each of which it moves tangentially, the same as is claimed for it here. A lever is also shown in the Amos Cooker (1887), in the Smith Shoe Polish Box-Opener (1894), and in the three several Record Can-Openers (1896, 1900); to say nothing of others. The distinguishing feature of the Cleveland device, however, consists in the particular form and arrangement of leverage adopted, which nowhere else appears, by which, while the exterior or power arm is outside the box or receptacle, the interior or pry arm, by means of its hook-like side attachment, is made to extend under and between the cover and the box rim, upon each of which it bears, obtaining thereby the necessary purchase to force them apart, and, being clasped between them when the box is shut, is in a position to be immediately and effectively operative to open it again. In order the better to keep it in position, as well as to secure a tight closure, in a modified form of the device an offset or recess is provided in the rim of the box into which that part of the interior arm of the lever is fitted, which lies between the box and the cover.

As stated above, an opener of this character is supposed to be particularly adapted for use in connection with the small round shoe polish boxes which abound, the polish or paste put up in them having volatile ingredients which require them to be kept tightly shut, while their constant use makes it necessary that they should be readily and quickly opened. The complainants, like the respondents, are manufacturers of and dealers in this class of goods, but, notwithstanding this fact and the advantages claimed for the device in suit, no commercial use has ever been made of it, by them or others, the nearest to it being the opener put out, at one time, with the Ravenola Shoe Polish boxes, by the company of which Mr. Cleveland, the patentee, is the head. The utility of the invention is therefore assailed, and the patent declared to be a mere paper patent, which equity will not enforce. But without entering upon that question, there are other grounds upon which the case necessarily turns.

The respondents, as just intimated, are manufacturers of a rival shoe polish to that of the complainants, which is put out in similar packages, and a similar opener is made use of, which is claimed to be an infringement. This opener consists of a short flat piece of metal, exterior to the box and extending tangentially to it, shaped like the head of a key or thumbscrew, and capable of being manipulated or turned, the same as that, between the thumb and finger. A narrow flat crane-like neck or arm, projecting from the center, passes in under the arm of the cover and over the edge of the box, on which it rests like a saddle, the effect of twisting or turning the head or thumb piece being to spring or pry off the cover, pressure to that end being brought to bear on the edge of the cover by the purchase or leverage secured on the top of the box edge.

It was held by Judge Holt, in a suit brought in the Southern District of New York by the same complainants, against one Reinhardt, a selling agent of the respondents, that this was an infringement.[1] The case was defended by the same counsel who appears here, and assuming that, by reason of privity of relation as well as by participating in this way in the proceedings, the respondents, although not immediate parties, would be bound if the decree was final (Bredin v. National Weatherstrip Co. [C. C.] 147 Fed. 741), being interlocutory merely (Harmon v. Struthers [C. C.] 48 Fed. 260), and having further been appealed from, as the matter stands, the decision is persuasive only, and the question must therefore receive distinct and independent consideration here.

The opinion of Judge Holt was very brief, being in fact a mere memorandum, and while it is equally effective, and may have been the subject of as much consideration, it naturally is not so convincing as if it was accompanied by a discussion, giving reasons. He also apparently holds that the respondents' device offends against the entire patent, no distinction being made between the claims, which it is clear cannot be indiscriminately charged. The third claim calls, as a special feature, for an offset or jog in the box or receptacle, into which the end of the lever, between the body and cover, is to fit and lie, so as to permit, as it is said, of a tight closure. There is no such offset as this in the respondents' box, nor anything like it, and it does not therefore fulfill or infringe the claim. It is sought to have it do so, however, by the suggestion, that of necessity, in every instance, when the cover is forced down into place, a depression or jog is made in the rim of the box under the pressure of that portion of the device which lies between the two, the box or receptacle not being able to be shut without effecting this. But assuming that, roughly speaking, this is the fact, it is obviously not what was intended by the claim. It is not such a temporary or forced recess as this that the inventor had in mind, occurring wherever the interior end of the opener happens to be caught between the box and the cover, but one, specifically arranged and prepared, into which, each time the box is closed, it is to be regularly fitted and set. Otherwise the claim is bad, as a mere duplication of the others, all, according to this, resulting in the same structure, whichever is followed. A regularly and purposely arranged offset is therefore clearly necessary in order to distinguish and save the claim, and, as nothing of the kind is to be found in the respondents' device, to this extent at least there is no infringement.

But the question of the general invention, represented by the other two claims, remains, as to which it must be confessed that in some respects the respondents have copied the patented device. Not only does each operate on the principle of a lever, but the pry or weight end of the opener within the box has the same hook shaped neck or stem extending between the cover and the box, the cover being sprung or pried upwards in the same way, by pressure exerted against the rim, the purchase or leverage for it being secured by means of the hook

[1] This decision was reversed by the Circuit Court of Appeals of the Second Circuit. See 159 Fed. 707.

end which is hung over and bears upon the rim of the box as a fulcrum, the actuating force being applied to the exterior or power arm. But this is only a part of the device, and as to the rest they plainly divide. Conceding that the two are of the same general type, the inventor did not attempt, or at least was not allowed, to cover every character of opener of the class to which they belong. By each of the claims in question, the exterior arm or handle of the complainants' device is specified as substantially parallel to the surface of the receptacle, and to this it is consequently confined. The invention not having been put into practical use, there is no commercial form with which to compare it as a standard. But in the model submitted to the examiner, at the time the patent was allowed, the exterior arm was shown hugging or encircling the periphery of the box, and this may be taken as the correct concrete expression of the invention responding to the terms of the claim. This construction, no doubt, has its advantages, which may have prompted it, the handle being out of the way, in the interest of compactness when the boxes are being shipped or stored, and also escaping being knocked out of place when in use. But whatever is to be so said of it, and even though the original conception may have been broader and has been unduly cut down, it is an essential feature of the invention as patented, that the exterior arm shall be substantially parallel to the surface of the receptacle, and, unless this appears, infringement is not made out. But that this is not true of the respondents' opener is clear. In direct contrast with what is so required the exterior arm or head stands out squarely at right angles to the plane of the rim, not parallel, but tangential thereto. Nor is the difference one of form alone, but of utility, if not of operative function as well. One practical difficulty with the patented device is that it is not easily kept in place. Hanging on the rim of the box by the hook at the inner end, with nothing to balance it, the exterior arm topples it over so that care has to be exercised each time the box is opened to see that it is properly adjusted before it is closed again. Nor, encircling the rim of the box, as it does, is the outer arm easy to manipulate, somewhat of an effort being required to engage and press upon it with the fingers so as to force the cover off. But, on the other hand, the convenience and ease of operation of the defendants' device is marked. Evenly balanced, as it is, on either side of the stem, it hangs wherever it is put on the edge of the rim without concern as to its being disarranged. The handle also, standing out from the rim of the box, and assuming the form and function of a key, which it is well called, is readily grasped and merely requires a slight twist or turn either way to press the cover off. These are substantial differences, due to inherent qualities, which no ingenuity of comparison can argue away. They result from the different structure of the handle, and the different relation it bears to the rest of the device, involved in which is the special feature called for by the claims in question, that it shall be substantially parallel to the body of the receptacle, which the respondents do not adopt.

No infringement therefore being found as to any of the claims of the patent, the bill will be dismissed on the ground of noninfringement. with costs.

DANIEL SLOTE & CO. v. CHARLES A. STRATTON CO.

(Circuit Court, S. D. New York. February 15, 1908.)

PATENTS—INVENTION—BLANK BOOK.

The Bowman patent, No. 468,780, for a blank book, claim 2, in view of the prior art, is void for lack of patentable invention.

In Equity. Suit to restrain alleged infringement of United States letters patent, No 468,780, dated February 16, 1892, to Frank Bowman for blank book, and for an accounting.

Harlan Moore (Lucius E. Varney, of counsel), for complainant.

Duncan & Duncan (Frederick S. Duncan and Harry L. Duncan, of counsel), for defendant.

RAY, District Judge. The alleged invention relates to certain alleged improvements in the manufacture of blank books, and has for its object to provide a very strong and durable outer back, and to provide improved means whereby the inner back may be securely fastened to the outer back and to the covers of the book. Also, to cushion the outer back or the fabric enveloping it—that is, to provide a slightly yielding surface which will secure a better impress of the tools with which the marking and printing on the outer back is done without danger of breaking the outer back or cutting the fabric inclosing it.

Claim 2 of the patent in suit, which seems to be the one relied on, reads as follows:

"A book consisting of a rigid outer back, a rigid inner back, a strip of yielding material glued between said backs, thereby securing them together, signatures secured to said inner back, the signature-fastenings passing through the inner back and embedded in the interposed strip, and covers secured to the backs, substantially as described."

This claim calls for a book consisting of (1) a rigid outer back; (2) a rigid inner back; (3) a strip of yielding material glued between said backs, thereby securing them together; (4) signatures secured to said inner back, the signature-fastenings passing through the inner back and embedded in the interposed strip; and (5) covers secured to the backs, all substantially as described. If any patentable invention is to be found in this structure we must seek its disclosure in the specifications unless it resides in the conception of embedding the signature-fastenings in the interposed strip of yielding material.

Rigid backs for books are very old. Double backs are old. Signatures secured to the inner back are old. Signature-fastenings passing through the inner back are old. Covers secured to the backs are old. So, interposing a strip of material between the double backs is old, as well as the gluing all together. The use of fibrous or yielding material in constructing backs for books is also old. So, too, various means for connecting the backs to the covers are old. However, the patentee says we are to find disclosed improved means for fastening the inner back to the outer back and improved means for fastening the inner back to the covers of the book. For per-

tinent references, see patent to George Smith, dated February 20, 1872, No. 123,947, for improvement in book binding; patent to Reynolds, dated May 16, 1876, No. 177,354, for improvement in the manufacture of books; patent to Frank Bowman, dated January 30, 1877, No. 186,791, for improvement in blank books; patent to Kena, dated May 20, 1879, No. 215,524, for improvement in albums; patent to Sneider, dated September 9, 1879, No. 219,370, for improvement in scrap book; patent to Hartung, dated March 1, 1881, No. 238,233, for invoice or scrap book; patent to Baumfaulk, dated May 3, 1881, No. 240,805, for binding books; patent to Bowman, dated July 17, 1883, No. 281,657, for back for books; patent to Nagle and Chalifoux, dated November 4, 1884, No. 307,488, for blank book; patent to Huether, dated December 27, 1887, No. 375,488, for book binding; patent to Ries, dated July 9, 1889, No. 406,476, for book binding; patent to Ringo, dated December 9, 1890, No. 442,395, for sample book; and patent to Bowman, dated February 16, 1892, No. 469,054, for blank book.

Before dealing with the details of the prior art, and keeping in mind the fact that the claim in issue of the patent in suit deals exclusively with the back and the mode and means for attaching the back to the covers, we will ascertain the exact construction of claim 2 as demanded by the specifications. The rigid outer back or strip, a, formed of a flat piece of binder's board, or other suitable stiff material, has secured thereto on its outer side a cushion, b, formed of leather or flannel, or any suitable cushioning material. The patentee gives a preferred manner of attaching this cushioning material to the outer or under side of the outer back, viz., the cushion, b, is first inclosed in a thin glue-excluding fabric, c, and then secured to this back by gluing or in any suitable manner. The edges of the inclosing fabric are secured next to the rigid outer back in order that the glue shall be effectually excluded from the cushion, and also that a smooth surface may be secured and presented on the outer side of the outer back to which is glued the outer finishing fabric, d. The longitudinal edges of this outer finishing fabric, d, extend beyond the longitudinal edges of this outer back, and are secured to the outer sides of the covers of the book at their inner edges (edges next the back), "thus forming a strong flexible connection between the outer back and the covers." The mode and manner of securing this outer finishing fabric to the covers is not mentioned, but presumably it is done by gluing. This mode of securing the outer back to the covers is obvious and simple and old, and presents no new or novel feature. It is distinctly and plainly illustrated and described in the Smith patent of 1872, No. 123,947, and others. Smith having described his back says:

"I will now describe the second part of my invention, the back, A, being of the construction last described. B is the cover board or base [being the cover] united to the back by the outer and inner coverings, e, f, denoted in solid black, so as to form the hinge at the intersection of the cover and back."

This outer covering, e, of Smith is the same as the outer finishing fabric, d, of the patent in suit.

Having given the construction of the outer back and its connection with and direct attachment to the covers we will proceed to consider the connection of the outer back with the inner back and its connection with and attachment to the covers. "To the inner [upper, as the book lies open before us] side of the outer back is glued a strip, f, of flannel or leather or any suitable material, which entirely covers the back, a [outer back on its upper side] and forms a yielding surface, to which the rigid inner back, g, is glued." While the specifications do not purport to describe the inner back, except as a rigid back and as having the signatures stitched or stapled thereto, and the strip, f, of flannel, or leather, or any suitable material glued thereto on its under or outer side, thus connecting the inner back to the outer back, the flannel or leather being interposed and glued to each, the drawings show it to be a rigid strip of the same size and shape, substantially, of the rigid outer back, a. The patentee says:

"The sections or signatures [leaves] are secured to the inner back by stitching or stapling, said fastening passing through the fabric, h, and the rigid inner back as clearly shown in Fig. 2 of the drawings."

Now comes the mode, manner and means of attaching this inner back directly to the covers. We have already seen that it is indirectly attached by "the outer or finishing fabric, d," which directly connects and attaches the outer back to the covers, for the outer back being glued to the inner back this indirect connection is made. The patentee says:

"The inner back is reinforced by the fabric, h, which is glued to its upper or inner surface and extends beyond the longitudinal edges of the inner back, said extensions being glued to the inner sides of the covers at their inner edges." (Edges next the back.)

This is all. Turn to the Smith patent, before referred to, and we have this precise mode of attaching the inner back to the covers both illustrated and described. The mode and manner of and means for attaching the back as a whole to the covers is the same in the Smith patent of 1872 as in the patent in suit. The same idea is clearly shown in the patent to Kena, No. 215,524, of 1879. It says:

"A piece of canvass or leather, b, is secured in the back, and is inserted into the rear edges of book-covers, thus flexibly connecting the same."

Also:

"Said strips, E [to which the leaves are fastened] at their opposite edges, are glued or otherwise secured upon a flap of canvass or leather, F, side by side," thus forming an inner back, "the projecting edges of said flap being placed under the strips, a, for holding the leaves to the cover," etc.

See, also, Hartung, No. 238,233, and Nagle and Chalifoux, No. 307,488.

In this last patent it is said:

"The cover of the book is composed of two or more thicknesses of paper board, C and C'. The flesher or sheep, B [to which the leaves are attached] extends between these paper boards, where it is firmly secured. D is the back-board of the book, L is a flexible lining attached to either or both sides of the back-board, D, with its edges extending beyond the back-board and firmly connected with the extended edge of the under board of the cover, so as to pass over the joint of the cover to strengthen it."

See, also, Huether patent, No. 375,488, and Ringo, No. 442,395.

Clearly, in view of the prior art, no patentable invention is disclosed in the means, mode, and manner, of connecting the backs, or either back, to the covers. Such change as can be discovered, if any, is a change of form only or of place of attachment, a mere matter of selection or judgment. This is not invention, even if a slightly better result is obtained. Now, what are the means for fastening the inner back to the outer back? The patentee describes these as follows:

"To the inner side of the outer back is glued a strip, f, of flannel or leather, or any suitable material, which entirely covers the back, a [on its upper or inner surface meaning] and forms a yielding surface, to which the rigid inner back, g, is glued."

The alleged improved means consist therefore in interposing this strip of yielding material between the rigid outer back and the rigid inner back and gluing it to each. When this is done we have an entire back made up as follows: (1) "The outer or finishing fabric, d; (2) the thin glue-excluding fabric, c, inclosing the cushion, b; (3) the cushion, b, inclosed in 2, or c; (4) the rigid outer back or strip, formed of suitable stiff material; (5) the interposed" strip, f, of flannel or leather, or any suitable material; (6) the rigid back piece to which are fastened or secured the sections of leaves or signatures by stitching or stapling, such stitches or staples passing through this inner back piece; and (7) lastly the reinforcing fabric, h, which is glued "to the upper or inner surface" of the rigid inner back. These parts are all glued together except that the cushion, b, in and forming a part of the outer back, is "inclosed in the thin glue-excluding fabric, c, but as the cushion is wholly inclosed therein, and it is glued to the adjacent parts, all the parts are, in effect, glued together. The patentee claims inventon in providing this cushion, for he says:

"Another of its objects is to cushion the outer back or the fabric enveloping it—that is, to provide a slightly yielding surface which will secure a better impress of the tools with which the marking and printing on the outer back is done without danger of breaking the outer back or cutting the fabric inclosing it."

However, neither claim 1 nor claim 2 includes this cushion, and I do not find that it is claimed defendant uses it. Claims 3, 4, and 5 include the cushion as an element. Proof of infringement is confined to claim 2. The patentee thus states the object of interposing this strip of yielding material between the outer and inner backs, viz.:

"The object of providing this yielding embedding surface, f, is to permit the projections or roughness formed on the under side of the inner back by stitching or stapling the sections to the upper side thereof to be embedded in this yielding surface, thereby more securely fastening said inner back to the outer back. The roughness or projections formed by the stitching is an advantage instead of a disadvantage, as when they are embedded and glued in the strip, f, they aid materially in securing the inner back to the outer back, as is evident."

Returning then to the interposed strip of yielding material glued between said backs we will consult the prior art to ascertain whether or not there is anything new or novel in its use; whether or not we have here a patentable conception accompanied by suitable means

for making it useful, for its applications. And, if so, does defendant use it?

Defendant has put in evidence three exhibits, "Defendant's Exhibit, Sneider Book No. 1 (1884)"; "Defendant's Exhibit, Sneider Book No. 2 (1880)"; and "Defendant's Exhibit, Sneider Book No. 3 (1880)." Each carries a printed label, viz., No. 1, "Patented September 9th, 1879, Robert Sneider"; No. 2, "Patented September 9th, 1879, Robert Sneider"; and No. 3, "Robert Sneider's Patent Scrap, Invoice, and File Book, Patented Sept. 9th, 1879," and "33 Scrap Book. 9 x 11½ oblong, Half Russia, 125 pages, Brown Card Stock, Robert Sneider's Patent September 9th, 1879." Each of these contains unmistakable evidence of their authenticity and ancient origin and construction. Each was made long before the patent in suit was applied for, and has been in existence and use since. Mr. Sneider gave evidence showing their construction, date, use, and preservation. Exhibits Nos. 1 and 3 have covers and No. 2 has had evidently, but they have been torn off. The outer back of No. 2 is missing, but the exhibit shows it has been torn off. Nos. 1 and 3 have each a rigid outer back and a rigid inner back, the outer back of No. 3 being more rigid than that of No. 2 which is of stiff leather. In Nos. 1 and 3 the rigid inner back is attached to the rigid outer back with heavy brown paper and some sort of cloth interposed, the interposed material being glued to the respective backs. No. 2 has the rigid inner back with the cloth still adhering and bearing abundant evidence of having been torn from the outer back. Each of these exhibits has signatures fastened to the rigid inner back by stapling passing through it and clinched on the under or outer side. On and over these clenched ends the cloth and paper, yielding material, is glued, covering the entire under or outer surface of the inner rigid back. Then this cloth, etc., is firmly glued to the upper or inner surface of the outer rigid back. This is the precise construction of the patent in suit so far as the interposed yielding material, and "yielding embedding surface, f," are concerned. One would think that Bowman had the Sneider construction before him and was describing it when he drew this claim 2 of the patent in suit and the specifications of the patent. While the Sneider patent, in its specifications, does not specifically describe and claim an interposed yielding material between the two backs his drawings clearly show it, and we have long and well-known user of books and book backs of this construction. But the prior art describes this construction, as well as the double backs with staples passing through the inner back. In a patent to Frank Bowman, dated January 30, 1877, No. 186,791, for improvement in blank books, he says:

"A represents a stiff back for a book, to which the sections, B B, of paper are fastened by means of wire staples, C C. These staples are passed from the front through the sections and through the stiff back, A, the sections being placed at suitable distances apart, and the ends of the staples clinched on the rear side of the back, A, by bending the ends of each staple towards each other. This wire-stitched book is intended to be made on a sewing-machine, and avoids perforating the back previous to placing the wire, as by my plan the wire is driven through the back and the section, and it cuts, stitches, and clinches the wire at one and the same operation. * * * I am aware

that books have been fastened with wire staples inserted from the back toward the front, and the ends of each staple passing through different sections of the book. Such invention, as known to me, requires, however, a double board or two stiff backs, while by my invention but one board or stiff back is required."

In that patent he was trying to obviate the necessity of having two stiff, or rigid backs.

In a patent to Frank Bowman of July 17, 1883, No. 281,657, for back for books, he says:

"This invention relates to certain improvements in backs for books, and it is particularly designed for use in connection with that class of books in which the sections of papers forming the leaves are secured to the back by means of wire or thread, and which are principally employed as invoice and sample books, although sometimes it may be used for other purposes, where the binding together of miscellaneous matters in the book is the object required; and the invention has for its object to provide a neat rounded back, to which the sections may be attached by means of wire or thread, as more fully hereinafter specified. These objects I attain by the means illustrated in the accompanying drawings, in which Fig. 1 represents a perspective view of a portion of a book-back; Fig. 2, a transverse section of the same; and Fig. 3, a like view, having a covering applied to both sides of the back. The letter 'A' indicates the book-back, which is constructed of pasteboard or other suitable material scored longitudinally, as at 'b,' so as to form a series of parallel strips, a, of sufficient rigidity to properly support the sections of paper forming the leaves. The leaves or sections are secured by wires or staples, as usual, and when the book is opened such construction will allow a free spreading out of the leaves, as the back is free to bend for the purpose. The back thus formed is provided with a flexible lining of leather, cloth, or other suitable material, whereby flexibility and strength are secured."

In a patent to Baumfaulk, dated May 3, 1881, No. 240,805, for binding books, we have the ends of the signatures roughened, etc., and then glue spread thereon on which is laid cotton flannel, and then this is glued to the back. The patentee says:

"The description already given applies when the back of the book is rounded, as shown in Figs. 1 and 2. If the book is straight-backed, as shown in Fig. 3, which is the style employed when the book need not open very widely, the leaves, A, are placed between the two movable sides of the press, a a, which sides are cut away near their tops, so as to leave a wider space there than below, and the leaves, A, put between these sides, a a, are thus allowed to spread more widely at their upper portion, e, than below. The book is then rasped in the manner above described, the layer of thin glue spread thereon, and on this layer is placed and pressed cotton wadding or similar substance, upon which the glue is allowed to dry. The cotton wadding adds to the fiber by which the rasped leaves are finally attached to the back of the binding. Upon this surface, when dry, is spread a coating of hot strong glue, and on this the cotton flannel, f, as heretofore described, is placed, extending slightly beyond the edges of the back. Both the round-back and straight-back books are fastened in their outside covers with the aid of the piece, f, in the ordinary manner."

True, this is not interposing a yielding material between two stiff or rigid backs, an inner and an outer, but it is using such material between the signatures and back for covering, welding, and evening up the rough surface or ends of the signatures and is equivalent, as a conception, to using the same material for the purpose described in the patent in suit.

In gluing one surface to another it would occur to anyone as it did to Sneider, evidently, that if one was covered partially, with rough projections such as thread or bent wire ends to such an extent as to prevent their firm union, that some means should be employed to obviate the liability of a partial union of the surfaces. Would it require thought amounting to patentable invention to interpose some pliable material into which the projections would penetrate, thus leveli.,, up the one surface to meet the other at all points? These projections, unless drowned in glue, would necessarily prevent the surface of a hard rigid material forming the outer back from coming in contact with that of the other, or inner back. That the remedy was obvious cannot be doubted; that it had been applied by Sneider is certain. He says on cross-examination:

"X-Q. 51. Referring to Fig. 4, does the interposed strip which you have pointed out in that figure have anything to do with securing the covers to the back? A. It is placed in there between to cover all roughness of the inner part and to adhere better to the cover."

Again, X-Q. 70 to 76, he said:

"X-Q. 70. Did you ever use the construction illustrated in the drawings, and particularly in Fig. 4? A. We used part round and part flat. X-Q. 71. I will repeat my question in a little clearer form. Where you employ the round headed rivets, did you ever construct a book in which these rivets were arranged in respect to the interposed pad strip and the outer and inner back as illustrated in Fig. 4? A. Yes, sir. X-Q. 72. In that figure the outer ends of the rivets appear to be wholly embedded in the substance of the outer back, do they not? A. They do. X-Q. 73. How did you secure the two backs together in such a construction? A. Gluing them together and pressing them with weights. X-Q. 74. I don't suppose the interposed pad strip was of much use in this case. Am I correct? A. Certainly it was. X-Q. 75. Did it help secure the backs together? A. It did. X-Q. 76. But I understood you to say that this interposed pad strip was used 'to smooth' the inner back, and thus form an even surface for gluing to the outer back when the rivet ends projected beyond the inner back. This evidently is not the case in the construction you refer to, is it? A. It is."

In view of the prior art, as disclosed by the record, I fail to find any patentable invention in claim 2 of the patent in suit. The device disclosed had been in use long before this patent was applied for. See, also, pages 117–119 of defendant's exhibit Cram Hand Book, Bookbinding for Amateurs, where pasting on paper for evening up uneven surfaces is pointed out.

I do not need to cite authorities. Not all improvements are invention. There must be something more. Loom Co. v. Higgins, 105 U. S. 591, 26 L. Ed. 1177; Pearce v. Mulford, 102 U. S. 112, 26 L. Ed. 93; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co., 150 Fed. 738, 80 C. C. A. 404. It is not necessary to find the precise process or structure in the prior art. It is all-sufficient if we find the path open, made so clear that the ordinary mechanic skilled in the art would see and construct and apply.

There will be a decree dismissing the bill, with costs.

ELECTRIC VEHICLE CO. et al. v. DE DIETRICH IMPORT CO. et al.

(Circuit Court, S. D. New York. February 15, 1908.)

1. JUDGMENT—DEFAULT—MOTION TO SET ASIDE DEFAULT.
A motion to set aside a default will be denied, where not made until after the expiration of the term at which the decree was entered, and where the defendant had been guilty of laches, and no valid excuse for permitting the default was shown.

2. PATENTS—VALIDITY—ADJUDICATION.
A decision overruling a demurrer to a bill for infringement of a patent, based on the claim that the patent was void on its face, does not establish its validity as against any defense requiring extraneous proof.

3. SAME—CONSTRUCTION OF CLAIMS—DETERMINATION ON MOTION.
A patent which has been in existence for 13 years, and has never been litigated on its merits, although its validity is attacked in numerous suits, which have not been brought to trial, will not be adjudged for a pioneer invention, on a motion to punish for contempt for violation of an injunction against infringement granted pro confesso.

In Equity. On motion to punish for contempt for violation of injunction, and on motion to set aside default.

Betts, Sheffield, Bentley & Betts (Samuel R. Betts, William A. Redding, and James J. Cosgrove, of counsel), for complainants.

Nathan Bijur, R. A. Parker, and George H. Engelhard, for defendants.

HOLT, District Judge. I think that the motion to open the default should be denied for the following reasons: (1) The term at which the decree was entered had expired before the motion was made. (2) The defendants were guilty of laches in making the motion. (3) No valid excuse is shown for the default. (4) The evidence satisfies me that the defendants, after full consideration, concluded to make no defense, and had no intention to move to open the default until after the motion to punish for contempt was noticed.

On the question whether the defendants have been guilty of contempt I have felt some hesitation. On the one hand, a final decree and an injunction issued pursuant to it should, in a patent case, as in all other cases, be effectively enforced. A decree pro confesso should be enforced just as effectively as any other decree. The fact that the defendant Allen, at first individually, and afterwards through the company which he had organized, took out licenses from the complainants authorizing him to import and sell in this country the De Dietrich machine, affords a strong legal presumption that he admitted that the Selden patent was valid and that it covered the De Dietrich machine. The fact that, in consideration of obtaining such licenses, he executed contracts agreeing not to sell any gasoline automobiles not licensed by the complainants, affords a strong presumption that he admitted that the Selden patent was a pioneer patent, covering all gasoline automobiles of the usual types. The fact that he permitted a decree to be taken against him by default, holding that he had infringed the patent by importing and selling the Mercedes machine, establishes as to him that the Mercedes machine is an infringement of the Selden patent, and

therefore, as to the defendant Allen, it may be a proper test, in order to determine whether the Allen Kingston automobile infringes the patent, to compare it, not only with the patent, but with the De Dietrich and Mercedes machines. On the other hand, the fact that Allen suffered the decree to be taken by default strictly establishes only the truth of the facts alleged in the bill. He admits that he had imported a few Mercedes machines, and the fact that he permitted the decree to be taken in that case simply established that he had no defense to make to that charge.

The decree did not establish that the Allen Kingston automobile infringed the Selden patent. It did decide that Allen had infringed the patent by importing and selling the Mercedes machines, and the decree thereupon enjoined him from doing anything to infringe the patent. If, therefore, the Allen Kingston automobile is obviously, upon mere inspection, an infringement of the Selden patent, the motion to punish him for contempt in offering to sell it should be granted. The question whether it is obviously an infringement seems to me to depend upon the question whether the Selden patent is a pioneer patent or not. If the Selden patent conveyed to the patentee a monopoly, in this country, of the right to make and sell any gasoline automobile of the usual types, then I think that the points of distinction alleged in the affidavit of Mr. Smith are immaterial; but if the Selden patent is not a pioneer patent covering the entire fundamental principle of the gasoline automobile, but simply is a patent for a particular kind of a gasoline automobile, I think it at least doubtful, in view of the grounds of distinction pointed out by Mr. Smith, whether the Allen Kingston automobile infringes.

It is claimed that the opinion of Judge Coxe shows that he held the Selden patent to be a pioneer patent, and its language, at first reading, seems to tend to sustain that claim; but I think that the opinion of Judge Coxe should be read in the light of the real question before him, and I cannot see how the question of the absolute validity or invalidity of a patent can be determined upon a demurrer, which is based simply upon the claim that the patent is void on its face. If the patent shows on its face that it is void, that fact may be determined upon a demurrer; but it seems to me that a decision upon such a demurrer upholding a patent cannot be conclusive on any defense which depends on extraneous proof, as, for instance, anticipation by earlier patents, or by inventions described in earlier publications, or by prior use, or any of the many defenses which may be set up to the validity of a patent which are not apparent on its face. I therefore cannot see how the decision of Judge Coxe upon the demurrer establishes conclusively that this patent is either a pioneer patent, or is valid; and admittedly there has been no decision rendered after a hearing upon the merits on proofs taken.

Moreover, there are facts in this case which support the suggestion that the complainants have hesitated to bring such a question to actual decision. The patent was applied for in 1879. It was granted 16 years later, in 1895. Nearly 13 years have since passed, during which the complainants have asserted that they had a pioneer patent, and have caused many persons to take out licenses from them, and have col-

lected, according to the motion papers, about $1,500,000 for license fees, without bringing to actual trial a case testing the question of the validity of this patent on the merits. Several such cases have been brought. One was a case against the Winton Carriage Company, in which the complainants took their prima facie proofs, and the defendant had nearly completed its proofs, when the case was compromised, and settled out of court. As early as 1903 suits were brought by the complainants against the Ford Motor Company and the O. J. Gude Company for the infringement of the Selden patent, and as early as 1906 suits were brought by the complainants against the Panhard Company. In all these suits defenses were interposed on the merits; but the testimony never has been completed, and the cases never brought to a hearing.

The claim put forth upon this motion is that the Selden patent is a pioneer patent, and that all makers of gasoline automobiles of the usual types infringe the patent. So serious a claim as this ought not to be upheld by the courts, unless the complainants either have established the validity of the patent in a contested litigation, or have been ready to do so without delay whenever an opportunity has been offered. If this motion is granted, it will be urged, as the decision of Judge Coxe on the demurrer has been urged, as an adjudication that the Selden patent is a pioneer patent, and that all makers of gasoline automobiles must have a license. I think, on the papers submitted, that there is sufficient doubt whether the Selden patent is a pioneer patent, and that, if it is not a pioneer patent, there is sufficient doubt whether the Allen Kingston automobile infringes to make it improper to grant this motion.

My conclusion, therefore, is that the motion to punish the defendants for contempt should be denied.

KILBOURN KNITTING MACH. CO. v. LIVERIGHT & DAVIDSON.

(Circuit Court, E. D. Pennsylvania. February 24, 1908.)

No. 17.

PATENTS—SEAMLESS LACE-FRONT STOCKING—NONPATENTABLE ABSTRACTION.

The Blood patent, No. 743,231, claims 3 and 4, being for the mere conception or idea of a machine-knit seamless single-feed stocking having open or lace-work meshes on the front of the leg and foot, to say nothing of its being merely a putting together of old features, is an abstraction, which is not patentable.

In Equity. Suit for infringement of letters patent, No. 743,231 for a stocking granted to George Blood, Jr., November 3, 1903. On final hearing.

L. P. Whitaker and Hector T. Fenton, for complainants.
Frank S. Busser and George J. Harding, for respondents.

ARCHBALD, District Judge.* The patent in suit is for a seamless stocking, ornamented with open or lace work effect on the front of the

*Specially assigned.

leg and foot, and knit in a single continuous operation. The claims relied on are as follows:

"3. A machine-knit seamless stocking having open or lace-work meshes upon the leg of the stocking and down upon the front of the ankle and top of the foot of the stocking, the heel, foot, and toe of the stocking being knit from a single thread, substantially as described.

"4. A machine-knit seamless stocking knit from a single thread in one continuous operation, the said stocking having lace-work upon the front of the leg of the stocking, said lace-work extending down upon the ankle and top of the foot of the stocking, substantially as described."

It is not necessary to differentiate between these claims, bearing as this does merely on the question of infringement, the case being otherwise disposed of. Patentably considered, the stocking structure, which is so declared for, cannot be distinguished from the so-called seamless, split-foot stocking, passed upon in the case of the Shaw Stocking Co. v. Weirman & Sarfert (C. C.) 154 Fed. 67, which was sustained by this court, but on appeal was held to be invalid. 157 Fed. 928. The claim which was there involved, which will show the similarity of the two, is reproduced in the margin.† Both stockings, as it will be seen, have the seamless feature, which was not new in either, and neither is the open work lace effect, which is found here, which in one form or another has been long known and practiced in the stocking art. As therefore there was nothing patentable in the Shaw Case, in the conception of combining the seamless and the split-foot ideas, which were both old, so neither is there anything patentable here, in bringing together in a single stocking structure the seamless and the lace work effect which are in the same position.

It is said, however, that the invention calls for this being done in a machine-knit stocking—leg, heel, foot, and toe—in a continuous operation, and, in one form at least, with a single thread, involving a knitting problem which the patentee alone has mastered. But the same thing was urged in the Shaw Case, it being claimed that the combined seamless, split-foot construction was only possible by the course marked out in the patent; but that did not save it. It is to be noted, as to this, that the invention, there as here, is not for a new knitting process, however the specifications may explain the method pursued by the inventor to carry out his conception. Nor yet for the manufactured article produced thereby or by a machine which has been devised to realize it. But for a stocking of the structural character indicated, having the features specified, however produced, saving only that it is machine knit, thus monopolizing the whole field, and leaving no room for anyone else to accomplish the same result by another method, however novel, as the present charge of infringement abundantly demonstrates. Or in other words, the patent is for the mere idea or conception, of a machine-knit, seamless, lace-front, single-feed stocking, which as an ab-

† "2. A stocking having the top or upper part of its foot composed of one yarn or set of yarns and the bottom or sole part of the foot composed of another and distinct yarn or set of yarns, the said upper and sole parts being united in the form of a tube by the reciprocal interloopments of the loops of the opposed edges of said upper and sole at the sides of the foot, substantially as described."

straction—to say nothing of its being merely a putting together of old features—is not patentable. Admittedly, a design patent, which it approximates, would not be good for such a stocking, for the simple reason, as confessed by counsel, that it would not be new, aside from its being confined to its own particular ornamentation. But if that be so, then surely the broad conception, covering a stocking of this general character, cannot be any more so, simply because it is put forward as an article of manufacture. Without, therefore, going into any of the other questions raised, the claims of the patent involved must be declared void for want of anything patentable to sustain them.

The bill will be dismissed, with costs.

GEORGE W. JACKSON, Inc., v. FRIESTEDT INTERLOCKING CHANNEL BAR CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 15, 1908.)

No. 28,237.

PATENTS—SUIT FOR INFRINGEMENT—SUBSTITUTION OF PARTIES.

Where a complainant assigns his right under a patent pending suit for its infringement and after the expiration of the patent, his assignee is entitled to be substituted as complainant and to file an original bill in the nature of a supplemental bill, and the filing of such bill is not the institution of a new suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 472.]

In Equity. On demurrer to original bill in the nature of a supplemental bill.

Thomas F. Sheridan, for complainant.
John G. Elliott, for defendant.

KOHLSAAT, Circuit Judge. This cause is before the court on demurrer to original bill in the nature of a supplemental bill. The original cause was for an injunction to restrain infringement of patent No. 500,780. After the patent had expired, complainant above named was substituted for the original complainant. The demurrer is based upon the proposition of law that the transfer of complainants by the original bill in the nature of a supplemental bill constituted a new suit in effect; that, having been effected after the patent expired, it would, if allowed to stand in the place of the original bill, result in depriving the defendant of his right to have his liability tested in a suit at law—citing Hewitt v. Penn. Steel Co. (C. C.) 24 Fed. 367; Miller's Heirs v. M'Intyre, 6 Pet. 61, 8 L. Ed. 320. In the former case, only a one-half interest in the patent was brought in under the original bill. After the patent had expired, it was sought to bring in the party representing the other half interest. The court there held that it did not acquire jurisdiction of the cause until all the parties were brought in, which in that case was not done until after the patent had expired; citing Gaylor v. Wilder, 10 How. 494, 13 L. Ed. 504, and Blanchard v. Eldredge, 1 Wall. Jr. 339, Fed. Cas. No. 1,510, and that until all parties were before the court, no case was presented; that the only remedy

was at law. In the latter case the Supreme Court held that new parties could not be affected by proceedings had while they were strangers thereto, and while their interests were not before the court. These authorities, however, cannot be held to sustain defendants' position here. When the substitution was made, as well as when suit was begun, all parties in interest in the patent were before the court. There is no question but that a complete case was before the court.

The question here is solely as to the effect of substituting one complainant for another; the cause of action remaining the same. At page 39 of volume 21, Encyclopedia of Pleading and Practice, note, it is said:

"An original bill in the nature of a supplemental bill by a party who has acquired the plaintiff's title by transfer from him pendente lite is not, in a proper sense, the commencement of an original suit, but is rather a mere continuation of the suit. * * *"

Judge Woods, speaking for the Court of Appeals for the Seventh Circuit in Ross v. City of Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288, held that where a complainant assigns his rights under a patent pending suit, and after the expiration of the patent, his assignee is entitled to be substituted as complainant and to file an original bill in the nature of a supplemental bill. It was decided in Clarke v. Mathewson, 12 Pet. 164, 9 L. Ed. 1041, that the administrator of a deceased plaintiff could bring suit in the federal court to revive the suit, notwithstanding no diversity of citizenship existed.

From these authorities it follows that the demurrer is not well taken, and it is accordingly overruled.

DIAMOND STONE-SAWING MACH. CO. OF NEW YORK v. SEUS.

(Circuit Court, S. D. New York. March 4, 1908.)

PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

Equity is without jurisdiction of a suit for infringement of a patent, brought 13 days before its expiration, in which no special reasons are shown why the remedy at law is not adequate.

In Equity. Suit for infringement of patent. On demurrer to bill.

Charles C. Protheroe and James G. K. Lee, for complainant.

Seabury C. Mastick, for defendant.

HOLT, District Judge. This is a demurrer to a complaint in a suit in equity to restrain the infringement of a patent. The ground of the demurrer is that the bill was filed so shortly before the expiration of the patent sued on that the patent expired before the defendant was required to appear in the action, and that therefore the bill is demurrable for want of jurisdiction, and because the complainant has a plain, adequate, and complete remedy at law. The bill was filed May 29, 1907. The patent expired June 10, 1907. The defendant's appearance was not due or made until the July rule day, and the defendant's pleading was not due until the August rule day, when this demurrer was filed. No preliminary injunction was issued, and no application was made for one.

It is well settled that the ground of jurisdiction in an equity suit for the infringement of a patent is the right to an injunction, that the remedy of an accounting for the recovery of profits or damages is incidental, and that a bill in equity will not lie after the expiration of a patent simply for an accounting and the recovery of damages or profits. It is held that the patentee, under such circumstances, has an adequate remedy at law. Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975. Upon the question whether the same rule applies to an equity suit brought just before the expiration of a patent the cases seem to be somewhat in conflict. Some appear to hold that it is a question of discretion with the court whether to take jurisdiction or not, and in various cases jurisdiction has been taken. Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074; Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707. Other cases hold that, when it clearly appears that there are no special circumstances in the case calling for the exercise of equitable jurisdiction, and the time which the patent has to run when the bill is filed is so brief that it is apparent that the prayer for an injunction is a mere form to support the jurisdiction, and that the real object of the action is an accounting to recover profits or damages, the court has no jurisdiction. Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; Keyes v. Eureka Con. Mfg. Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929.

There are various decisions in the Circuit Courts of Appeals and in the Circuit Courts, some of which support one view of the case and some the other. Upon the whole, in my opinion, the authorities preponderate that, when there are no special circumstances shown calling for the exercise of equitable jurisdiction, an equity suit brought for the infringement of a patent 13 days before its expiration is not a suit brought for a preliminary injunction. One cannot be obtained before the patent expires. The essential object of the suit is to have an accounting, and, as a result of the accounting, to obtain a recovery for damages or profits. This is such a suit, and my conclusion, therefore, is that the demurrer should be sustained; and, as I cannot see that it would be possible to cure the defect by any amendment, I think that there should be a decree dismissing the bill on the demurrer, with costs.

In re ARGENTO.

(District Court, E. D. New York. January 28, 1908.)

ALIENS—NATURALIZATION—MORAL CHARACTER OF APPLICANT.

The fact that an alien imperfectly acquainted with the English language obtained a certificate of naturalization under the prior law on a false statement that he was less than 18 years old when he came to this country, which certificate he afterward voluntarily surrendered, does not necessarily reflect on his moral character to such extent as to preclude him from making a new application.

Application for Naturalization.

Charles W. Bacon, for petitioner.

CHATFIELD, District Judge. This applicant voluntarily surrendered his papers in October, 1904. These papers had been obtained in October, 1903, after a residence of five years, and upon a statement that the applicant was less than 18 upon arrival. This statement was untrue.

The applicant seems to have done nothing within five years to reflect upon his moral character, except that he has recently filed a petition in this court, which was verified by him, but did not set forth that he had previously been in possession of a naturalization certificate. His ignorance of English, and the circumstances surrounding the making of his last petition, seem to justify his being allowed to make a new petition setting forth the exact facts. If anything be found inconsistent with good moral character, this can be presented at the time of final hearing; but for the purpose of application his record of good character would seem to be sufficient. See In re Di Clerico, 158 Fed. 905.

LOTTE BROS. et al. v. AMERICAN SILK CO.

(Circuit Court, S. D. New York. December 9, 1907.)

1. CORPORATIONS—CONSOLIDATED CORPORATIONS—RECEIVERS.
   Where one of the main purposes of a receivership was to enable all the parties in interest to save a concern which was a consolidated corporation, at least one of the receivers should be chosen from the management, because of his familiarity with its history and the transactions of the organization.

2. RECEIVERS—NONRESIDENTS—BONDS.
   Where one of the receivers of a corporation was a nonresident, his bond should be conditioned that he would appear when required by the court, either on notice to him within or without the state, or on notice to the counsel for the receivers.

Leavitt J. Hunt, for complainants.
Roelker, Bailey & Curtis, for defendant.

WARD, Circuit Judge. I have considered the affidavits submitted in support of the motion made by Mont D. Rogers and Loren O. Thompson to remove Bernard E. Sheibley, heretofore appointed, with Charles W. Gould, one of the receivers of the American Silk Company in this cause, and am of opinion that the objections made have been met by the answering affidavits. When, as in this case, one of the main purposes of a receivership is to enable all the parties in interest to save the concern, particularly where it is a consolidation of various companies in process of formation, it is desirable that at least one receiver shall be chosen from the management, because of his familiarity with the history and the transactions of the organization. There should also be a receiver well known to and relied upon by the court.

Charles W. Gould having declined to act, I shall appoint Charles C. Burlingham in his place; the receivers, Sheibley and Burlingham, each to file bond, with sureties to be approved by the court in the sum of $100,000, for the faithful performance of their duties, their action

in all matters relating to the trust to be joint. The receiver Sheibley being a nonresident, his bond may contain a clause that he will appear in New York at any time when required by the court, either on notice to him within or without the state, or on notice to the counsel for the receivers.

In re PENNELL.

(District Court, D. New Jersey. March 25, 1907.)

BANKRUPTCY—RESTRAINING ORDER—ENFORCEMENT OF ATTORNEY'S LIEN.

A court of bankruptcy will not by a restraining order interfere with the carrying into effect of a valid order of a state court, based on a finding that attorneys for a bankrupt are entitled to a lien on a judgment recovered for him prior to the bankruptcy.

In Bankruptcy. On motion to vacate restraining order.

Pratt & Koehler, for the motion.
Isaac Phillips, opposed.

LANNING, District Judge. After examining the papers in this case and hearing counsel, I have reached the conclusion that the restraining order of March 4, 1907, should be vacated so that the order of the New York City Court dated February 27, 1907, may have due effect. That court plainly had jurisdiction of the proceedings in which the order was made. The order was based on an opinion by that court in which the conclusion was expressed that the bankrupt's attorneys had a lien upon the judgment which the bankrupt had previously recovered against Kneeland & Kneeland. The proofs before me amply sustain the conclusion of that court.

An order may be presented to me vacating and setting aside the restraining order of March 4, 1907.

GOLDFIELD CONSOL. MINES CO. v. GOLDFIELD MINERS' UNION NO. 220 et al.

(Circuit Court, D. Nevada. March 7, 1908.)

No. 1,020.

1. INJUNCTION—GROUNDS AND SCOPE.

An injunction pendente lite should not usurp the place of a final decree, neither should it reach out any further than is absolutely necessary to protect the rights of property of the complainant from injuries which are not only irreparable, but which may be expected before the suit can be heard on its merits. It is not necessary that the complainant's rights be clearly established, but it is sufficient if it appears that there is a real and substantial question between the parties proper to be investigated in a court of equity, and that in order to prevent irremediable injury to the complainant before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 302.]

2. SAME—SUBJECTS OF PROTECTION AND RELIEF—RIGHT TO OPERATE MINE.
The right to operate a mine and to carry on the business of mining therein is a property right whether one owns the mine or not, and he may invoke the powers of a court of equity to protect such right, in a proper case. even though he is not the owner of the mine, or even a stockholder in the company which does own it.

3. CONSTITUTIONAL LAW—LIBERTY TO CONTRACT—VALIDITY OF STATE STATUTE.
Laws Nev. 1903, p. 207, c. 111, § 1, which provides that "it shall be unlawful for any person, firm or corporation to make or enter into any agreement, either oral or in writing by the terms of which any employé of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment shall promise or agree not to become or continue a member of a labor organization, or shall promise or agree to become or continue a member of a labor organization," deprives the employer of the liberty to contract as to matters which may be vital to him, and therefore is invalid under the constitutional provision that "no one shall be deprived of life, liberty or property without due process of law."

4. CONTRACTS—LEGALITY—AGREEMENT BETWEEN MINE OWNERS NOT TO EMPLOY MEMBERS OF LABOR ORGANIZATION.
An agreement between mine operators that they will not employ any person who belongs to a certain labor organization, or to any organization affiliating therewith, does not constitute an unlawful conspiracy against such organization or its members.

5. "CONSPIRACY"—WHAT CONSTITUTES.
An unlawful "conspiracy" is a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means.
[Ed Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 1–5.
For other definitions, see Words and Phrases, vol 2, pp. 1454–1461; vol. 8, p. 7613.]

6. INJUNCTION—PERSONAL RIGHTS—INTERFERENCE WITH OCCUPATION—UNIONS.
Workmen, when free from contract obligations, have a legal right, singly, collectively, or as a union, to quit work—that is, to strike—and they have the further right to use such lawful means to make the strike effective as are not inconsistent with the rights of others, and they may endeavor by peaceful argument and persuasion to secure the co-operation of any nonunion men, provided the persuasion is of such a character as to leave the person solicited free to do as he pleases, and he is not persuaded to do that which it would be unlawful for him to do

7. SAME—PICKETING.
Nonunion men have a right to seek employment, to come and go from their work, or to go where they please on the public thoroughfare, without molestation, threats, violence, or insults of any kind, and without being picketed or compelled against their will to listen to persuasion.

8. SAME.
Striking workmen, who assail nonunion men with threats, ridicule, or insult, or who follow them to or from their work with vile language and abusive epithets, in order to compel them to quit work, or to refrain from offering to work, are guilty of unlawful conduct.

9. SAME.
Picketing, if confined strictly and in good faith to gaining information and to peaceful persuasion and argument, is not forbidden by law; but when it is used for purposes of intimidation it is unlawful. The massing of unnecessary numbers of pickets at a point which must be passed by nonunion men, whom the strikers desire to influence, is in itself an act of intimidation.

10. SAME.

Any attempt to intimidate a man in order to compel him to refrain from exercising a legal right is unlawful.

11. SAME.

If, after the miners' union became aware of the fact that the pickets were carrying out a common purpose to intimidate nonunion men in order to compel them to quit work, it still continued to co-operate with and supervise the pickets, it must be held that there was an agreement between the union and the pickets to do an unlawful act.

12. SAME—EVIDENCE—SUFFICIENCY.

Defendant, a miners' union, declared a strike against complainant, which was a mining company, and appointed a committee, with full power to regulate the conduct of the strike. With the knowledge and acquiescence of such committee, if not by its orders, members of the union, to the number of from 30 to 75, or more, gathered each time shifts were changed at complainant's mine, where its employés were compelled to pass, and there was evidence tending to show that they followed such employés, and used abusive and threatening language towards them. It was also shown that complainant was unable to obtain sufficient men because of their fear of the strikers, and that it employed 50 guards at an expense of $250 per day to protect its property and workmen. It also appeared, from the constitution of the union and from its prior acts, that it was dominated by men who were not inclined to cultivate friendly relations with employers, but rather to promote strife. *Held*, that such evidence was sufficient to show a conspiracy to subject complainant to unlawful picketing and interference with its business and property by intimidating its workmen, which the union either originated or became a party to, and which entitled complainant to relief by injunction against the union and its members.

13. SAME.

An important element to be considered in determining whether injurious conduct is to be apprehended from a labor union during a strike, which ought to be restrained by injunction, is the character of the dominant faction in such union.

In Equity. On motion for preliminary injunction.

Complainant, a Wyoming corporation, owns mines in the Goldfield Mining District, and also owns about 97 per cent. of the capital stock of the Goldfield Mohawk Mining Company, Red Top Mining Company, Goldfield Mining Company, and Laguna Goldfield Mining Company. It operates all of its own mines, as well as the mines of said companies, as one property for the use and benefit of itself and other stockholders. It appears from the bill of complaint that the Goldfield Miners' Union No. 220 is an unincorporated association composed of the individual respondents named, and from 1,500 to 2,000 other persons in Goldfield, all of whom are residents of Nevada. It is a branch of the Western Federation of Miners, also a voluntary, unincorporated association.

It is alleged that the Goldfield Miners' Union, though claiming to be a labor organization, is a criminal society, organized to agitate certain so-called political questions, which tend to subvert the general principles of government, and, for the purpose of carrying out its conspiracy, it has, as one of its cardinal principles, that there shall be a continuous state of warfare between its employers and employés; that it is the duty of the employés to take the property of the employers by stealth and force, and if the demands of the employés are not complied with, to destroy the property of the employers; that it seeks to accomplish its purpose by making unreasonable demands upon complainant, and enforcing the same by threats, boycotts, intimidations, picketing, brutal assaults, deportations, and other similar methods; that in the past two years the union has at Goldfield declared a large number of strikes, to enforce which it has resorted to every form of lawless violence, even to murder and wanton destruction of property; that each of these strikes

was a conspiracy on the part of respondents to prevent complainant from working its mines, and shipping its ores to other states, unless it agree to the terms announced by said respondents, in consequence of which complainant's mines have been idle more than one-quarter of the time, and such a threatening condition of disorder was produced that it became necessary in December, 1907, to bring federal troops to Goldfield in order to maintain public peace and safety; that since December 12th the respondents have caused complainant's properties to be picketed; that is, a large number of men belonging to Goldfield Miners' Union No. 220 have kept constant watch upon complainant's property, unlawfully invaded the same, endeavored to prevent employés from working for complainant, and threatened them with bodily harm, death, or deportation if they continued to work. It is further alleged that complainant pays higher wages than are ordinarily paid in Western mining camps; that it is unable to secure a sufficient number of men to operate its works by reason of the unlawful conduct of respondents; that it can obtain hundreds of men who are ready and willing to work if assured adequate protection; that the pickets and trespasses have increased in number; the threats and intimidations have increased day by day since the picketing was first established, and that the property of complainant will be destroyed in whole or in part unless some order is made by this court to protect the same. By reason of respondents' unlawful conspiracy complainant has been put to an expense of over $10,000 by the shutting down of its mines, guarding its property, and bringing men from other points; that such expense is increasing, and will continue to increase unless the court by some order protects complainant's property and employés. The bill further states that the union is a nuisance and an illegal body existing for the sole purpose of hampering complainant in the control of its business, and preventing interstate commerce; that it is a continual menace to complainant's business, and will, so long as it exists, prevent complainant from mining and shipping its ores, and cause hundreds of thousands of dollars damage to complainant's property; that the respondents are wholly irresponsible, and the union should be abated as a nuisance; that all said conspiracies are planned in meetings of the union, and if such meetings are permitted to continue the conspiracies will continue to be hatched, and the injury will be irreparable; that the shutting down of the mines has already caused drifts, stopes, and other workings in the mines to cave.

An injunction is asked restraining respondents from obstructing the operation of complainant's mines; from intimidating its employés; from congregating on and picketing its works; from maintaining an illegal boycott against the company, its agents or employés; and from holding or attending any meeting of the Goldfield Miners' Union. It is further asked that said Goldfield Miners' Union be prohibited from holding or calling any meeting of any kind in the Goldfield Mining District, or elsewhere.

To this bill a joint plea and answer was filed, in which it is alleged that complainant is violating the provisions of the Constitution of Wyoming against consolidations and combinations, to prevent competition; against forming corporations for holding stock in other corporations, and against monopolies. It is further averred that complainant in November, 1907, conspired with other corporations and millowners in Goldfield District, to oppress, boycott, and drive therefrom all laborers in and about the mines who would not accept the scale of wages and other conditions dictated by the members of such combination, in pursuance of which they adopted a reduced scale of wages and refused to employ any members of the Western Federation of Miners, or of the respondent union. It also avers that the present strike is due to the fact that the members of the union were unwilling to accept depreciated paper in lieu of money for wages. Respondents also deny that they have caused any depreciation in complainant's stock; that either the union or the Western Federation of Miners is a conspiracy, or that their principles or practices are unlawful; deny that they have made or enforced any demands by boycotts, threats, intimidation, picketing, brutal assaults, or deportation, or that they have resorted to any form of lawlessness or violence in the Goldfield Mining District. It is alleged that the bringing of the federal troops to Nevada was unnecessary, and was brought about by complainant

and others in pursuance of the above-mentioned conspiracy; deny that the union ever caused complainant's property to be picketed, or has adopted a system of picketing in said strike, except that divers members of the union, voluntarily and without preconcert, and without any special direction of the union, have gone into the neighborhood of complainant's property, and addressed lawful arguments to any nonunion man willing to listen; deny any unlawful picketing or trespass on complainant's property, or that respondents have caused, or will by any unlawful acts or conduct cause, complainant any loss or expense, or that any order of this court is necessary to protect complainant's property or employés, or that respondents are unable to respond in damages, or that the union is a nuisance, or an unlawful or illegal body, or that it has been, or is, an unlawful menace to complainant's business; and, in general, denies all unlawful conspiracies and combinations charged in the bill.

In order to appreciate the present conditions in Goldfield it is necessary to review briefly the relations which have existed between the parties herein during the year preceding the commencement of the present trouble.

The affidavit of W. H. Bryant shows that the stealing of high grade ores by complainant's employés from mines operated by complainant has been a common practice, and that during the six months preceding December 31, 1907, not less than $1,000,000 worth of ore was so stolen from the Mohawk property alone. The statement has not been denied. This practice has been the source of much irritation. In December, 1906, in pursuance of an order and injunction of the federal court, watchers were sent to the Mohawk property to prevent the stealing of ore; thereupon the employés, "all of whom were under the jurisdiction of the respondent, Goldfield Miners' Union No. 220, refused to work below the surface where any of said watchers were stationed." The affidavit of E. S. Sheridan, one of these watchers, shows that he was waited on by a committee from said union consisting of Ted James, the present assistant secretary of the union, and John Devit, who remonstrated with him on the ground that no good union man would stand guard over the men. Sheridan refused to give up his position, and shortly after was expelled from the union. Later, the union demanded his discharge by the company on the ground that he had violated his obligations to the union. This was refused. December 20, 1906, a general labor strike was inaugurated by the union. Complainant's mines were shut down on this occasion 19 days. January 9, 1907, a settlement was reached; the wages of each employé were then raised about one dollar per day, and it was agreed that properly appointed change rooms should be erected at the mines; that any operator might at any time require all employés to use such change rooms in going on and off shift, and to change their outer garments; the change rooms were to be under the control of a watchman. The object of the change room was to check ore stealing or "high-grading." Early in March, 1907, trouble arose between the Goldfield Miners' Union No. 220 and the Carpenters' Union, affiliating with the American Federation of Labor, which resulted in a general effort by the members of the respondent union to induce all American Federation of Labor men to join the Miners' Union. The Miners' Union carpenters refused to work at any mine where carpenters, not members of their own union, were employed. March 7, 1907, in consequence of this friction, a delegate of the Miners' Union, without authority, called upon all members of the union working in the Mohawk mine to quit work on the ground that said mine was employing carpenters not members of the union. The men at once ceased work, but, on the same day, the Miners' Union repudiated the action of the delegate; the men returned and offered to work again, but the offer was refused, and complainant shut down all its mines until such time as the discordant labor unions could adjust their differences. About this time the following notice was served on complainant:

"Goldfield, Nevada, March 8th, 1907.

"Mr. John W. Finch, Nixon Building.

"Dear Sir: Goldfield Miners' Union No. 220, W. F. M., have passed a law that all workers employed around the mines must hold a membership card in this union, and if they do not join our members shall refuse to work. This

pertains principally to the carpenters. We demand that members of our organization only shall follow that work, and shall draw the same wages as men now following that line of work. This goes into effect at once."

On the 10th day of the same month, John Silva, a restaurant keeper in Goldfield, who had refused to conform to certain demands of the Miners' Union, was shot. M. R. Preston, then a walking delegate, and Joseph Smith, a member of the respondent union, were accused of the homicide. Later they were convicted in the district court of Esmeralda county, Nev.; Smith of manslaughter, and Preston of murder in the second degree. Both are now confined in the State Prison of Nevada. The respondent union went to the support of both Preston and Smith, furnished them with attorneys, and, since their conviction in the spring of 1907, and up to December 6th of the same year, paid them at first $5 per day, and later $50 per month. March 13, 1907, the Goldfield Business Men and Mine Owners' Association adopted and published certain resolutions, in which it was stated "that local conditions are becoming intolerable through constant and unreasonable agitation on the part of the leaders of an organization known as the I. W. W., and that an unchecked tendency of such conditions means danger to life and property and the ultimate destruction of mining and general business in the camp of Goldfield," and the members pledged themselves not to employ any member of the I. W. W. in any capacity, but to recognize any labor organization not affiliated with or under the jurisdiction of the I. W. W. The Goldfield Miners' Union being subsidiary to the Western Federation of Miners, and the Western Federation of Miners being the Mining Department of the I. W. W., the effect of these resolutions was such that no member of the Miners' Union could obtain employment in the Goldfield Mining District. During this trouble a large number of guards were employed to patrol the town of Goldfield and protect property therein. April 1, 1907, a settlement in the following terms was effected:

"In order to establish a definite understanding between the Western Federation of Miners, Local Union No. 220, and the mine owners and operators of the Goldfield Mining District, it is agreed that mining and milling operations will be resumed and continued under the following terms:

"1. The wage scale in effect in the district March 1, 1907, shall remain in force, and eight hours shall constitute a day's work for all men under the jurisdiction of the Miners' Union.

"2. The Miners' Union shall have jurisdiction over all men regularly employed in and around the mines, mills and smelters, including timbermen, timber-framers, engineers, blacksmiths and machinists, and excepting superintendents and managers.

"3. No strike or boycott shall be officially declared by the Miners' Union unless by a two-thirds vote of that organization in favor thereof, and no lockout shall be enforced by the mine owners and operators unless by a like vote.

"4. No town labor controversy shall interfere with the operation of the mines, or the employment of miners.

"5. These terms shall remain in force for a period of two years from date."

In June, 1907, the Western Federation of Miners at an annual convention held in Denver, Colo., amended its constitution in such a manner as to make it easier to strike, and harder to settle. Nothing appears, either in the amended constitution of the Western Federation of Miners, or in the constitution of the Goldfield Miners' Union, which recognizes any duty on the part of either organization to maintain good relations with its employers, or to arbitrate their differences. August 17th change rooms were put in operation at the Mohawk mine; the water furnished was impure, and the arrangements were such that each man after disrobing on one side of the change room was compelled to walk in his underclothes around a partition, a distance of about 100 feet, to the other side of the room. A strike was inaugurated immediately, which continued until September 6, 1907. A number of conferences between complainant and representatives of the union followed. Complainant insisted that the men should be "supplied with lockers or clothes hooks on opposite sides of the change room, on one side for mining clothes and on the other side for street clothes, and in effecting the change of clothing should

walk across the room, passing no intervening partition;" and that "besides the timekeeper stationed in the room, the mining company may, at its discretion, place among the men in each change room one or more watchmen, who are to be neutral." The Miners' Union insisted, first, that each miner be furnished a locker; second, that he change his outer clothes without leaving his locker; and, third, that No. 220 W. F. M. have jurisdiction over all men working in and around the mines and mills, irrespective of time of their employment or nature of work, except managers and superintendents. The strike was finally settled by the following agreement:

"It is agreed between Local Union No. 220 of the Western Federation of Miners and the Goldfield Consolidated Mines Company for itself and its constituent companies, that the wage scale and other terms of settlement made in January and April, 1907, between the mine owners and operators of the Goldfield Mining District and the said union shall remain in force and effect as between them, and that work will be resumed upon the following conditions:

"1. That all employés of the Goldfield Consolidated Mines Company, and of its constituent companies, when required will change their outer clothing when going on and ceasing work without any humiliation or undue exposure of the men and in the presence of the timekeeper of the company and one or more neutral watchmen to be appointed by the company. Each man shall be supplied with two lockers, one for his street clothes and one for his mining clothes, which lockers are to be adjoining one another and the keys to be given to the person using them. In using the lockers each man is to take off the clothes he is wearing, place them in one of the lockers and lock the same, then unlock the other locker and take out the clothes contained there and put them on and then lock that locker. In using the lockers no man shall be required to pass any intervening partition and no visitors shall be admitted to the change room while the men are changing clothes.

"2. That all men at work on the Goldfield Consolidated Mines Company properties and its constituent companies who walked out over change rooms be reinstated without discrimination, provided, the men present themselves for work within twenty-four hours after work is resumed.

"3. That Local Union No. 220, Western Federation of Miners have jurisdiction over all men regularly employed in and around all mines and mills owned and operated by the Goldfield Consolidated Mines Company, and its constituent companies, with the following exceptions: (a) Managers and superintendents; (b) assayers, chemists, and the men in charge of the furnace, parting and weighing rooms of assay department and of chemical laboratory; (c) mine surveyors and the civil and mining engineers; (d) watchmen; it being understood, however, that no party who for good cause is particularly obnoxious to the union shall be employed as a watchman; (e) employés of independent contractors engaged in the placing of machinery, delivery of supplies, erection of buildings, or other surface work not directly mining in its character, it being agreed, however, that the company will place in all such contracts and in bonds for the performance thereof, a clause binding the contractor to pay the customary and established wages of the Goldfield Mining District; to employ none but members of some recognized Labor Union and no discrimination to be made against members of the Western Federation of Miners; (f) any employé when the Western Federation of Miners is unable to furnish from its own ranks a person able to do such work.

"It is understood and agreed that any employé of any of the excepted classes enumerated may belong to the Western Federation of Miners if he so desires, and that organization will admit him and no discrimination will be made by the company against members of that organization in the employment of any of the excepted classes and any one belonging to the organization shall be subject to its juridiction."

About the last of October, 1907, the Goldfield Miners' Union refused to declare a sympathetic strike in aid of the Bishop Union against the Nevada Power Company; there was a majority vote in the union in favor of the strike, but not the necessary two-thirds. About November 14, 1907, complainant, claiming that it was unable on account of the financial stringency to obtain necessary gold to pay its employés, posted notices in Goldfield "to the effect that on and after that date, and until the financial stringency was relieved,

the employés of the company would be paid one-half in gold and one-half in cashier's checks issued by John S. Cook & Co., Bankers, of Goldfield, Nevada, and that this notice applied only to labor performed in the month of November, and later." Mr. MacKinnon, president of the Goldfield Miners' Union, says that on November 16th a further notice was posted to the effect that thereafter complainant's employés would be paid entirely in scrip. On the same day, November 16th, the union appointed a committee to confer with a committee of mine owners. The instructions to the committee were embodied in the following statement which was sent to the Mine Owners' Association:

"This meeting is called for the purpose of considering the best means of meeting the present financial crisis. Some of the mines are issuing checks in payment of wages to the men, with the words 'payable in exchange' written across the face of the checks. I believe that we want the mines to be operated; and at the same time the men must be paid so that they can use their pay without discount to procure the necessities of life. We realize that, until some method is put into action, money is hard to obtain. In order that this whole matter may be properly considered, I recommend that a committee of three be selected to confer with a committee of mine operators, and that said committee be empowered to assist in devising some way to meet the present crisis. That said committee co-operate with the mine operators in endeavoring to secure from the smelters and mills a concession that all bullion procured as a result of mining in Nevada be sent to the mint, and coin demanded therefor, and that said smelters and mills then pay for said ores in coin, and that the mine operators pay their men in coin as soon as this arrangement can be satisfactorily brought into operation. That in the meantime such method of payment be followed as will best enable the men to meet their current expense without loss. That where checks are issued 'payable in exchange' said committee have the mine operators' guarantee the payment of said checks, or exchange, and have a time limit fixed for the payment of same in cash, and that everything be done that is possible to put the business of Goldfield on a cash basis, and that all checks, or exchange, issued to the men for wages shall be the first ones paid in cash out of the produce of the mines."

A number of conferences were had, but the evidence is so conflicting that it would be difficult at this time to make a satisfactory statement as to what occurred at such meetings; however, the correspondence between the parties gives fairly, and with reasonable accuracy, the attitude of each. November 18th, the Mine Operators' Association addressed a communication to the union, the material portion of which is as follows:

"Resolved, that all the companies operating in the Goldfield Mining District pay all employés in bank checks, payable in exchange and suspend cash payment for labor; and that this form of payment go into effect on and after November 18, 1907, and continue in operation until the present financial crisis is passed and the local banks are able to obtain currency for funds and balances due them from corresponding banks and smelters."

November 22, 1907, the following letter was sent by the miners' committee to the operators' association:

"Goldfield, Nevada, November 23, 1907.

"To the Goldfield Operators' Association,
"William M. Erb, Secretary.

"Sir: Your communication of recent date received, and the same with all other matters placed before the special meeting of Goldfield Miners' Union No. 220, November 22, 1907. How it was received is shown by the resolution passed unanimously by No. 220, which we here give you in full.

" 'Resolved, that the present committee be continued with instruction to notify the Mine Operators' Association that unless the wages of the mine employés of Goldfield are paid either in cash or in checks, backed by a guarantee satisfactory to the union committee, said employés will cease work on the mines at 7 o'clock Sunday morning, November 24, 1907.'

"You will see by this the working class in Goldfield wish to have some part in deciding what they shall accept as wages for work performed now and hereafter.

"We wish to call your attention to the fact that according to the terms of the resolution passed by the Union, it is absolutely necessary that your association shall give us a reply before tomorrow morning.

"Trusting the mine operators of Goldfield will see the justice of our position, and co-operate with us to avert trouble we remain, respectfully,

"John H. Gilbert,
"Michael Callahan,
"Marion W. Moor."

On the same day the mine operators replied as follows:

"Goldfield, Nevada, November 23, 1907.

"Goldfield Miners' Union No. 220, Goldfield, Nevada.

"Gentlemen: Your communication of November 23rd signed by your committee addressed to the Goldfield Mine Operators' Association has been considered, and in reply the Goldfield Mine Operators' Association wish to state that after a reconsideration of the question in issue with your committee, the Goldfield Mine Operators' Association offers the following facts in explanation of its communication of the 18th day of November:

"The Goldfield Mine Operators' Association cannot offer a guarantee in addition to that offered by the local banks for cashiers' checks issued by the local banks.

"The Goldfield Mine Operators' Association cannot place the ore shipped from the Goldfield District as a guarantee for cashiers' checks issued by the local banks for the reason that more than eighty per cent. of the ore shipped is sent out by the local banks and the returns from these shipments are made direct to the local banks. The local banks do not issue cashiers' checks except against collateral or ore shipped from the camp, and no operator can possibly issue checks for amounts unless secured by camp products.

"The local bank will not extend credit to any operator without collateral which is negotiable into cash.

"Yours very truly, Goldfield Mine Operators' Association,
"By Wm. M. Erb, Secretary."

On the evening of November 26th, at a meeting of the respondent union, the following resolution was adopted:

"That members of this union cease working for all employers that do not pay cash or secure their paper to the satisfaction of this union. Carried unanimously."

The members of the union ceased work November 27, 1907.

The cashiers' checks referred to in this correspondence were in the following form:

"John S. Cook & Co., Bankers.
"Goldfield, Nevada, Dec. 7, 1907.
"Pay to the order of I. J. Gay, Asst. Cashier,
(Payable in Exchange.) $1.
.....One.....Dollars.
"Cashier's check. Jno. S. Cook,
"Cashier."

"Endorsed: I. J. Gay,
"Assistant Cashier.
"No further endorsement required."

Mr. MacKinnon thus states the position of the union with reference to these checks:

"We were in this boat, when we accepted a check in payment from any mine, consolidated or other, that had written on that check 'Payable in Exchange,' we had to take that check to the bank and accept John S. Cook & Company's scrip, which had no backing whatever that they would show us, * * * and it was taking away from us all possibility of getting back from the company any money in case of failure of the bank, and it was a questionable institution at that time, as to its ability. * * * The very fact that two banks had closed their doors, and the fact that John S. Cook & Compa-

ny's bank had a run on it, and the further fact that to meet a deposit of five million dollars or more, that all the wealth that it could acquire among its friends or banks, was nine hundred thousand dollars, was evidence in itself that the bank was not solvent."

Complainant claims that the strike of November 27th is in violation of the April agreement, and that the majority of the miners were not only opposed to the strike, but were willing to continue work, and to receive their pay in cashiers' checks. This claim is supported by affidavits of persons who state that they had talked with the miners. The testimony of Mr. MacKinnon, and other respondents, shows that the meeting at which the strike was declared was held after due notice; the Miners' Union Hall was full at the time, there being not less than 700 persons present; the vote was taken by uplifted hands; there were more than 500 in favor, and but 1 against, declaring a strike; the meeting was participated in by all members who customarily attend meetings of the union, and 95 per cent. of those present were miners. Mr. MacKinnon further testifies that there were not more than 1,200 members of the union employed, and 700 or 800 unemployed, in the district on the 1st day of August, and of the total, about three-fourths were miners; the remainder were town workers.

Federal troops were brought to Goldfield December 6, 1907, three days before the Mine Owners' Association, including complainant, gave public notice of a reduction of wages and of their refusal to employ members of the Goldfield Miners' Union. The Special Commission appointed and sent by the President of the United States in December, 1907, to Goldfield to investigate conditions there, rendered a report upon which the President acted, and the recommendations of which he adopted. The report was admitted in evidence, and from it the following quotation is made:

"The question as to possible future violence and disorder on the withdrawal of the troops we find to depend largely on the personnel of the Miners' Union and their leaders in particular. A number of these leaders are represented to be men of radical socialistic beliefs and in favor of forcibly asserting what they hold to be their rights. Goldfield, being one of the newest and richest gold mining camps of the West, attracted many of the most adventurous and radical characters in the Miners' Union, and while many of these have recently left, it is believed that there remain a considerable number of men whose records in other mining camps presage ill for the future of law and order in Goldfield, if federal troops are withdrawn.

"It was strongly urged that the experience of other mining camps with the Western Federation of Miners gave good grounds for the belief that, should the mine operators insist on maintaining their position, as above stated, serious disorder would be likely to ensue immediately upon the withdrawal of the troops. All this, however, is purely a matter of future possibilities and not of actual present or past disorders in Goldfield. From the almost unanimous consensus of opinion of all witnesses we are satisfied that in the Miners' Union of Goldfield there are not over a few hundred men of a dangerous type —men who would readily resort to violence to accomplish their ends. The great majority, probably over three-fourths of the union, while loyal to their organization, were conceded to be men of law-abiding tendency who would not willingly initiate or support deliberate violence. But there is likewise little doubt but that this large proportion of orderly men have in the past permitted themselves and their organization to be dominated and controlled in its public actions by vicious leaders, and have lacked either the coherence or the courage to suppress this element and conduct the affairs of their organization in a way to command public respect and confidence. In the early part of the present year the Miners' Union of Goldfield permitted a celebration to be held by the union and a procession under its auspices to march through the streets of that city carrying the red flag of anarchy as a sole emblem, and bearing aloft legends and mottoes of an incendiary character. It is claimed that but a small proportion of the Miners' Union took part in the procession, but it had received the official sanction of the union, and, so far as is publicly known, was never repudiated by that body. Their personal good character cannot excuse members of the Goldfield Union for permitting their leaders to outrage decent sentiment, and cannot save the organization to which they belong

from bearing the reputation it has earned. By permitting their organization to be managed and controlled by men of violent tendencies, the union as a body has thus laid itself open to the reproach of being a vicious organization, and has furnished a foundation for the fear existing in Goldfield that it will support violence and disorder to win its present strike.

"In view of the foregoing facts, we believe there is considerable danger that serious disorders will be attempted if the troops be withdrawn and the mine operators insist on carrying out their publicly announced policy."

Subsequently, and on the 17th day of January, 1908, the Legislature of the state of Nevada, by practically a unanimous vote, adopted a resolution, wherein it was recited that:

"Conditions exist in the state of Nevada, that border upon and threaten an immediate state of domestic violence, and said state of Nevada has no State Militia or other adequate police force at its disposal sufficient to protect its inhabitants against such domestic violence, therefore, be it resolved, that application is hereby made by the Legislature of Nevada to the President of the United States to retain in the Goldfield Mining District of Nevada a sufficient force of the United States Army to protect said state against domestic violence, and to insure to the inhabitants of that community and the state domestic tranquility, the preservation of law and order, and the observance of the laws of the United States and the state of Nevada, and that such portion of the United States Army be maintained in said district until the state of Nevada, through its Legislature now in extraordinary session assembled, shall be able to provide by law for the organization and equipment of the State Constabulary or other police force, sufficient to maintain law and order, and suppress any domestic violence that may occur."

After the strike was declared, a strike committee, consisting of five members of the respondent union, was appointed. The joint affidavit filed by the members of this committee contains the following statements: "Affiants ever since their appointment have acted and still act as such committee, with power and authority to oversee and regulate the conduct of said strike. That affiant has taken an active interest in said strike, keeping in touch with all union men engaged therein. * * * On account of the greatness of the territory necessary to be covered the picket system was found by affiant and said committee and union to be practically useless, and for that and other reasons such system has been adopted only to a limited degree; that is to say, no person has been detailed to any particular duty or assigned to any particular place, but volunteers have gone to the neighborhood of said premises as hereinafter described; no squads or other aggregations of miners and no so-called picket lines have been organized, but union members of their own volition, without special or any direction from or understanding with said union or any of the members, officers, or committees, have from time to time gone in the neighborhood of complainant's premises, in numbers ranging from thirty up to seventy-five, but they do so without concert among themselves. * * * No miners have kept constant watch on complainant's premises; on the contrary, they have not approached said premises save at the hours of the morning and afternoon changes of shifts, refraining entirely from approaching said premises after dark. * * * All miners belonging to said union are instructed * * * peaceably to address any nonunion miner willing to listen, and endeavor in a lawful manner to persuade him to join said union or refrain from injuring the cause of labor by taking the place of union miners." They are also instructed "not to trespass upon or congregate about complainant's property, or anywise molest it, or threaten or intimidate any nonunion miner. * * * To indulge in no act to which the officers of the law, or complainant, or any mine owner or operator could reasonably object. * * * Not to congregate in undue numbers near complainant's property or anywhere, and to refrain from all threats or acts of intimidation whatsoever." And all members engaged in the strike were "instructed by affiant not to * * * carry any deadly weapon." The affiant also states that each member of said strike committee has kept in close and constant touch with all members engaged in said strike, and has been in a position to ascertain and know, and does know, that these instructions have been implicitly obeyed; that no miner or member of the union has trespassed on complainant's property, or demand-

ed of any employé that he should not work, or threatened him with death, deportation, or anything calculated to arouse his fears, or that he would be otherwise interfered with, or "committed any act of intimidation," or censured or found fault with any employé of complainant, or molested him in any respect, so far as affiant has been able to observe or ascertain. The affiant also says that no "agreement, combination, or conspiracy ever existed, nor does it now exist, to prevent complainant from working its properties or shipping the ores mined therefrom, or at all."

The testimony on the part of complainant tends to show that members of the union are nearly all of the time, day and night, stationed at various points on and about complainant's premises, their numbers varying from 15 to 150, and even 200 on occasions; that they are apparently under the charge of captains, the greatest number being stationed at the crossing of the railroad traversed by the men in going from the Combination Mine and Mill to the company's boarding house. This is supported by some 22 photographs taken December 29th and 30th and January 2d, 5th, and 7th; 19 of these views are of men in groups of from 3 to 50 or more, standing on or near the above-mentioned crossing. Many affidavits have been introduced by complainant, made by its employés, and also by guards and deputy sheriffs in its employ, testifying to their actual experiences. These state that the men going to and from the boarding house to the mines are sent in a body; that on occasions it has been difficult for the guards and deputy sheriffs to open a path through the pickets, so numerous were they. The men going to and from work are compelled to pass by or through squads of pickets who endeavor to prevent them from working, by assailing them with threats, ridicule, and insults; some of the men have been threatened with personal violence and deportation; several have been photographed for identification. December 13th two ladies, one of them over 60 years of age, while escorting a relative from the Combination Mill, where he had been at work, were met by a crowd of pickets, who addressed them with vile and insulting language. These ladies were followed by pickets to the town of Goldfield. The employés are said to be in more or less fear of the pickets; some have already quit work, and many others will follow when the troops are withdrawn, unless adequate protection is given. If such protection is given, there are plenty of men ready and willing to work for complainant on the terms offered. Complainant is now employing 150 miners, and could obtain and put to work 750 but for the intimidations and unlawful acts and conduct of the respondents. Complainant ever since the beginning of the strike has had in its employ an average of about 50 guards and deputy sheriffs at an expense of $250 a day. These men are employed to protect the company's property and its employés. A body of troops is stationed within a few hundred yards of the place where the pickets assemble.

C. S. Thomas, W. H. Bryant, and W. P. Malburn, for complainant.
Augustus Tilden, for respondents.

FARRINGTON, District Judge (after stating the facts as above). 1. Evidence as to the probable and possible injuries which may result to complainant if members of the Goldfield Miners' Union are permitted to assemble and hold meetings pending this suit is not of such a character as to warrant an interlocutory order forbidding such assemblages. An injunction pendente lite should not usurp the place of a final decree neither should it reach out any further than is absolutely necessary to protect the rights and property of the petitioner from injuries which are not only irreparable, but which must be expected before the suit can be heard on its merits. Only those issues will be determined which are necessary factors in granting or denying a temporary restraining order. It is not necessary that the complainant's rights be clearly established, or that the court

find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremedial injury to the complainant, before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation. 22 Cyc. 822; 6 Pomeroy's Eq. Juris. §621; Harriman v. Northern Securities Co. (C. C.) 132 Fed. 464, 485.

2. Complainant is the owner of the Combination Mines, and also the owner of more than 97 per cent. of the capital stock of the several subsidiary corporations which own the Mohawk, Laguna, and other mining properties mentioned in the complaint. It is urged that as a stockholder in these corporations complainant cannot maintain a suit for the relief sought without showing actual or virtual refusal by each of said corporations to bring the suit. This objection is based on the rule that a stockholder cannot sue in his own behalf on a corporate cause of action. The objection might be good if the Goldfield Consolidated Mines Company, merely as a stockholder, was asking relief for wrongs to property of the tributary corporations. But such is not the case. The allegations of the bill show that complainant is engaged in the business of mining, developing, and operating the property of these corporations, and that respondents, unless restrained, will unlawfully interfere with this business. The right to operate a mine and carry on the business of mining therein is property, whether the operator owns the mine or not. It is a right as distinct and real as the ownership of the fee itself. If complainant has such right, it has the further right to enjoy such property, and to operate the mines free from unlawful molestation and interference, and it naturally follows that the power of a court of equity may be invoked to protect such right, even though the operator may not own the mine, or even a share of stock in the company which does own the mine.

3. Respondents urge that, inasmuch as complainant is a corporation organized under the laws of the state of Wyoming, it can have no standing in this proceeding, unless it exists in conformity with the Constitution and laws of that state. It is recited in the bill, and also in the plea and answer, that complainant owns more than 97 per cent. of the capital stock of the Goldfield Mohawk Company, the Red Top Mining Company, the Jumbo Mining Company, Laguna Goldfield Mining Company, and Goldfield Mining Company, and that, under the laws of Wyoming, no corporation can be formed for the principal purpose of holding stock in other corporations. Without deciding whether such an objection can be raised in this proceeding, or by any party other than the state of Wyoming itself, it is proper to quote that portion of the statute referred to:

"It shall not be lawful for such company to use any of its funds in the purchase of any stock in any other company, nor in its own; provided, however, such company may in its discretion purchase, hold and own any stock, and to any amount in any other company that is or may be subsidiary or tributary to, and that does contribute to the objects and purposes of the first company in this proviso mentioned." Section 3040, Rev. St. Wyo. 1899.

Sufficient evidence has not been introduced to support a finding that complainant has violated this statute. It has been held that, where a suit is brought by a corporation to enforce or protect a private right by injunction, a claim that the corporation is illegal or is a monopoly cannot be made collaterally as a defense. Am. Steel & Wire Co. v. Wire Drawers', etc., Unions (C. C.) 90 Fed. 608, 614; Allis-Chalmers Co. v. Reliable Lodge (C. C.) 111 Fed. 264, 266.

4. The evidence shows that a number of persons within the past two years have been deported from Goldfield, and in several cases the victim has been ordered, or advised to leave, by an officer of the respondent union. None of these incidents in evidence, however, have any direct connection with the present labor trouble in Goldfield. Those who have been deported appear in some way to have incurred the hostility of the Western Federation of Miners during the labor difficulties in Idaho or Colorado, and for this, and not for any participation in the present trouble, they were punished. The deportations were accompanied in some cases by violent beatings, and in other instances, the undesired person left camp immediately on being ordered to do so.

5. The respondents allege, in substance, that the Goldfield Consolidated Mines Company entered into an unlawful combination with other corporations and mine and mill owners to prevent the employment of, to oppress, to boycott, and to drive from said district all laborers in and about the mines thereof, the respondents included, who will not conform to and accept the scale of wages, and other conditions of employment, which the members of the combination dictate, and, in furtherance of this conspiracy, they adopted and published the resolutions of December 9, 1907. The argument is made that by reason of this alleged conspiracy, complainant is not in court with clean hands, and therefore is not entitled to equitable relief, either temporary or permanent.

The Nevada statute, Laws of 1903, p. 207, c. 111, provides as follows:

"Section 1. It shall be unlawful for any person, firm or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization, or shall promise or agree to become or continue a member of a labor organization.

"Sec. 2. Any person or persons, firm or firms, corporation or corporations, violating the provisions of section 1 of this act shall be deemed guilty of a misdemeanor," etc.

The agreement to be executed by the employés as provided for in the resolution is plainly in violation of this statute. But complainant contends that the statute is unconstitutional, and that its right to exclude members of the Western Federation of Miners from its employ, and to employ nonfederation men who are willing to work at the reduced wage scale, is guaranteed by the federal and state Constitutions.

It is provided by section 1 of the fourteenth amendment to the Constitution of the United States as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

The Constitution of Nevada, art. 1, § 8, has a similar provision:

"No person shall be * * * deprived of life, liberty, or property, without due process of law."

The obvious purpose of the Nevada statute just quoted is to invade and control the discretion of the employer in selecting his men. If the statute is valid, an employer cannot make it a condition on which he will hire men that they shall not belong to any particular labor union; to do so is made a crime, no matter how vicious, turbulent, or lawless the organization may be. This statute lays no similar restriction upon the employés. Their freedom of contract is unrestrained. There is nothing in the statute which forbids union men from discriminating against nonunion men, or nonunion men from discriminating against union men. There is nothing which prevents union men from exacting, as a condition upon which they will work, an agreement that every nonunion man must be discharged, or join the union.

It may be to the advantage of a manufacturer to do business exclusively with some one labor union; its patronage may be immensely valuable to him; but to contract with his men that they must be members of such union, it matters not how wisely that organization may be controlled, or how great the advantage and profit to the master and his servants, if the latter become members of the organization, the employer, under the statute, is guilty of a crime if he insists, as a condition of employment, that his employés shall join the union. On the other hand, another operator may believe that the success of his business depends upon the undivided loyalty and support of his men, and that he cannot have such loyalty and support if they belong to, and are bound to submit to the control of, a labor organization; but he also violates this statute by exacting as a condition of employment that his men shall not join a union.

Among the reasons formally assigned in the statement of the association, dated December 1, 1907, justifying the action and resolution of the mining company, we find the following:

"4. The Union has encouraged, protected and assisted its members in the crime of stealing ore from the mines of the district. * * * During the six months ending December 31st, 1906, there was stolen from the Mohawk Mine alone not less than one million dollars, and during the past six months there has been taken from the Little Florence Mine not less than two thousand dollars per day. The union has refused to permit underground watchmen (and) ordered a strike when effective change rooms were placed upon the property."

It is a constitutional right of an employer to refuse to have business relations with any person or with any labor organization, and it is immaterial what his reasons are, whether good or bad, well or ill founded, or entirely trivial and whimsical. Under the conditions existing in Goldfield at the time the resolutions were published, it is possible that the only practical method of exercising this right was to require all employés to refrain from being or becoming members of the Western

Federation of Miners. Thus we have a right guaranteed by the Constitution, and its exercise blocked, or at least hindered and restricted, by the statute of Nevada. It is too clear to require a citation of authorities that the Legislature has no power to restrict the exercise of a constitutional right, unless the interests of the public, as distinguished from the interests of the individual, or of a class of individuals, demand such restraint. The act so forbidden by the Legislature must be detrimental to the public welfare, and the health, safety, or morals of the community to justify such interference. There can be no pretense here, and none is made, that the execution of such a contract as the one in question has any tendency to injure the health, safety, or morals of the public, or of either employer or employés. It is clear that the Nevada statute deprives the employer of the right to contract as to certain matters which may be vital to him, and that it also, while not preventing, does obstruct the exercise of his right to exclude objectionable persons from his employ. The fact that the statute includes an element which is not found in any other similar statute to which attention has been called, in that it prohibits contracts requiring employés to join a union as a condition of employment, in no wise heals its invalidity; the added element simply makes larger and wider the invasion of the liberty of the employer to fix the terms and conditions upon which he will contract for labor.

The terms "life, liberty, and property" as used in the federal Constitution, embrace every right which the law protects. They include not only the right to hold and enjoy, but also the means of holding, enjoying, acquiring, and disposing of property. The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one's subsistence, to live and to support wife and family. The right of master and servant to enter into contracts, to agree upon the terms and conditions under which the one will employ and the other will labor, is property. The master has the right to fix the terms and conditions upon which he is willing to give employment; the servant has the right to fix the terms and conditions upon which he will labor, and any statute which curtails and limits that right deprives the party affected of his property, and, in the same measure, of his liberty. Both parties are free to enter into, or refuse to enter into, the contract. Before the law, there is the same freedom to employ as to work, to buy as to sell, to choose one's employé as to choose one's employer.

"The liberty of contracting relating to labor, includes both parties; the one has as much right to purchase as the other to sell labor." Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Lochner v. New York, 198 U. S. 45, 56, 25 Sup. Ct. 539, 49 L. Ed. 937.

"One citizen cannot be compelled to give employment to another, nor can any one be compelled to be employed against his will." Gillespie v. The People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176.

The right of an employer to refuse to employ any particular individual, or any class of individuals, is neither greater nor less than the right of a man to refuse to work for any particular individual, or class of individuals. The reason for the refusal can in no wise control, en-

large, or diminish the legal right of refusal, the right to employ, or the right to refuse to be employed.

"It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts." 2 Cooley on Torts, p. 587.

Statutes similar to the Nevada act in question have existed in other states, but, in every jurisdiction where their validity has been called in question, they have been held invalid, under the constitutional provision that no one shall be deprived of life, liberty, or property without due process of law. Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. ——; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902; Id. (Sup.) 97 N. Y. Supp. 323; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934; Coffeyville, etc., Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; Railway Co. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628.

In Adair v. United States, supra, Adair, a foreman for the Louisville & Nashville Railroad Company, discharged O. B. Coppage, a fireman in the employ of the company, on the ground that he was a member of a labor organization. Adair was convicted in the District Court of the United States for the Eastern District of Kentucky, under the tenth section of the act of Congress of June 1, 1898, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3210] which provides, among other things that:

"Any agent or officer" of an interstate carrier, "who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement either written or verbal, not to become or remain a member of any labor corporation, association or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such labor corporation, association, or organization * * * is hereby declared to be guilty of a misdemeanor."

The lower court (152 Fed. 737) held that it was within the power of Congress to enact such a law under the provisions of the commerce clause of the federal Constitution, but it is significant (page 753 of 152 Fed.) that the court refused to criticise the decisions of the states of Missouri, Illinois, Wisconsin, and New York, in which similar statutes were held to be unconstitutional. On the contrary, the court intimated that those decisions were correct, because such legislation by a state is in violation of the fourteenth amendment. In other words, Congress may, but the states cannot, enact such a statute. The case was taken to the Supreme Court of the United States, and there the provision of the statute, under which the defendant was convicted, was held to be an illegal in-

vasion of the personal liberty, as well as of the right of property, of the defendant Adair, and therefore unconstitutional. The court said:

"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant Adair, however unwise such a course might have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, however unwise such a course on his part might have been, to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In People v. Marcus (Sup.) 97 N. Y. Supp. 323, the defendant was convicted under a statute forbidding an employer to exact an agreement from an employé, as a condition of employment, not to join a labor union. The case was appealed to the Supreme Court, and subsequently to the Court of Appeals. In both appellate courts the statute was held invalid, because it was in contravention of the fourteenth amendment to the Constitution of the United States. The Supreme Court used the following language:

"The contracts at which the provision of the Penal Code in question is aimed, it is true, do discriminate against labor unions; but that is in the lawful exercise of the right of the employer to employ whomsoever he pleases, and it is not competent for the Legislature to make it a crime for him to decide the question upon considerations of race, or of religion, or of the affiliations of the individual with civic organizations, unless, of course, he makes a contract contrary to public policy and affecting the state itself, as, for instance, imposing as a condition that the employé shall not join the National Guard, the maintenance of which is essential to the peace and safety of the people of the state. The statute, however, clearly discriminates in favor of labor unions by forbidding an employer either to impose as a condition of employment that the employé shall sever his relation with the union, or, if not a union man, shall not join a union. In the making of such a contract, both the employé and the employer are acting within their strict legal rights. The employé is not obliged to accept the employment on those conditions, and the employer is not obliged to give it without them."

An unlawful conspiracy is a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means. 8 Cyc. 620.

An examination of the resolution in question shows that the association agreed to do five acts, namely: First, to reduce the wages of the men employed by the various members of the association; second, to resume operations, giving preference to old employés; third, to reduce the cost of living in Goldfield District 20 per cent.; fourth,

to have no further dealings with the Goldfield Miners' Union, or any organization affiliating with the Western Federation of Miners; fifth, to require each person presenting himself to any member of the association for employment to sign, as a condition of such employment, an agreement that he is not, and during the period of his employment will not become, a member of respondent union. The fifth item may be regarded as the means agreed upon to accomplish the first and the fourth. None of the proposed acts are either unlawful or criminal. For these reasons I must hold that complainant in entering into the agreement with the other members of the Goldfield Mine Operators' Association, which is embodied in the resolutions of December 7, 1907, was not guilty of any unlawful conspiracy against the respondents.

6. Is the evidence sufficient to show the establishment of a picketing system and concerted action by the pickets to coerce and intimidate the employés of the mining company, and thus prevent complainant from operating its mines? The union, by unanimous vote of those present at the meeting of November 26th, declared a strike, and later appointed a strike committee composed of five members. This committee is clothed "with power and authority to oversee and regulate the conduct of said strike." The members of this committee state in their joint affidavit that the committee and the union found the picket system "practically useless," and therefore picketing "has been adopted only to a limited degree"; that is to say, men are not assigned to any particular duty or place, no picket lines or squads of pickets have been organized, but union members in numbers ranging from 30 to 75 approach complainant's premises at the hours of the morning and afternoon change of shifts, and they do this at their own volition, without any concert among themselves, and without special, or any, direction from, or understanding with said union, or any of its members, officers, or committees. This picket system as organized, evidently contemplated the active participation of every member of the union, for the affidavit states "that all of the miners belonging to said union were instructed * * * to peaceably address any nonunion man willing to listen, and endeavor in a lawful manner to persuade him to join said union, or refrain from injuring the cause of labor by taking the place of nonunion miners." The miners were also instructed to refrain from violence, intimidation, and unlawful conduct of every kind in dealing with complainant, and with nonunion men. The miners engaged in the strike were not only carefully instructed, but evidently they were carefully watched by the members of the strike committee, each of whom says that he "has taken an active interest in said strike," and "has kept in such close and constant touch with all miners engaged in said strike," and been in such "a position to ascertain and know" the fact, that he can say that "none of said miners trespassed" on, "or in any way molested complainant's property," or demanded of any of its employés that he should not work, etc. This committee also maintains such authority over the miners engaged in the strike that each of them could testify that he would have "reprimanded and disciplined any miner en-

gaged in the strike who indulged in any act or word in the nature of a threat or intimidation."

It is as unreasonable to suppose that these men assembled without design or concert among themselves, and without any direction or understanding with the union or its officers or committees, as it is to suppose that the wheels of a watch get into place by accident. Why are all miners belonging to the union instructed "to peaceably address any nonunion miner willing to listen, and endeavor in a lawful manner to persuade him to join the union, etc? If it is not intended that the instruction should be obeyed, why is it given? It cannot be assumed for an instant that the person who gave such instructions, or that any or all of the miners who received them, had any other thought but that they were to go where the nonunion men were to be found, and address them. At this time the respondent union counted on its rolls about 1,200 resident miners, of whom in the neighborhood of 750 had, before the strike, been employed in complainant's mines. After "all of the miners belonging to the union" are so instructed, it is not at all remarkable that from 30 to 75 of them, or even as many as 200, as complainant's affidavits show, assemble at or near the crossing between the Combination Mines and the company's boarding house. If all these men obeyed instructions, and the affidavit of the strike committee says they did, the common design and purpose which they were each and all seeking to effect was to induce nonunion miners to join the union, and not to work for complainant. If the nonunion men consent, the mining company, being without miners, will be unable to operate, and it must yield to the demands of the union, or close down the mines. On the other hand, if the nonunion men refuse, and the company obtains enough nonunion men to work its property, the strike will be a failure, the power of the Western Federation of Miners in Goldfield broken, and the members must seek work elsewhere.

Each party has the right to enter into lawful competition for the support of the nonunion miners, and to endeavor by peaceful argument or persuasion to secure their co-operation, provided the persuasion is of such a character as to leave the person solicited feeling free to do as he pleases, and he is not persuaded to do that which in him would be unlawful. This is so, because workmen, when free from contract obligations, have a legal right, singly, collectively, or as a union, to quit work; that is, to strike, and, having this right, they have the further right to use such lawful means to make the strike effective as are not inconsistent with the rights of others. Karges Furniture Co. v. Amalgamated Woodworkers' Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; 18 Am. & Eng. Ency. L. (2d Ed.) 88. The mining company has the right to employ nonunion men to take the places vacated by those who quit work. The latter have no legal interest or concern in the contract between the company and its new employés. The places which they vacated to strike are no longer theirs, and never again will be theirs unless they are re-employed. It is difficult to see, when a man has voluntarily given up a job, how he can maintain that he has a shadow of claim or right to the vacated place. Union Pac. R. Co. v. Ruef (C. C.) 120 Fed. 102, 128.

There is no law, nor is it within the power of this or any other court, to make an order by which the Goldfield Consolidated Mines Company can be compelled against its will to re-employ any miner who quit, or any member of the Western Federation of Miners; neither can any member of that organization be compelled against his will to work for the company. The nonunion men have the same right to work or not work, to agree upon the terms of employment, or to quit work, as union men, no more, no less. They have a perfect right to take the vacated jobs if they can agree with the company upon terms, and the respondents have no legal right to dictate what those terms shall be. They have the right to seek employment, to come and go from their work, or to go where they please on the public thoroughfare, without fear or molestation, threats, violence, or insult of any kind. They have a right to come and go without being picketed, or compelled to listen to argument or persuasion, whether it be peaceful or irritating. The pickets have no legal right to insist that any nonunion man shall listen to their solicitations if he is unwilling to do so, it matters not how peaceful and friendly such solicitations may be. Union Pac. R. Co. v. Ruef (C. C.) 120 Fed. 114. These considerations are true, because, under our system of government, every man has the right to enjoy his liberty and property until it is taken away from him by due process of law. To guard these rights is the true end and aim of our civilization. The existence of such a right in one man necessarily imposes upon every other man the duty to respect it, and upon the government and the courts the duty to guard and protect it. And it necessarily follows that any attempt to intimidate a man in order to compel him to refrain from exercising a legal right is unlawful, and this is true no matter whether the attempt is made by one man or many, or by a corporation or a labor union. Hence, if the pickets, or members of the respondent union, who gather at or near complainant's premises at the time of the morning and afternoon change of shifts, assail nonunion men with threats, ridicule, and insult, or follow them to or from their work with vile language and abusive epithets in order to compel them to quit work, or refrain from offering their labor to the complainant, they are guilty of unlawful conduct.

The affidavit of the strike committee states that the instructions given to the miners engaged in the strike have been strictly obeyed; it also states that no member of the union has violated any right of the Goldfield Consolidated Mines Company, or of its employés, or has committed any act of violence or intimidations, or in any way molested complainant or the nonunion men. It should also be stated here that no evidence on the part of either complainant or respondents identifies any particular member of Goldfield Miners' Union with any specified act of violence or intimidation against the men who are now working for, or offering their labor to, the company. The affidavits on the part of complainant, as well as other evidence in the case, however, convince the court that the company's premises are almost constantly picketed, day and night, by members of the Miners' Union; that there are altogether too many pickets, especially at the railroad crossing used by the workmen in going to and from the mines

and mill to the company's boarding house. The unnecessary massing of so many men at this point is, in itself, an act of intimidation, which is further aggravated by insults, threats, and ridicule. It is not necessary that a man should be knocked down to be intimidated. The most reprehensible intimidation may exist not only without violence, but without words, or even the lifting of a finger. Whether conduct is intimidating or not depends upon the circumstances of each case. What would fill a timid man with fear might only provoke the mirth of a strong man; and a simple request, when backed up by a display of physical force, may overawe the most determined man, even though there is neither threat nor violence. The vast majority of wage-earners are peaceful, law-abiding men, who instinctively avoid trouble and the giving of offense. Such men would cease working or refuse to work if compelled to run the gauntlet of a picketing system such as the evidence shows is in force at and near complainant's premises in Goldfield. Notwithstanding the denials of the respondents, the affidavits of so many witnesses, guards, and employés who testify to what they have actually seen and heard, who have repeatedly passed by or made their way through squads of pickets at the crossing, and who were often the victims of ridicule, insult, and threat, leave no doubt in the mind of the court that the pickets were, in the main, members of the Goldfield Miners' Union; that they so assembled with a common purpose, and that purpose was to coerce and intimidate nonunion men who wished to work for, or who are already in the employ of the company. This conviction is strengthened by the fact that the complainant has 50 guards and deputy sheriffs in its employ for the protection of its employés. It is unreasonable to suppose that complainant would go to an expense of $250 per day for this purpose if guards were not needed. Otis Steel Co. v. Local Union, No. 218 (C. C.) 110 Fed. 698. The fact that men have quit and refused to work, and the further fact that it is the custom to send and have the men go in a body between the mines and the company's boarding house, and that guards are stationed on the way, show that there is something in the appearance, conduct, language, or numbers of the pickets which inspires fear among the employés of the company. It is significant that all these precautions are taken while a body of federal troops is stationed only a few hundred yards away. It also appears that the company cannot, by reason of the fear which exists, obtain a sufficient number of men to operate its mines. Peaceful picketing, in theory, is not only possible, but permissible, and, as long as it is confined strictly and in good faith to gaining information, and to peaceful persuasion and argument, it is not forbidden by law. Unfortunately, peaceful picketing is a very rare occurrence. This follows from the very nature of things. Men who want to work for an employer who is eager to employ them must be persuaded not to work—persuaded not to exercise their legal rights. In such case peaceable solicitation is of but little effect, and when it becomes persuasion by intimidation it is universally condemned, and has been declared unlawful in every jurisdiction where the question has been raised. These views will find

abundant support, not only in the cases which have already been cited, but in the following authorities: In re Doolittle (C. C.) 23 Fed. 545; Mackall v. Ratchford (C. C.) 82 Fed. 41; American Steel & Wire Co. v. Wire Drawers', etc., Unions (C. C.) 90 Fed. 608, 614; Southern R. Co. v. Machinists' Union (C. C.) 111 Fed. 54; Union Pac. R. Co. v. Ruef (C. C.) 120 Fed. 124; Knudsen v. Benn (C. C.) 123 Fed. 636; Atchison, T. & S. F. Ry. Co. v. Gee (C. C.) 139 Fed. 582, 584; Pope Motor Car Co. v. Keegan (C. C.) 150 Fed. 148; Allis-Chalmers Co. v. Iron Molders' Union (C. C.) 150 Fed. 155, 179; Beck v. Ry. Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; Fletcher Co. v. International Ass'n of Machinists (N. J. Ch.) 55 Atl. 1077; O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702; Winslow Bros. Co. v. Building Trades Council, 31 Chicago Legal News, 337, cited in note to Jensen v. Cooks' & Waiters' Union, 4 L. R. A. (N. S.) 306.

In Mackall v. Ratchford (C. C.) 82 Fed. 41, the defendants had joined a body of over 200 striking miners in marching with music and banners by one of the mines belonging to the complainant. The men marched and countermarched along the public highway for 3 days, early in the morning and again late at night when the men were coming off shift, and on each occasion the men taking part in the procession stopped on each side of the road where the miners must cross in going to and from the mine. The avowed object of the strikers was to induce the miners to join the strike. There were no threats and no loud, boisterous, or taunting language. The court found that the purpose was to intimidate the men, and thereby induce them to abandon their work, and secure their co-operation in closing the mines. It was held that the conduct of the defendants was intimidating and unlawful, and they were punished for violating the preliminary injunction.

In American Steel & Wire Co. v. Wire Drawers', etc., Unions (C. C.) 90 Fed. 608, 614, the court said:

"The truth is that the most potential and unlawful force or violence may exist without lifting a finger against any man, or uttering a word or threat against him. The very plan of campaign adopted here was the most substantial exhibition of force, by always keeping near the mill large bodies of men, massed and controlled by the leaders, so as to be used for obstruction if required. * * * Such a force would be violence, within the prohibition of the law; and its exhibition should be enjoined as violating the property rights of the plaintiffs in the streets, their liberty of contracting for substituted labor, and the liberty of the substitutes to work if they wished to accept the lowered wages, and to pass through the streets to their work."

In Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 416, 74 Am. St. Rep. 421, members of a union followed the complainant's teamsters along the street, hallooing at them, and using abusive language, and intercepting on the street those who were going to the mill with their teams. In reference to this the court said:

"To picket complainant's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. * * * It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word 'picket': 'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.'"

In United States v. Kane (C. C.) 23 Fed. 748, no force was used by the strikers, there were merely persuasions to quit work. The court, however, held that these persuasions were made under such circumstances, and by such numbers, that it tended to intimidate the men who desired to work, and those who participated were punished.

In Pope Motor Car Co. v. Keegan (C. C.) 150 Fed. 148, 150, this language is used:

"Large numbers of strikers were congregated in the neighborhood of the works, and used threatening and intimidating language to employés and officers of the complainant. Undoubtedly such conduct is unlawful. The presence of a large number of strikers, under such circumstances, is in itself intimidating."

7. The evidence clearly shows that complainant and its employés have been and are victims of unlawful picketing, and, if we may judge the intention and the design of the pickets by their conduct, they have been and are actuated by a common purpose to injure complainant's business by coercing and intimidating its men.

Judge Sanborn says in Allis-Chalmers Co. v. Iron Molders' Union (C. C.) 150 Fed. 155, 181:

"There can be no doubt, as it seems to me, that the constant and regular maintenance of the pickets after repeated acts of violence by pickets, the use of abusive epithets, the creation of an unfriendly atmosphere surrounding the workmen, with the other conditions mentioned, constitute a clear case of conspiracy among the pickets to unlawfully intimidate and coerce the workmen."

In Eddy on Combinations, § 539, it is said:

"A picket is the agent of a combination. * * * In determining the object of the combination, the courts will probe deeper than resolutions and mere professions of good will and lawful intentions. It unfortunately happens that there is seldom a case where a picket is maintained that the members of the picket or their hangers-on do not resort to acts of violence, and to jeers, cries, epithets, and threats calculated and intended to intimidate workmen who are not members of the combination. So true is this that the very term 'picket' has come to mean in the popular mind threats, violence, and intimidation. It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket, under the most favorable consideration, means an interference between employer seeking employés and men seeking employment."

8. Whether the union is an original conspirator or whether, after it became aware of the coercive conduct of the pickets, it became a party to the conspiracy by co-operating with and supervising them, is immaterial. In either event, the Miners' Union is a conspirator and is responsible for the acts of its co-conspirators.

In the recent case of United States v. Standard Oil Co. (C. C.) 152 Fed. 290, 294, the court uses the following language:

"The Waters-Pierce Oil Company is still a distinct legal entity, a corporation of the state of Missouri. The knowledge of its officers and directors is its knowledge, and those officers and directors cannot have caused this corporation to act its important part in the accomplishment of the purpose of this conspiracy without knowledge of the conspiracy, its scheme, its object, and its effect. One who learns of a conspiracy after it is formed, and then joins it, or knowingly aids in the execution of its scheme, and shares in its profits, becomes from that time as much a co-conspirator as if he were one of those who originally designed it and put it in operation. * * * If a series of acts are to be performed with a view to produce a particular result, he who aids in the performance of any one of these acts, in order to bring about the result, must have the intention to effectuate the end proposed, and if he operates with others, knowing them to have the same design, there is in fact an agreement between him and them. His criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy."

Judge Shaw, in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, 355, says:

"When an association is formed for purposes actually innocent, and afterward its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto."

In order to demonstrate that the union originated or joined this conspiracy, it is not necessary to prove any formal or explicit agreement. The existence of a conspiracy may be shown by circumstantial evidence.

"Where an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, everyone of said persons becomes a member of the conspiracy." United States v. Babcock, 24 Fed. Cas. No. 14,487; The Mussel Slough Case (C. C.) 5 Fed. 680, 684; United States v. Cassidy (D. C.) 67 Fed. 698, 702; Spies v. People, 122 Ill. 170, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

The system of picketing was adopted by the union and its strike committee, and this picketing has been and is under the supervision of the union, through its strike committee. Each member of the committee has taken an active interest in the strike, keeping in close and constant touch with all union men engaged therein, and all, or nearly all, of the pickets are members of the union. Even if it were possible to believe that the union was innocent of any improper design when it adopted the picketing system "to a limited degree," it is idle to contend that it has remained in ignorance of the misconduct of its pickets. The knowledge of the strike committee was the knowledge of the union. Spaulding v. Evanson (C. C.) 149 Fed. 913. Nevertheless, the union, through its strike committee, continued its supervision of the strike, and its members continued to threaten and abuse nonunion men. The coercion was in behalf of the union, for the benefit of the union, and in aid of the strike inaugurated by the union. The union cannot now, while it is consciously and uncomplainingly accepting the benefits of this terrorism, relieve itself from responsibility by saying that it has always instructed the miners against lawlessness of every sort.

Neither the history of the Goldfield Miners' Union, nor its conduct as detailed in the evidence, justifies any assumption that it was guilt-

less of wrongful purpose in adopting a system of picketing. There is hardly a page in the history of picketing which does not record lawless deeds and acts. When the union, by its instructions, practically made all its members pickets, it was bound to anticipate the natural and almost inevitable consequences, to foresee that the pickets would do just what they did and are doing, or something worse. We are justified in assuming that the union intended and designed, and therefore conspired, to effect the natural consequences of its acts. It is idle to talk of 30 to 75 pickets, and at times more than 100, gathering twice a day at the crossing for friendly solicitation. Such bands of men were never sent by the union to confer with the Mine Operators' Association. The picketing, designed by the instructions, was designed and intended to inspire fear and apprehension among the employés. Such assemblages are never conducive to fair argument; they are simply intended to back up persuasion with a display of physical force.

In Union Pacific R. Co. v. Ruef (C. C.) 120 Fed. 102, 125, the evidence showed that few of the strikers had committed any unlawful acts; it was therefore contended, for reasons similar to those urged in this case, that the injunction should be denied as to all who did not commit any unlawful acts. They were not responsible, first, because they did not participate in the unlawful acts, and, second, because there was no sufficient evidence of a conspiracy, therefore they could not be held as co-conspirators. The court said:

"In the light of these authorities (Allis-Chalmers Co. v. Reliable Lodge [C. C.] 111 Fed. 267; Southern R. Co. v. Machinists' Local Union No. 14 [C. C.] 111 Fed. 49; Farley v. Peebles, 50 Neb. 723, 733, 70 N. W. 231), it seems clear that all of the respondents who were members of the various organizations which established and maintained the picket line, as well as those who are shown by the evidence to have personally participated in the assaults and various acts of intimidation, must in this action be held chargeable with the results naturally flowing therefrom. * * * The strikers * * * voluntarily put into operation a system of espionage which history shows is almost universally accompanied by intimidation, force, and violence. Can it be doubted for a moment that, had there been no strike and no picketing, there would have been no assaults, no threats, and no intimidations?"

The recent case of Franklin Union No. 4 v. The People, 121 Ill. App. 647, is a strong one. The union declared a strike and established a picket system. Violent assaults, threats, vile language, and other forms of intimidation were used by the pickets to coerce complainant's employés to quit work. The court, in adjudging the union itself guilty of contempt for violating the preliminary injunction, uses the following language:

"There is no room for reasonable doubt that the union was a party to the conspiracy charged in the bill, and that the picketing was established and continued under the direction of plaintiff in error through its officers and strike committees. * * * The picket system once established, the intimidation, assaults, slugging, and bloodshed followed as naturally and inevitably as night follows day. There can be no such thing as peaceful, 'polite and gentlemanly' picketing, any more than there can be chaste, 'polite and gentlemanly' vulgarity, or peaceful mobbing or lawful lynching. * * * Consequently the mere fact of a picket system being established by men known to be unfriendly constitutes and is a threat of physical violence and an intimidation to the peaceful man. * * * It is idle to talk of picketing for lawful persuasive purposes. Men do not form picket lines for the purpose of conversation and

lawful persuasion. Such picketing as is established by the evidence in the case at bar is intended to annoy and intimidate, whether physical violence is resorted to or not, and is unlawful in either case. * * * The union or its members had no legal right to interfere with the business of complainants or to disturb them in their lawful business or occupation, as was done in this case, for the purpose of compelling them to make agreements with the union or its members as individuals in regard to the wages to be paid. * * * The union was the main factor in the conspiracy, and by reason of its money and its control of its members it was the real power back of the whole scheme. Under the authorities cited above and many others and the evidence the union must be held guilty of willfully violating the injunction, and it must suffer the consequences."

In the still more recent case of the Sailors' Union of the Pacific et al. v. Hammond Lumber Co. (C. C. A.) 156 Fed. 450, Judge Gilbert holds that the fact that the disorders of the strike were deprecated by the officers and leaders of the unions does not relieve the unions of responsibility, or render the court powerless to deal with them in their collective capacity, for violent acts committed and threatened to be continued.

9. "That conditions exist" in Goldfield "which border upon and threaten an immediate state of domestic violence" is stated in the joint resolution of the Legislature of Nevada. That this apprehension is well grounded is also shown by the report of the Special Commission which investigated conditions in Goldfield by direction of the President of the United States, and also by the action of the authorities in retaining the troops in Goldfield. The commission says "the question as to possible future violence and disorder on the withdrawal of the troops" depends "largely on the personnel of the Miners' Union, and their leaders in particular." The policy and purpose of the Miners' Union and its leaders finds expression in the constitution of the Western Federation of Miners and in the constitution of the Goldfield Miners' Union No. 220. The former preamble to the constitution of the Western Federation of Miners declared that one of the objects of that organization is "to use all honorable means to maintain and promote friendly relations between ourselves and our employers, and endeavor by arbitration and conciliation, or other pacific means, to settle any difficulties which may arise between us, and thus strive to make contention and strikes unnecessary." This was the proper spirit, and it meets the approval of good and patriotic men everywhere. But in June, 1907, at the annual convention of that organization, this provision was stricken from the constitution, and nothing of similar or equivalent import appears therein. Is it unjust to infer from this action that conciliation, arbitration, and the maintainance of friendly relations between employer and employé are no longer among the objects of the organization, and that it proposes to favor strikes and contention? In the same constitution, prior to June, 1907, it was provided that "it shall be unlawful for any union to enter upon a strike unless ordered by three-fourths of its resident members in good standing voting. Such question shall be decided by a secret ballot at a special meeting called for that purpose." This provision was amended by the same convention so as to read as follows:

"It shall be unlawful for any union to enter upon a strike unless ordered by two-thirds of the votes cast upon the question; such question shall be decided by referendum vote at a special meeting called for that purpose."

That the ballot should be secret is no longer essential; it may be by referendum vote, and the distinction between three-quarters of all resident members in good standing voting and two-thirds of all the votes cast upon the question is also significant. These changes have rendered it much easier for a minority to declare a strike. The present strike was declared by not more than 700 votes. The same convention increased the difficulty of settling strikes by adding to the constitution this provision:

"No local union or unions of the W. F. M. shall enter into any signed contract or verbal agreement for any specified length of time with their employers."

This provision seems to provide for and render possible such a condition that the employer cannot count upon any definite period of industrial peace. Whether there shall be constant turmoil and contention must depend upon the personnel of the men who control the action of the union. The industrial struggle between employer and employé, with occasional truces, whose length cannot be regulated by agreement with the local union, must go on until, as the preamble to the present constitution of the Western Federation of Miners says, "the producer is recognized as the sole master of his product."

Conciliation, arbitration, and the promotion of friendly relations between employer and employé, and the elimination of strikes and contention, are no longer among the declared objects of the Western Federation of Miners, and its policy seems to be to render strikes easier, settlements more difficult, and settlements by local unions for any definite period impossible. The preamble to the constitution of the Goldfield Miners' Union declares that "the working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until all the toilers * * * take and hold that which they produce by their labor." In the early part of the year 1907, a celebration was held by the Goldfield Miners' Union and "under its auspices a procession marched through the streets of that city carrying the red flag of anarchy as a sole emblem, and bearing aloft legends and mottoes of an incendiary character."

About the beginning of the strike or lockout of March, 1907, the following notice was sent to the then manager of the Goldfield Consolidated Mines Company:

"Goldfield, Nevada, March 8th, 1907.

"Mr. John W. Finch,
"Nixon Building.

"Dear Sir: Goldfield Miners' Union No. 220, W. F. M., have passed a law that all workers employed around the mines must hold a membership card in this union, and if they do not join our members shall refuse to work. This pertains principally to carpenters. We demand that members of our organization only shall follow that work and shall draw the same wages as men now following that line of work. This goes into effect at once."

In the agreement by which that strike was settled, it was conceded that the union should have jurisdiction over all men employed in and around the mines, mills, and smelters, excepting superintendents and managers. A similar concession is to be found in each agreement recited in the record between complainant and the respondent union by which a strike was settled.

These considerations strengthen my conviction that injunctive relief is necessary. One of the most important elements to be considered in determining whether injurious conduct is to be apprehended which ought to be restrained by order of this court is the character of the dominant faction of the Goldfield Miners' Union. If that faction is animated by the spirit and the purpose exhibited in the constitutional amendments made by the Western Federation of Miners, it would be remarkable if intimidation and coercion were not resorted to if necessary to secure "jurisdiction over all men regularly employed in and around the mines." When the spirit which prompts conciliation, arbitration, and friendly relations between employer and employé is banished, we are not far from anarchy.

An injunction pendente lite will issue against all of the respondents, except C. E. Mahoney.

WEST & CO. v. OCTORARO WATER CO.

(Circuit Court, E. D. Pennsylvania. January 29, 1908.)

No. 30, October Term, 1905.

1. JUDGMENT—CONCLUSIVENESS—ISSUES.

Where proceedings by defendant water company to condemn all the water of a stream for public use as against complainants, lower riparian proprietors owning a mill on the stream in another state, were dismissed on the ground that the state's right of eminent domain had no extraterritorial force, and that the compensation to be awarded for the taking of complainants' rights could not be determined in a state in which they did not reside, such judgment of dismissal was not conclusive against defendant's right to take a fair proportion of the stream for public use which was not in issue in a prior suit.

2. EMINENT DOMAIN—REMEDIES OF OWNERS OF PROPERTY—INTERSTATE WATERS AND WATER COURSES—INJUNCTION—LACHES.

Defendant was incorporated in July, 1903, under the laws of Pennsylvania to furnish water for public purposes with the right of eminent domain, and on July 24th decided to appropriate the whole of a stream on which complainants, who were lower riparian proprietors, operated a paper mill in Maryland by water power from such stream. In October, 1903, complainants were aware of defendant's intent to appropriate water from the stream, and employed an attorney to protect their rights. He at first insisted that defendant should either desist from its intent to take water from the stream or purchase complainants' plant at a specified price. Defendant declined either, but offered to pay complainants $5,000 for the privilege of taking five to six million gallons daily which was declined. Nothing was done until January, 1904, when complainants' counsel threatened an injunction, but finally admitted that this would be dissolved on the filing of a bond to pay damages sustained, it being then agreed that 60 days' notice should be given before defendant began to pump. This notice was given in December, 1904, but nothing further was done until June, 1905, when defendant attempted to condemn complainants' rights which proceeding was dismissed April 14, 1906, prior

to which, on January 6, 1906, complainants, by new counsel, filed a bill to restrain the diversion of the water from the stream, defendants in the meantime having made large expenditures in the furtherance of their undertaking. *Held*, that complainants were barred by laches from insisting on their right to restrain defendant's appropriation of so much of the stream as had been taken, and were at most only entitled to compensation for the damages sustained.

3. EQUITY—BILL—RETENTION.

Where, in a suit to restrain an upper riparian proprietor from withdrawing water from a stream, it was held that complainants were barred by laches from objecting to such withdrawal, and were only entitled to damages for the injury sustained, compensation will be allowed according to the water so far taken, the bill being retained as a pending case so that further compensation might be awarded in case of a further taking thereafter.

In Equity.

W. H. Surratt and L. L. Smith, for complainants.

Joseph T. Bunting and John G. Johnson, for defendants.

ARCHBALD, District Judge.[1] This is a bill brought by the complainants, who are citizens of Maryland, and owners there of a paper mill operated by water power developed from the Octoraro creek, to restrain the defendants, a Pennsylvania corporation, from diverting the waters of the stream. The Octoraro creek rises in the hills of Lancaster and Chester counties, Pa., and flows southerly into Maryland, emptying into the Susquehanna river about a mile below the complainants' mill. The stream drains an extended area of 216 square miles, 180 of which are in Pennsylvania, 151 of these being above the point at which the defendant company has located its Pine Grove pumping station, and 23 square miles being above the pumping station at McCrea's Mills, on the west branch. The company was incorporated in July, 1903, under the laws of Pennsylvania, by the merger and consolidation of seven other companies, which had been similarly incorporated for the purpose of supplying water to the public in different townships of the two counties named, each of these companies being vested with the power of eminent domain, and the consolidated company, by statute, having the combined powers of all. The stream, with its several branches, is practically the only one available to the water company, and by resolution July 24, 1903, it decided to appropriate the whole of it, in line with which, by agreement with the Pennsylvania Railroad Company, the only customer which it so far has, it has contracted to deliver 60,000,000 gallons of water daily for the next 15 years. At present, however, its equipment falls far short of that, the capacity of the Pine Grove dam, being but 43,000,000 gallons, and the pumping station there, which is run by water power, being able to pump but 1,200,000 gallons daily from the stream, while the dam at McCrea's Mills has a holding capacity of but 1,000,000 gallons, and the pumping station, with one of its two sets of pumps working, is able to take but 3,000,000 gallons daily, these two stations in actual results, thus so far diverting from the stream not to exceed 3,200,000 gallons in every 24 hours. The only other reservoir is that at Mars Hill, with a capacity of 10,-

[1] Specially assigned.

000,000 gallons, but other property has already been acquired by the company with a view to provide for increased storage; and with a change from water to steam power at Pine Grove—56 gallons of water going down the stream in order to raise 1—there is a possibility there of an immense increase. The general average flow of the stream at the complainants' mill is variously estimated at from 100,000,000, to 200,000,000 gallons daily, and the average minimum flow, during the dry season, at some 15,000,000 or 20,000,000. This according to the complainants' proofs, is capable of developing 348 horse power, to which extent wheels have been installed by them, for the use of their plant. But according to the defendants, this is an over-installation, only 184 horse power being able to be safely or profitably relied on, which at times will go down to as low as 77 or 78, the quantity of water at present being taken from the stream by the defendants amounting to but 9 of 10 horse power. The complainants are not asking for damages to compensate for this diversion. They deny the right of the defendants, notwithstanding their charter, which, as it is said, has no extraterritorial force, to any use of the water other than that of an ordinary riparian owner, and assert their right to have it come down to them unimpaired. The defendants concede that they cannot appropriate the whole stream, nor divert more than a fair proportion of it; but this they claim the right to do, by virtue of their charter from the state of Pennsylvania, within the bounds of which over three-quarters of the watershed lies, professing a willingness to make compensation to the complainants for any damages which they may suffer, which they contend are not large.

The questions which are so presented are novel and important, but it will not be necessary to go into them, in view of others by which the disposition of the case is controlled. It is charged by the defendants that the complainants are estopped by laches from asking more than to be compensated for the water taken; and on the other hand, it is claimed by the complainants that the defendants are concluded by the result of certain condemnation proceedings, instituted in the common pleas of Lancaster county, in which it was decided that they had no right as against the complainants to divert any of the waters of this stream. Either of these, if sustained, is decisive of the case, and they are consequently to be first discussed.

The charge of laches is based on the delay for over two years to file the present bill, during which large expenditures by the defendants were being made, and negotiations for a settlement were entered into. It appears, as to this, that as early as October, 1903, the complainants were aware that the defendants intended to take water from this stream, in consequence of which they retained Mr. W. U. Hensel of Lancaster, Pa., to protect their interests, who in November following notified Mr. Bunting, the defendants' counsel, that unless a settlement was effected with them, or their rights were otherwise protected, an injunction would be applied for by his clients. This, after some further correspondence, resulted in an interview December 18, 1903, at which Mr. Huey, representing the defendant company, made the proposition to pay the complainants $5,000, on the basis of taking 5,000,000 or 6,000,000 gallons daily from the stream. He said they were not going to

take much, "a mere drop in the bucket," as he expressed it, amounting to but 10 horse power, which, out of the 350 which the complainants claimed to have developed at their works, he said would not be felt. The pumping station at McCrea's Mills, as he explained, had only 22 square miles of the watershed above it, and the one at Pine Grove only three-quarters of the whole drainage area, pointing out that, as the latter was to be operated by water power, there would always be a considerable quantity going down the stream, which would be ample most of the year except in a very dry season. The response of the complainants was that they wanted to be let alone, and that the only proposition which they would entertain, was to buy them out entirely, putting the value of their property at $250,000, which Mr. Huey said was out of the question. No agreement was thus reached at this meeting, nor at others which followed a few days later, each party adhering to the position originally advanced, the complainants expressing a willingness to sell at the price named, and the defendants offering to pay $5,000, on the basis of taking 6,000,000 gallons daily, with the understanding that when more was taken there would be further compensation. The matter drifted along in this shape some six months further, the defendants in the meantime, in May, 1904, having completed the work which they had undertaken at the McCrea's Mills station. Anticipating, in view of this, that the company would soon begin pumping, Mr. Hensel, in January, 1904, again called attention to the fact that no provision had been made for the protection of his clients, and notified the defendants that he should have to proceed for an injunction, unless this was promptly remedied. This led to further correspondence between counsel for the respective parties, in which it was asserted by counsel for the defendants that, as the company had the right of eminent domain, and the taking was in Pennsylvania, the only redress, even for owners of property upon the stream in Maryland, was by condemnation proceedings, and the assessment of damages by viewers or a jury in the courts of Pennsylvania; to which view, after some demur, Mr. Hensel finally assented, conceding that an injunction, if obtained, would be dissolved upon a bond being filed to pay the damages sustained; and it was thereupon stipulated that 60 days' notice should be given by the water company before beginning to pump, in order to afford the complainants the requisite opportunity to protect themselves; of all of which the complainants were advised by their counsel. Notice of a contemplated pumping was accordingly given in September, 1904, in prospect, no doubt, of the completion of the Mars Hill reservoir, which occurred soon afterwards in October, a start on the Pine Grove dam having also been made in August. Notwithstanding this, however, there was again an interval of inaction, nothing being done to bring the matter to a head, until June, 1905, when the defendants filed and had approved, by the common pleas of Lancaster county, a bond with proper surety in the sum of $1,000, conditioned for the payment to the complainants of the damages they would sustain by reason of the appropriation of the water of the stream. To this, objections were filed on behalf of the complainants: (1) That the bond was inadequate; (2) that, as against the complainants, the defendants had no right to take the water; and (3) that the court had no authority to ap-

prove the bond or entertain the proceedings, the parties, and interests affected, not being in the state of Pennsylvania. The contention that the court had no jurisdiction in the premises, the right to appropriate under the power of eminent domain being limited by state lines, was ultimately sustained April 14, 1906, and the approval of the bond which had been entered was stricken off. Octoraro Water Company's Petition, 15 Pa. Dist. R. 767. But in the meantime, on January 6, 1906, under the guidance of new counsel, the present bill was filed.

There was nothing adjudicated in the condemnation proceedings referred to which concludes the issues here. The water company there, pursuing the remedy given by the statute, sought to have assessed the damages which the complainants would be compelled to take in exchange for their property in the stream. This the court held that it could not do, the company having no right to appropriate the water of the stream as against parties beyond the borders of the state. The complainants, in other words, could not be drawn into the common pleas of Lancaster county to have the compensation for their property compulsorily fixed, as for a lawful taking under the power of eminent domain, the authority in that regard, conferred by the state law, having no extraterritorial force. The right to go into that question must be conceded (Philadelphia Street Railway's Petition, 203 Pa. 354, 53 Atl. 191; Katharine Water Co., 32 Pa. Super. Ct. 94), and the soundness of the views expressed is beyond doubt; that is to say, so far as concerns the authority of the water company to take whatever part of the stream it chose, the manifest intention, as expressed in its resolution, being to take it all. But the right of the company, representing the state and vested to that extent with its sovereign powers, to take a fair proportion of the stream for the use of the public, was not in issue, and was not discussed, nor was the question of the complainants' laches, by which, whatever might have been originally insisted on, it is claimed that they are now estopped. These are the questions, which are presented here, and being distinctly different in principle and effect and not having been passed upon or involved in the decision made, they must be regarded as reserved, and not barred by anything that was there ruled.

Turning then to the subject of the complainants' laches, it is no doubt true that the mere delay to bring suit for two years, after it was known that the defendants intended to take water from the stream, is not enough of itself to estop them at this time. There must be something besides that, which makes it inequitable that they should now proceed. Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; London Bank v. Dexter Horton & Co., 126 Fed. 593, 61 C. C. A. 515. This is said to be found in the fact that the complainants not only stood by and allowed the defendants to make large expenditures, in building dams, installing pumping stations, buying rights of way, and laying water mains, but that they actually entered into negotiations, with the defendants, as to a money compensation to be paid. It is claimed, however, on the other hand, that consistently denying from the first the authority of the defendants to appropriate any of the stream the complainants have asserted their right and desire to be let alone, confirmatory of which it is pointed out that, at the two inter-

views which were had early in the controversy, they rejected the offers of settlement which were made, and insisted that the purchase of their plant by which they would be eliminated as a factor was the only proposition which would be entertained. Nor, as it is contended, are the defendants shown to have done or abstained from doing anything on the strength of the inaction charged, the plans which they had made in the beginning having been carried out as they were originally formed. But the case is not so simple, either way, as that. It is no doubt true, that the defendants have gone on with their work, apparently unaffected by the attitude of the complainants towards it, but it is at the same time to be borne in mind that the complainants early in the controversy allowed themselves to be drawn into negotiations looking to a money settlement, if indeed they did not seek them, after which it can hardly be asserted that the defendants were not in fact misled. Nor have the complainants consistently maintained to the end the right to have the stream flow unimpaired. This position may have been taken at the start, but in the letters which passed between counsel in the summer of 1904, when a material part of the defendants' outlays were still unmade, it was conceded by Mr. Hensel, as we have seen, that the water company had the right to take by virtue of the power of eminent domain, and that the injunction to prevent it would be dissolved, if obtained, upon the forthcoming of a bond to secure the damages sustained. Later on, it may be, that he expressed a somewhat different opinion, the complainants having become restive under this advice. But in the meantime the mischief had been done, and the ground lost could not be regained. Nor can it be said that he had no authority to surrender their rights, and that they are not bound by what he said. Mr. Hensel was careful to notify them of all that he had done, and having knowledge of it, without dissent, they are not in a position to repudiate it at this time.

Assuming, then, that if the complainants had moved promptly when first threatened they would have been entitled to assert rigidly their right to the undiminished flow of the stream, it is too late to do so now, in view of all that has occurred. Not only has there been the delay shown, during which the defendants were known to be proceeding with their work, in which large expenditures have been made which cannot be recalled, but negotiating for a money settlement, whether for much or little, as they did, and even though they held out against the offers made, insisting on the purchase of their mills as the only thing to which they would accede, having committed themselves to an adjustment which would leave the defendants in the undisturbed possession of the stream they cannot turn around now and insist that everything should be put back as it originally was. As said by Mr. Justice Brewer in New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820:

"It is one thing to state a right and proffer a waiver thereto for compensation, and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril. In the former he may well assume that payment of a just compensation will be accepted in lieu of the right."

And when to this is added the concession of counsel, with the knowledge of the complainants, while a material part of the defendants' outlays were still unmade, that the water company had the right to take the water under the power of eminent domain conferred by the Pennsylvania laws, and that all that could be asked by his clients was to be secured in the damages which they had sustained, it is clear that the defendants are entitled to be protected in what they have done meanwhile, and that the complainants are estopped from demanding more than to be compensated, as so conceded, at this time.

That a lower riparian owner can be barred by laches in this way from contesting the right of another to take under circumstances such as these was expressly decided in New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, just referred to, and is not open to question here. It is true that in that case the water was appropriated by a municipality in order to supply its citizens with one of the necessities of life, while here, although ostensibly incorporated for the same purpose, the only customer of the defendant water company so far is the Pennsylvania Railroad, for whose sole benefit it apparently exists. But while the public character of the taking may emphasize, it is not the basis of, nor does it affect the principle involved. The point is that, whatever in this regard may be the fact, if there is any lack of authority in the parties to take, they are entitled to have it promptly challenged before any extended expenditures have been made, after which, and after being led to believe that no extreme rights will be insisted on, it would be inequitable to allow it to be done. Again quoting from New York City v. Pine:

"If one aware of the situation believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal."

With this conclusion reached, the difficulties in the case disappear. It is no longer necessary to determine the respective rights of the parties to the water of this stream, flowing as it does through different states; nor whether as against a lower riparian owner in the one, authority to take a fair proportion, if not the whole of it, for a public use can be conferred by the state where it takes its rise. Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. All that is decided is that the complainants under the circumstances which have been disclosed must accept what has been so far done, being remitted, as the full measure of relief to which they are now entitled, to a money compensation for the property rights impaired or destroyed. That is not to say that the defendants can go on and make a still further inroad upon this stream, much less, that they can take it all, as they have resolved. As yet they have stopped with the resolution, without any further overt act. When they do more, the questions which are now left in abeyance will revive in their original force, and to avoid the

necessity for a new suit, if a new and additional taking should be essayed, the bill will be retained as a pending case to meet it. But in the meantime it will be left to a master to fix the compensation due to the complainants for the damages which they have sustained, the question of costs being deferred until the coming in of his report. Let a decree to this effect be drawn by counsel.

BAILEY & GRAHAM v. PHILLIPS et al.

(Circuit Court, S. D. Georgia, S. W. January 15, 1907. On Motion for New Trial, December 3, 1907.)

1. CONTRACTS—ILLEGALITY—PUBLIC POLICY.
   Under the Georgia law, contracts to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, and contracts of maintenance or champerty are contrary to public policy and unenforceable.

2. GAMING—GAMING CONTRACTS.
   Gaming contracts, and all evidences of debt, incumbrances, or liens on property executed on a gaming consideration, are void in the hands of any person.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 39.]

3. SAME—BROKER'S SERVICES—LOSSES.
   A broker, who is privy to a wagering contract for the purchase or sale of futures, cannot recover either for his services or losses.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 73–75.]

4. SAME—VALIDITY OF CONTRACT—"GAMBLING CONTRACT."
   An agreement for the sale of any commodity for future delivery is void as a "gambling contract," where neither party intends an actual delivery of the property purchased or sold; but if one of the parties in good faith contemplated an actual delivery, and not a mere settlement by a payment of differences in the rise and fall of the market price, the contract was valid and enforceable."
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 22–27. For other definitions, see Words and Phrases, vol. 4, pp. 3028–3029.]

5. BROKERS—EMPLOYMENT—IMPLIED CONTRACT.
   The employment of a broker to buy or sell a commodity for future delivery implies, not only an undertaking to indemnify the broker in respect to the execution of his agency, but also a promise on the principal's part to repay or reimburse the broker for such losses or expenditures as may become necessary or result from the performance of the agency.

6. GAMING—DEALING IN FUTURES—BURDEN OF PROOF.
   Where, in an action for broker's commissions and losses in the purchase and sale of cotton for future delivery, defendant pleaded that the contract was a gaming agreement, the burden of proof that neither party intended an actual delivery, but a mere settlement of differences in the market price, was on defendants.

Olin J. Wimberly, for plaintiffs.
Merrill P. Callaway and T. J. Hendricks, for defendants.

SPEER, District Judge (charging jury). The issues offered in this case for your determination are on two actions brought by Bailey & Graham, members of the New York Cotton Exchange, one against P. D. and the other against T. E. Phillips. The claim in each case is the

sum of certain amounts alleged to have been paid by the said plaintiffs on account of the particular defendant sued. In the case of T. E. Phillips, it is claimed that he is indebted to the plaintiffs in the sum of $2,950.32, besides interest from June 17, 1904, at 6 per cent. per annum. This sum is alleged to be due upon an open account for commissions, for services, and for money paid and advanced by the plaintiffs for and at the request of T. E. Phillips in selling for his account, and as his agents, cotton for future delivery, according to the rules and regulations of the New York Cotton Exchange, in the city of New York. A copy of the account is annexed, and the petition proceeds to set out in detail the nature of the demand. The other action is brought by the same plaintiffs against P. D. Phillips, and the amount claimed is the sum of $8,625.54, for work and labor done, services rendered, and money paid out and expended by the plaintiffs at the instance of the said P. D. Phillips, with interest at 6 per cent. from the date above mentioned. This is on similar account to that already stated.

There is no question made by the defense as to the accuracy of the account sued for, nor is there any doubt as to the right of the plaintiffs to recover a verdict for the full amount with interest on each action, unless the defense pleaded and set up by the defendants shall be held, in view of the evidence, to be supported by the law, and therefore meritorious. This issue you must determine from the evidence, which has all been submitted to you (none of it as I recall having been excluded), in view, also, of the instructions of law which it shall be my duty to give for your assistance. In other words, since the plaintiffs have produced their account, and given testimony to the effect that it is correct, they are entitled to a verdict therefor, unless, in view of the facts, the plea and defense is sufficient to defeat it. The plea is, in a word, that these claims originated in a transaction for the sale of cotton futures, which is contrary to law and to the public policy of the state of Georgia. Under the law of this state there are certain contracts upon which no recovery can be had. These are contracts which are against the policy of the law. They are such as tend to corrupt legislation, or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, and contracts of maintenance or champerty.

It is not necessary that I should explain to you all of these contracts which are against the policy of the law. It will be sufficient, for the purposes of your duty, for me to point out that gaming contracts are void, and all evidences of debt, or incumbrances or liens on property, executed upon a gaming consideration, are void in the hands of any person. For instance, under the law of Georgia, a note for illegitimate cotton futures is a gambling contract, and void in the hands of a bona fide purchaser even. A broker who is privy to a wagering contract cannot recover for his services or his losses. Losses in buying or selling futures for his principal, when they are in fact wagering contracts, cannot be recovered. These questions have many times been before the Supreme Court of the state, and there is no doubt as a matter of law that a gambling contract cannot be enforced, and that losses, or services rendered by one who is a party thereto and understands its

character, likewise cannot be recovered. The law simply refuses its assistance to the enforcement of such a contract, for the reason that it is contrary to the general welfare—that is to say, to the public policy —and the courts leave the parties where they find them.

It is, however, true that it is not every agreement for the future sale of commodities that is a gambling contract. The law upon this subject may be expressed as follows: An agreement for the sale of stocks, grain, cotton, or any other commodity is a gambling contract, where the parties do not intend an actual delivery, but agree that at the time fixed for delivery they shall settle by one of them paying the other the difference between the price agreed upon and the market price at the time of delivery. This is a mere bet or speculation on the rise and fall of the price of the article, and is illegal, not only under the statutes, but in most states even independently of any statute. It is illegal by the express statute of this state, and is now so clearly inimical to the public policy of the state that brokerage establishments, known as "bucket shops," are expressly denounced by the statute law.

The policy which forbids contracts of this character is easily discoverable. The commonest form of this disguised gambling in modern life is the contract for the purchase or sale of property in the future, without the intention upon the part of either party to deliver or receive such property; the mutual intention being to settle the contract at the period of maturity thereof, by paying or receiving the difference between the market price and the contract price of the property bargained for. The temptation to those who do not own the property in which they thus deal to engage in such ventures, by which they imagine that large profits may be won at a minimum expenditure, is deemed by the lawmaking bodies to be of such character as to demand statutory protection for the people. This is probably ascribable in large part to the fact that the small and inexperienced dealers in villages and rural communities are wholly incompetent to trade on equal terms in such illegal ventures with the alert and trained intelligences who gather in the great marts of commerce in our country and who devote their powers to this illegal trading. In addition to this, the excitement of such ventures tends to divert the mind of the farmer or small tradesman from those productive enterprises for which he is really capable, and not infrequently to afford a more irresistible and dangerous temptation to those persons who are intrusted with funds for other purpose, which are diverted, at whatever hazard to the true owner, for the possibility by their use of personal gain to the trustee. It is probably true that no practice prevalent in the trade conditions of the present time does more to unsettle legitimate business, to degrade the probity of individuals engaged therein, and to bring unanticipated loss upon what otherwise would be stable and prosperous lines of trade.

It is, however, by no means true that all speculation is gambling. Merchants and manufacturers speculate with entire propriety upon the future prices of those commodities which they sell and buy, or which they manufacture. In other words, they weigh the probabilities of the coming market, and act upon their judgment of future prices in their business transactions. In this way the mind of the merchant or manufacturer becomes second to no other in its vigor and clearness, in pow-

er, in the knowledge of national and international affairs, and of the productive capacity of their own and foreign nations. Nothing can be more admirable than this display of talent and forecast. Such foresight on the part of New York, Boston, or London merchants may control international controversies, and change even the maps of nations. Said Sir Walter Raleigh: "Whosoever controls the commerce of the world controls the world itself." When, therefore, such merchants and others thus act upon their conclusions, and buy and sell in a bona fide way, there is no room whatever for a denunciation of such contracts.

It is true, also, that these exigencies of modern commerce and manufacture may justify the purchase in good faith of cotton or other similar commodities for future delivery, which purchase, although to be carried out in futuro, may depend for its price on the rise or fall of the markets, and in a proper sense may be speculative. For instance, a cotton manufacturer in this city may contract to deliver a large order of cotton sheetings at a certain date in the future and for a certain price. In order to protect his contract, he may, by going into the open market, purchase contracts for cotton to be delivered at a time which will enable him, if his judgment is right, to hedge against any possible loss on his contract to manufacture. He may do this, we will say, in the New York market, and under the rules of the New York Cotton Exchange, and yet he may not anticipate that in any event the cotton will actually be delivered to him in the city of New York. The freight rates from New York to Valdosta would make this an impossible delivery in all likelihood. As he needs the cotton for the daily work of his machines, he may buy it at the most favorable localities of the neighborhood, and, as it is manufactured, he may close out to that extent his New York contracts. He, however, can get his cotton in New York, if by any exigency his business demands that he should have it delivered there. This I do not esteem to be a gambling contract. He may need the cotton for a specific purpose. He, in that event, must have it. If he cannot get it here, he can get it in New York, although he will most probably get its value there, and so there is no injury to either factory or community. This illustration, however, and others which might be given of a legitimate purchase of commodities for future delivery, is essentially different from that which the law denounces, and which is entered into by men who have no possible necessity for the commodity for any productive purpose, or for any purpose at all, who do not expect to take or deliver it, and who only take the chances of the rise and fall of the market, with a view of winning by any adjustment of differences between the price at which they agree to purchase and the actual market price on that date.

Nor is it true that the law, in an investigation of a transaction of this general character, will hold the parties down to the letter of their contracts, whether they are in telegrams, memoranda, slips, rules of a Cotton Exchange, or what not. If, however, it appears from the documentary evidence that the transaction was to be in accordance with the rules of the Cotton Exchange, it will be presumed that both parties understood this, unless the contrary is made to appear by the proof. If it were a question merely between the parties, the general rule that the written contract controls would be enforced; but in a case of this gener-

al character the public has the gravest interest, and, however formally the contract may in letter seem to comply with the law, yet if in fact and in purpose it is in disregard of the law, the court and jury may look through the form, and hear evidence to ascertain what was the real purpose and the real transaction. When, from the proof, it appears that such contracts are gambling contracts in contemplation of law, their injury to the public welfare is not lessened, or the illegal nature of the transaction altered, if it also clearly appears that the agents or representatives of the parties, who carry on such business, entered the rural or village localities and by contract, statement, suggestion, or solicitation induced persons engaged in other vocations to take part in an unlawful purchase or sale of such future contracts.

It is true that when, on the face of the papers or otherwise, it appears in proof that an indebtedness has been created in favor of the plaintiff against the defendant by the future sale or purchase of commodities, the burden of proof is upon the defendant to show that the transaction is illegal and a gambling contract—that is to say, the proof must preponderate in favor of the defendant on that issue—before they can be justified in finding in his favor. The real test whether the ostensible contract is or is not a gambling contract is a question of fact, and it is therefore, where the evidence is in conflict, a question for the jury to determine under proper instructions from the court. It is true, also, that before the jury will be justified in deciding that the contract is a gambling contract, and therefore void, they must find that both parties understood it to be a contract of that character. If one party intended to have a bona fide delivery of the cotton, and the other did not intend such delivery, but intended to settle differences between the market and the contract price, why the contract itself could be enforced at the option of the party who in good faith intended to exact delivery as the case might be. If, however, it was the intention of both parties, evidenced either in conversation, letters, telegrams, or by the oral proof, to settle their contract of future sale by the payment of the differences between the market price and the contract price, and such intention existed at the inception of the contract, this would be sufficient to show that the contract was a gambling one, that it is void, and that the court and jury will help neither of the parties.

Generally it is true that "the employment of a broker to sell [or buy] property for a [lawful] future delivery implies, not only an undertaking to indemnify the broker in respect to the execution of his agency, but also implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary or result from the performance of the agency." This is applicable to this case, provided, however, that the transaction which the broker makes is believed by him to be legitimate, and not a gambling contract, and provided he also believes that the party with whom he contracts for the future delivery of cotton or other property to his principal really and bona fide intended at the inception of the contract to actually deliver such cotton or other property to the broker's principal.

In conclusion, you should carefully consider the oral and the documentary evidence submitted to you in this case, and determine whether

in point of fact the parties on both sides of this transaction at its inception understood that it was to be a dealing in futures, by which the customers of this New York firm should win or lose on the fluctuations of the market, and that the differences should be settled by a payment of the differences between the contract price and the market price on the date when the contract should be executed. If the parties on both sides understood this to be the nature of the contract, I instruct you positively that there can be no recovery. If, however, the plaintiffs, or the defendants, understood that this was a purchase of cotton for future delivery, bona fide in its character, and that the cotton actually was to be delivered, then the plaintiffs are entitled to recover the full amount sued for, although the defendants may have understood that no cotton was to be delivered. On this issue, as before stated, the burden of proof is on the defendants; that is to say, the proof must preponderate in their favor to the extent of producing moral and reasonable conviction on your minds that their defense is true in point of fact.

On Motion for New Trial.

SPEER, District Judge (orally). Bailey & Graham were members of the New York Cotton Exchange. One of them had a winter home at Thomasville, not far from where the defendants reside. The defendants were the Messrs. Phillips, who appeared to be men of considerable means, and conducted a large business, much of which consisted in purchasing grain, provisions, and cotton for future delivery. They had certain transactions with Bailey & Graham, and the result was a balance in favor of the members of the Cotton Exchange, amounting to about $8,000. They refused to pay this, and suit was brought for its recovery. The issues were submitted to a jury in the Circuit Court of the Southwestern Division at Valdosta, and after the trial, of some four days, in which the parties on both sides were ably and thoroughly represented, and all the facts submitted to the jury, they returned a verdict for the plaintiffs.

A motion is now presented to the court for a new trial. No complaint is made of the decisions of the court or its action at any time. It is now for the first time intimated by one of counsel that, if he had not slept over his rights, he might have made a complaint at a certain time; but he did not make such a complaint. The law will not hear him now to correct the mistake, if it was a mistake, which he made then. I think he was wise not to make the complaint then, because the ruling of the court, the facts being in much dispute, not to direct a verdict for the defendants, was nothing more than a ruling to submit it to the jury, and they were in that situation the proper triers of the facts. I will not attempt to discuss the case at length, but, since it is conceded that the questions at issue were fairly and legally submitted to the jury, I will content myself with reading brief extracts from my charge, as follows:

"In conclusion, you should carefully consider the oral and documentary evidence submitted to you in this case, and determine whether in point of fact the parties on both sides of this transaction at its inception understood that it was to be a dealing in futures, by which the customers of this New York firm should win or lose on the fluctuations of the market, and that the dif-

ferences should be settled by a payment of the difference between the contract price and the market price on the date when the contract should be executed. If the parties on both sides understood this to be the nature of the contract, I instruct you positively that there could be no recovery. If, however, the plaintiffs or the defendants understood that this was a purchase of cotton for future delivery, bona fide in its character, and that the cotton actually was to be delivered, then the plaintiffs are entitled to recover the full amount sued for, although the defendants may have understood that no cotton was to be delivered. On this issue, as before stated, the burden of proof is on the defendants; that is to say, the proof must preponderate in their favor to the extent of producing a moral and reasonable conviction in your minds that their defense is true in point of fact."

Now on that issue, thus fairly presented, the jury found for the plaintiffs the full amount claimed. I think it was a just verdict. There is an enormous business carried on throughout the world by dealing in the future delivery of products of many sorts. The courts have regulated it, and the laws have regulated it, by making it essential to the validity of a contract that actual delivery should be contemplated. That was made plain to the jury. It was a clear-sighted, straightforward, honest jury of the vicinage, many of them among the shrewdest merchants in Valdosta, and there are not many shrewder merchants anywhere else. I see no reason, therefore, to disturb this verdict, and the motion for a new trial is overruled.

In re EASTERN DREDGING CO.

THE SCOW NO. 34.

(District Court, D. Massachusetts. March 15, 1906.)

No. 1,669.

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—PROCEDURE.

In a proceeding by the owner of a vessel for limitation of liability on account of a collision, where an answer is filed by the owner of the other vessel setting up a claim for damages, the question of the knowledge or privity of the petitioner, though jurisdictional, and the question of liability for the collision, where both are put in issue by the pleadings and are to be determined largely upon the same evidence, may properly be heard at the same time as a matter of convenience, and the court is not required to hear and dispose of the jurisdictional question separately.

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

2. COLLISION—VESSEL ADRIFT—DEFENSES.

If damage is done by a vessel adrift, her owner is allowed to show affirmatively, if he can, that her drifting was the result of inevitable accident or a vis major which human skill and precaution and a proper exercise of nautical skill could not have prevented; and such proof establishes a defense, even in a suit in rem against the vessel herself.

3. SAME—PERMITTING SCOW TO GO ADRIFT—NEGLIGENCE OF WATCHMAN.

Petitioner, a corporation, left two of its mud scows overnight made fast to a permanent mooring near the shore in accordance with its custom. They were fastened to the mooring by pennants and to each other by a cross-line, and at 6 o'clock lights were set on each. During the evening one went adrift, and at 10 o'clock claimant's ferryboat came into collision with it and was so injured that she sank. At that time there was

no light on the scow, and when found the next morning there were no lines on her bitts and no lights on board, although there had been two the evening before. The pennant was found attached to the mooring and intact. Petitioner kept no watchman on board the scows, but kept one on a dredge, which was moored near by, whose duty it was to care for the scows and see that their lights were kept burning. During the evening in question he was part of the time below, and once went on shore. He saw the lights on the scows in the earlier part of the evening, but when he went to the mooring at 9 o'clock found that one scow was gone; but, supposing that it had been taken by a towboat, he paid no further attention to it. The night was clear, with little wind. *Held*, that the uncertainty as to the manner in which the scow went adrift and lost her lights did not relieve her from fault for the collision; the watchman having clearly been negligent.

4. SHIPPING—LIMITATION OF LIABILITY FOR COLLISION—PRIVITY OR KNOWLEDGE OF OWNER.

The precautions taken by the petitioner, however, to secure and care for the scow, were sufficient; and, it appearing that none of its managing officers had knowledge of her going adrift or of the negligence of the watchman, it was not chargeable with privity or knowledge which precluded it from limiting its liability.

5. COLLISION—DUTY TO MAINTAIN ANCHOR WATCH ON SCOW—MASSACHUSETTS STATUTE.

St. Mass. 1848, p. 800, c. 314, § 4, requiring every vessel anchoring in Boston Harbor to keep an anchor watch at all times, does not apply to a mud scow having no accommodations for a watchman, when made fast to a permanent mooring near a dredge, in connection with which she is used and on board of which a watchman is kept to look after both vessels.

6. SAME—FERRYBOAT AND DRIFTING SCOW—LOOKOUT.

A ferryboat, which came into collision at night with a mud scow drifting without lights, *held* not chargeable with contributory fault because she had no lookout in the bow; a lookout having been kept from the pilot house, which was sufficient in respect to any other vessel carrying proper lights.

In Admiralty.

See 138 Fed. 942.

Carver & Blodgett, for Eastern Dredging Co.

John O. Teele and Arthur P. Teele, for Winnisimmet Co.

DODGE, District Judge. The special plea denying the jurisdiction of the court, filed by the Winnisimmet Company March 5, 1905, was overruled by the court June 6, 1905, on the grounds stated in the opinion of that date. On June 24th the Winnisimmet Company filed an answer to the petition and a proof of claim of its damages alleged to have been suffered in the collision which the petition describes, reserving, however, its right to object to the jurisdiction of the court under the special plea referred to. A hearing has now been had upon the questions raised by the answer and proof of claim.

The petition for limitation of liability alleges that the collision and the damage resulting therefrom were in no event done, occasioned, or incurred with the privity or knowledge of the petitioner, but were without its privity or knowledge; and it denies the petitioner's liability for any damage resulting from the collision, alleging that the collision was in no respect due to fault on its part or on the part of its Scow No. 34, but was caused wholly by the fault of the respondent's ferryboat City of Boston, or by persons unknown, or by both.

In its answer to the petition the Winnisimmet Company takes issue with the petitioner on both propositions, denying that the collision and damage were without the petitioner's privity or knowledge, and alleging that the collision was wholly due to fault on the part of the petitioner or its scow.

At the hearing the respondent contended that the petitioner should be required first to show that the collision happened without its privity or knowledge, and that the court should not, until that fact was established, enter upon any inquiry regarding responsibility for the collision. This contention was overruled. While it is true that the court, no libel seeking to recover damages sustained in the collisior being before it, is without jurisdiction to decide the question of liability for the collision unless this petition can be maintained, and while it is also true that the petition can only be maintained upon proof to be made by the petitioner that the collision was without its privity or knowledge, yet the question as to the petitioner's privity or knowledge and the question as to its liability for the collision are now both raised by the pleadings in the case, both involve the investigation of the same facts, and the evidence material upon one question is for the most part the same as that which is material upon the other. A separate hearing and decision of the two questions would involve so much inconvenience and waste of time that it may be said to be practically impossible. The procedure, when limitation of liability is sought in admiralty, is understood to vary in some respects in the different districts; but no case has been found involving both the questions referred to, in which they have been thus separately heard. Both questions appear to have been in all cases dealt with at the same hearing, and that method has been followed in this case.

The following facts alleged by the petitioner are admitted by the answer to the petition: On Sunday, March 13, 1904, the petitioner was sole owner of Scow No. 34, which was an ordinary mud scow 110 feet long and 34 feet wide, built in New York in the year 1900, and employed by the petitioner in carrying mud from Boston Harbor to the dumping ground in fulfillment of its contract for excavation with the United States government. At about 10 o'clock in the evening of that day the respondent's ferryboat City of Boston, while on its regular trip between the city proper and East Boston, came into collision with the scow, which was at that time adrift in the harbor.

It is not disputed that by the collision the ferryboat was damaged and caused to sink.

I find on the evidence before me that the circumstances of the collision were as follows: The ferryboat was making one of her regular trips from Boston toward Chelsea, having left Boston at 10 o'clock in the evening. It was a clear, starlight night. There was no moon. It was dark on the water, there being wind enough to roughen its surface sufficiently to prevent any reflection of lights on shore. In the ferryboat's pilot house were the captain, who was steering, and one pilot or deck hand. Both of them were keeping lookout from the windows of the pilot house. Another pilot or deck hand was on duty below. He was in one of the cabins when the collision

happened. These three men, with the engineer and fireman, who were below, composed the entire crew of the ferryboat. There were some passengers on board. The ferryboat was on her regular course, had completed the greater part of the trip, and was nearing her Chelsea landing, but was still in the channel between East Boston and Charlestown, at a point nearest the eastern side thereof, off Cunningham's Wharf, in East Boston, when she struck the scow. Nothing whatever was seen of the scow on board the ferryboat before the collision, nor was she seen from the ferryboat after it had taken place. She had no masts, houses, or other structures rising above her deck, and no part of her hull rose more than two or three feet above the water. She had a load of mud on board, which in some places came two feet above the highest part of her hull. The damage sustained by the ferryboat was damage to her hull underneath the guards, which were sufficiently high above water to permit the scow to pass underneath them without striking them. The scow was drifting at the time, with no one on board and without lights of any kind. Of the absence of any light on board her I am satisfied by the evidence of the men in the ferryboat's pilot house. I have no doubt that they would have seen the light if there had been any. The scow was found in the neighborhood soon afterward by a tugboat which went to look for her, and when found was in the condition which is later described below.

1. The first question to be considered is as to the liability of the scow or her owner. Looking no further than the circumstances which immediately attended the actual collision, and having regard only to the navigation of the scow at the time it occurred, there is, of course, no question that the scow was in fault. She had no one on board under circumstances which required her to be under proper control. She was unlighted under circumstances which required her to be showing lights of some kind. Just what lights such a craft should have been showing it is unnecessary to consider, inasmuch as she showed none at all. As she was, she was a danger to all other craft navigating the channel in which the ferryboat ran against her. The mere fact that she was thus endangering navigation in the harbor is of itself enough to establish fault on her part in regard to the collision, if the inquiry is to be carried no further.

The principle, however, that a vessel which has damaged another by navigation in violation of law may be treated in admiralty as an offending thing, herself the wrongdoer and liable for the damage done, is not carried so far in cases of this kind as to preclude further inquiry absolutely and to warrant a conclusive presumption that the owner of the scow was negligent. If damage is done by a vessel adrift, her owner is allowed to show affirmatively, if he can, that her drifting was the result of inevitable accident or a vis major which human skill and precaution and a proper display of nautical skill could not have prevented. The Louisiana, 3 Wall. 164, 173, 18 L. Ed. 85. Such proof by the owner establishes a defense, even in a suit in rem against the vessel herself. In these proceedings the issue is as to the personal liability of the owner. The owner's liability arising from its

negligence is what is denied in its petition and alleged in the answer and claim of damages. The negligence alleged is that the scow was left insecurely moored and unguarded by crew, or by watchmen, or otherwise, so that she floated as a derelict across the harbor, without guards or lights. The petitioner's averments, on the other hand, are that she had been properly and securely made fast at her mooring ground, that the lines whereby she was secured were not parted, and that they had evidently been unfastened by persons unknown, for whose acts it was not responsible.

The petitioner, as the evidence in the case shows, was accustomed to keep its scows, when not in actual use, or when loaded and waiting to be towed to the dumping ground, at a mooring 200 or 300 feet from shore, off the Charlestown Navy Yard, not quite half a mile distant from the place where the collision occurred, and on the opposite or western side of the channel between Charlestown and East Boston. On the day before the collision, Saturday, March 12th, Scow 34, loaded and ready to be towed to the dumping ground, and also another scow, empty, had been placed at this mooring. The dredge Bothfield, also belonging to the petitioner, was at work, also off the Navy Yard and about the same distance from shore, at a place about 500 feet distant from the mooring where the scows were placed. Both scows were at the mooring during the day on Sunday. No dredging work appears to have been done on Sundays, and the dumping of loaded scows could not, according to the regulations governing the contract work, be done between midnight on Saturday and midnight on Sunday. No watchman was kept at night on board the petitioner's scows when at the mooring, and there was none kept on these scows. There was no shelter for them on board the scows. A watchman was kept at night on board the dredge. The practice was to set lights on the scows at sunset, and then to leave them with no one on board until morning. Setting the lights on board was done by the petitioner's towboats. The watchman on the dredge was relied on to see that the lights on the scows were kept burning during the night, and, if any light went out, to investigate and fill or restore it. The captain of the dredge was relied on to see that lights were set on the scows, if the towboats failed to do it. The dredge people were instructed to supply any deficiency occurring in the lights, and the towboats, as they went about the harbor, had orders to see that no scow was left unlighted. On Sunday nights the only man on duty on the dredge would be the watchman referred to.

The evidence further shows that Scow 34 was found to be leaking on Sunday afternoon and that two of the petitioner's towboats went to her and pumped her out. On these boats, besides their captains and crews, were Capt. Dickinson, employed by the petitioner as superintendent of dredging, and Capt. Bogan, employed by the petitioner as assistant to Mr. Gerrish, its secretary, treasurer, and general manager. Both boats left the mooring at a few minutes before 6 o'clock, having seen that proper lights were set on the scows, that they were securely fastened to the mooring by the two mooring pennants wherewith it was provided, and that the scows were also lying alongside

each other, properly secured in that position by a cross-line from one to the other. The lights set were burning properly when the towboats departed. Two lights were left burning on Scow 34, and one light on the empty scow.

It further appears that two men were on board the dredge when the towboats left the scows thus moored and lighted, one of whom was the night watchman. He occupied himself during the evening with various duties about the dredge, which kept him below most of the time. He went on deck occasionally to look at the lights on the dredge and on the scows, or to see if any one wanted to come on board. He went to the shore during the evening in a rowboat and brought another man on board. At about 9 o'clock he rowed to the scows, to see if there was any more water in Scow 34. He then found her gone from the mooring and only the empty scow there. The light on this scow was burning. This was the first he knew of any absence of Scow 34 from the mooring. From the dredge he had been able since 6 o'clock to see two lights on the scows, one light higher than the other; but he had not ascertained and could not tell on which scow either light was. The empty scow was so much higher out of water than Scow 34 that, as they had been lying, in looking from the dredge he had not been able to see the hull of Scow 34 at all. Upon finding her gone, he supposed a towboat had taken her away, returned to the dredge, and did nothing further about her. He had seen a towboat about there an hour or more before he found that the scow was gone.

The evidence is that, when the scow was found and examined after the collision, no lanterns were found on board her, the poles or standards to which her lights had been attached were gone or out of place, no lines remained on her bitts where the mooring pennants and cross-line had been made fast by the men from the towboats, she showed marks of collision, and the machinery which operated the dumping pockets which held her load of mud had been so broken as to empty a pocket at one end and thereby bring her other end down nearly to the water. Her condition in most of the above respects is to be accounted for by her collision with the ferryboat; but the absence of the lights which had been set on board her cannot, as it seems to me, be so explained. The pennant by which she had been attached to the mooring was found still on the mooring and intact. It was produced at the hearing. Its condition afforded no ground for the belief that it had parted or had been cut.

Further than has been stated, there was nothing in the evidence to show how the scow got adrift, or how her lights came to be missing at the time of the collision. The utmost that can be said to be established in the petitioner's favor is that something out of the ordinary course of events must be supposed to have occurred after 6 o'clock, without the knowledge of the petitioner or its employés, which had the effect of setting the scow adrift and extinguishing her lights.

It is obvious that this is not enough to support the only defense against liability which could avail the petitioner. It was bound, not

only to moor and light the scow at 6 o'clock, but to keep her moored and lighted all night. It does not show that it was prevented from doing this by causes not to have been anticipated or prevented by the exercise of reasonable skill and diligence; and, what is of still more importance for the purposes of these proceedings, the watchman upon whom it principally relied for the purpose of keeping the scow moored and lighted after 6 o'clock is shown to have been negligent in the performance of his duty. If the fact of her disappearance from the mooring without his knowledge at some time between 6 and 9 o'clock would not be sufficient of itself to establish his negligence, it is impossible to say that he kept as careful a watch upon her as was required by his duty to use reasonable care, if he was most of the time below deck, part of the time absent from the dredge altogether, and at no time took the trouble to ascertain to which scow the lights visible from the dredge belonged. If the scows at any time so swung at the mooring that from the dredge he could not see anything of Scow 34 or her lights, this at least required care on his part in watching the place where he knew her to be, sufficient to enable him to know if she moved away from that place. The petitioner is therefore in fault for the collision, because of the fact that its scow was adrift, deserted, and unlighted at the time of the collision, and because the negligence of its watchman prevents it from escaping the responsibility thrown upon it by that fact.

2. The collision was with the petitioner's privity or knowledge, if its managing officers are chargeable with privity or knowledge in regard to it, but not otherwise. "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation." Craig v. Continental Ins. Co., 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886. Of the facts and circumstances attending the actual collision no officer had any knowledge at the time, nor did any officer have knowledge regarding what was done just before 6 o'clock in mooring and lighting the scow, or afterward in watching her. No officer was on board either of the tugboats which visited her at 6 o'clock. Capt. Dickinson and Capt. Bogan were not officers, but employés, through whom the general directions of the officers were carried out. Mr. Gerrish, the secretary, treasurer, and general manager, was the managing officer responsible for the general method followed at the Charlestown moorings in securing, lighting, and watching such scows as were from time to time left there, and also for the precautions adopted and ordered by the company for the purpose of keeping such scows properly moored and lighted. If it can be said that this scow was adrift and unlighted in the track of the ferryboat by reason of an inherent insufficiency or defect in the method or precautions referred to, independently of the fidelity with which each employé relied on to carry them out performed his task, Gerrish, and therefore the petitioner, is chargeable with privity or knowledge. This, in my opinion, cannot be said. The usual precautions were sufficient under all ordinary circumstances. The chance of scows moored as these were getting adrift was extremely small. There were no indica-

tions that anything beyond the usual regular precautions would be required on the night in question. As it happened, the watchman on the dredge failed to perform his duty and allowed the scow to get away from her mooring unobserved. This man was a witness at the trial. Nothing has been shown which would warrant the finding that he was an improper person to be employed for his position. Other men were with him on the dredge, and there was a boat which could have been used when required. I see nothing to prevent the natural conclusion that, if he had been as vigilant as the petitioner and its officers had the right to expect him to be, the drifting of the scow or her want of lights would have been prevented, or discovered and remedied in time. The same negligence of an employé, therefore, which prevents the petitioner from escaping liability for the collision, must be taken to have been the cause of the collision, so far as the question of privity or knowledge is concerned, and the petitioner's liability thereby incurred is of the kind which it is the purpose of the statute to limit.

The owner of the ferryboat relies upon a Massachusetts statute of 1847 requiring every vessel anchoring in Boston Harbor to keep an anchor watch at all times. This is section 4, c. 314, p. 800, of the Acts of 1848 (8 Sp. Laws Mass. 1007); and it appears to be now published with the regulations for Boston Harbor issued by the harbor master. I am unable to believe that it was intended to apply or can now apply to scows like Scow 34, when made fast to a permanent mooring near a dredge in connection with which she is used. If applicable, it requires at least one man to be kept on board each scow, day and night, while so moored. I find nothing to indicate that it has ever been so understood as applied. In the absence of any authority to that effect, and in view of the nature and purpose of an "anchor watch" on ordinary vessels (see The Lady Franklin, 2 Lowell, 220, Fed. Cas. No. 7,984), I do not think the petitioner can be held to have violated it by not providing that a man should be actually on board each scow, or by not having had a man on board Scow 34 during the evening of the collision.

3. The remaining inquiry is: Was there negligence on the part of the ferryboat, such as to require a division of the damages? It is contended that her evidence shows her to have been without a proper lookout. So far as the duty of the lookout could be properly attended to from her pilot house, it was sufficiently performed; but the pilot house, some 20 feet above the water, was about 55 feet aft of the bow, and no one was keeping lookout anywhere on board forward of the pilot house. Absence of a lookout at the bow, as far forward as possible, is often held to be fault. Brigham v. Luckenbach (D. C.) 140 Fed. 322. But it is not necessarily fault under all circumstances. It must have contributed to cause the collision. The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Iberia (D. C.) 117 Fed. 718, 723. In the present case I do not think it was a contributing fault. The fault on the scow's part which brought about the collision so far outweighed in importance, as causes tending to bring it about, any deficiency which can reasonably be imputed to the ferryboat's lookout from the fact that it was

not kept from her bow, that she cannot justly be held responsible in any degree. Under such circumstances any reasonable doubt is to be resolved in her favor. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053. As regarded all vessels themselves observing the required precautions, I cannot doubt that the lookout maintained on the ferryboat was entirely sufficient. The possibility that a deserted scow adrift without lights might be encountered in such a place and at such a time was so extremely slight as to make it unreasonable to hold the ferryboat negligent in this respect.

The petitioner is entitled to limit its liability to the owner of the ferryboat for its damages sustained in the collision. For those damages it is liable. There will be a reference to ascertain their amount.

In re EASTERN DREDGING CO.

THE SCOW NO. 34.

(District Court, D. Massachusetts. August 17, 1907.)

No. 1,669.

SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—TIME FOR FILING CLAIMS—EXTENSION BY COURT.

While a court of admiralty may in a proper case permit a damage claimant to file his claim in a proceeding by a vessel owner for limitation of liability, arising out of a collision, after return day of the monition, it cannot properly exercise such discretion in favor of a claimant who elected to bring suit, against the owners of the other vessel in collision, by permitting the filing of a claim more than two years after such return day, and after all other claims have been heard and determined.

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

In Admiralty. On petition of Mary L. and Vernon B. Davenport for leave to file answers and proofs of claim after return day of monition.

See 138 Fed. 942.

Carver & Blodgett, for Eastern Dredging Co.

William A. Davenport, for Mary L. and Vernon B. Davenport.

DODGE, District Judge. The monition in this case was issued November 26, 1904. It cited all persons claiming damages for injuries due to the collision of March 13, 1904, between Scow No. 34 and the ferryboat City of Boston, to appear and make proof of their claims on or before Friday, March 3, 1905. It was served upon the company which owned the ferryboat and by publication. In a letter to the petitioner's counsel, dated November 28, 1904, Mr. and Mrs. Davenport's counsel waived further service of the monition upon them. The time limited by the monition expired, they had not then appeared or proved any claims in these proceedings, nor have they until now sought to do so.

Meanwhile on March 15, 1906, after a hearing on the question of liability for the collision raised in the answer which the owner of the ferryboat filed in compliance with the monition, the court held in these proceedings that the scow was solely to blame for the collision and the ferryboat free from blame. By an order entered July 20, 1906, a commissioner was appointed to receive proofs of claims for damage. On October 15, 1906, the commissioner filed his report. After his findings as to the amounts of damages sustained by each damage claimant who had appeared, the commissioner states in his report as follows:

"I find, also, that one Mary L. Davenport, a resident of Franklin county, Mass., was a passenger on the ferryboat City of Boston at the time of the collision; that on August 26, 1904, she brought separate actions in the superior court of said county of Franklin against the Eastern Dredging Company and the Winnisimmet Company to recover damages to her person and property alleged to have been sustained as a result of said collision; that said actions were duly entered, and the action against the Winnisimmet Company was tried in November, 1905, and a verdict rendered for the plaintiff in the sum of $2,600; that the Winnisimmet Company filed exceptions in said action in January, 1906, and the action is now pending on said exceptions.

"On April 2, 1906, said Winnisimmet Company filed in the District Court of the United States for the District of Massachusetts a petition for limitation of liability as owner of said ferryboat City of Boston, and a restraining order was issued thereon; that the said Davenport filed a motion to dismiss said petition as against her, and to dissolve the injunction so far as to allow her to proceed in the common-law suit in the state court, which motions are pending.

"Vernon B. Davenport, the husband of said Mary L. Davenport, has filed a claim in the case of the said Winnisimmet Company, petitioner for limitation of liability, for loss of services of his wife occasioned by the collision.

"Said Winnisimmet Company claims that, if it should be adjudged that the said Mary L. Davenport or the said Vernon B. Davenport have any claim against the Winnisimmet Company because of the collision aforesaid, said Winnisimmet Company should be entitled to present and prove such judgment against said Eastern Dredging Company, but that until such judgment shall be entered such claim cannot be presented or proved, and requests the foregoing facts to be reported to the court for further directions as to the rights of the parties; and I so report them."

In consequence of this portion of the report final action upon the question of its confirmation was suspended to await the result as to the Davenports' claim in the limited liability proceedings taken by the owners of the ferryboat.

The motion for dismissal of the Winnisimmet Company's petition, to which the commissioner here refers, was denied after a hearing thereon, in the proceedings under that petition, on December 18, 1906. Mary L. and Vernon B. Davenport then filed answers and proofs of claim in those proceedings. After a hearing on the merits of the claims thus presented by them it was held that neither of them had established any claim for damages against the owner of the ferryboat. See the opinion in those proceedings, dated July 9, 1907. That the ferryboat was not in fault for the collision the court regarded as established by its decision of March 15, 1906, in the proceedings upon this petition for limitation filed by the owner of the scow, of which proceedings the Davenports had had due notice and to which they

might have become parties. That there was no negligence toward Mrs. Davenport on the part of the owners of the ferryboat, if they were not responsible for the collision, the court found upon the evidence before it at the hearing on the merits of their claims. The present application is made after, and, as may be presumed, in consequence of, this decision.

What is now asked, therefore, is that the court will by an exercise of its discretion permit claims for damages to be presented in these proceedings more than two years after the time limited by the monition has expired, after the hearings upon all claims presented have been completed, and while a commissioner's report in which their amounts have been ascertained is before the court for confirmation.

In a proper case, the court may and will allow damage claims to be presented after the time fixed by the monition has expired. There was such an exercise of the discretion of the court in favor of these petitioners in the proceedings upon the petition filed by the owner of the ferryboat. See the opinion in that case, dated December 18, 1906. There was such an exercise of the discretion of the court in The Argus (D. C.) 100 Fed. 143. But while a damage claimant who has not had a fair opportunity to appear may be allowed to file his claim late, as, for example, when through force of circumstances it has not been reasonably possible for knowledge of the proceedings to reach him, or when, though he has had notice, his appearance has been delayed through accident or mistake, and while this may be more readily permitted so long as none of the steps have been taken which are based on the assumption that all parties are in court who wish to be heard, these claimants have no such claim upon the indulgence of the court. They had due notice of the monition, and deliberately elected not to present their claims in these proceedings, but to rely upon their rights in proceedings elsewhere. In The Argus Judge Lowell had some doubt whether the discretion of the court ought to be exercised in the petitioner's favor, even in the circumstances there shown. In the present case I think such an exercise of discretion would be unjust toward the petitioner for limitation and the other damage claimants. Each damage claimant has the right to be heard in opposition to every other claim. Upon all the issues raised upon all the claims presented the evidence has long since been taken, and a result arrived at on all the issues raised. I do not think I can properly reopen the case at this stage and under these circumstances. Any precedent, moreover, which might encourage the belief that the terms of the monition in such a case as this may be safely disregarded, seems to me a precedent to be avoided.

The petition must be denied.

THE OCRACOKE.

(District Court, E. D. Virginia. January 17, 1908.)

1. SHIPPING—CARRIAGE OF PASSENGERS—INJURY TO PASSENGER—IMPROPER LANDING PLACE FROM VESSEL.

Libelant took passage on respondent steamer for Newport News, at which port the boat stopped in passing. On reaching there the boat went alongside a pier, the gangway railing was removed, and a deck hand stepped out on the pier and made a line fast. Libelant followed four or five other passengers to the gangway, and they each stepped out on the pier. Seeing the hand removing the line from the cleat, libelant asked him if he was not going to put out the gang plank, and, being told he was not, libelant attempted to step up on the pier, but lost his balance and fell, receiving serious injury between the vessel and the pier. It appeared that the vessel stopped at another pier at Newport News, which was the usual passenger landing, but libelant did not know and was not informed of such fact. *Held*, that the vessel was negligent in impliedly inviting passengers to land at the pier, and in failing to instruct or assist them or to provide proper facilities; that libelant under the facts shown was not chargeable with contributory negligence which would preclude his recovery of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 538–544, 551.]

2. WITNESSES—IMPEACHING TESTIMONY—PRIOR STATEMENTS.

Testimony as to a statement made by a person injured immediately after the injury and while he is in severe pain, blaming himself in a general way for the accident, is not entitled to great weight, as impeaching testimony in respect to the facts which is apparently thoroughly reliable.

In Admiralty. Libel to recover damages for personal injuries.

Thorp & Bowden, for libelant.

Loyall, Taylor & White, for respondent.

WADDILL, District Judge. The steamer Ocracoke is operated by the Old Dominion Steamship Company, in its local service between the city of Norfolk, via Newport News, and Smithfield, Va., between which places it makes a round trip daily. On the early morning of March 8, 1907, the libelant took passage on this steamer at Norfolk for Newport News. At the latter place, the steamer stops at Pier No. 6 of the Chesapeake & Ohio Railway Company, upon signal to discharge and receive freight, and then proceeds some distance further up the harbor to Pier A, the regular Old Dominion pier, which it seems is the regular passenger landing. The libelant was making his first trip on this steamer, and did not know of the two places of stopping at Newport News. En route from Norfolk, he observed several passengers, one of whom he knew, but he did not join any of them. Soon after leaving Norfolk, the libelant purchased his ticket through the stewardess, being informed that there was no purser on board, and shortly before arriving at Pier 6 in Newport News the captain of the steamer collected his ticket. Upon approaching Pier No. 6 libelant observed four or five of the persons above referred to proceed to the main deck, apparently to leave the vessel at Newport News, and he followed them for the same purpose. As the steamer reached the pier, a colored deck hand, having removed the gangway railing, jumped from the boat

to the wharf to make the steamer fast, there being no person on the pier for that purpose, and about the same time four of the passengers stepped off on the wharf, without waiting for the gang board to be put out, and, as they did so, the steamer sprang off somewhat from the pier, and upon again touching the wharf a fifth passenger likewise stepped off. The libelant waited with the steamer thus in position for the gang board to be put out, when he observed the deck hand apparently in the act of removing the line which held the boat to the pier from the cleat on the pier, and he called to him to know if he was not going to put out the gang board, and received the reply that he was not; and libelant then supposing the steamer was leaving for Smithfield, attempted, as other passengers had done, to step to the wharf, but lost his balance, was thrown upon the wharf, as he thinks, upon his back, and fell with his body partly on the wharf and partly off, his head being between the steamer and the pier, and resting against or on the guard rail of the ship, as a result of which he received painful and serious injury. This suit is to recover for the injuries sustained, and the respondent denies his right of recovery, because of the alleged contributory negligence of the libelant. The facts are few, and the conflict as to them not very great—certainly as to material matters. The libelant is positive that he was informed by the deck hand that the gang board would not be put out, while the latter says no such inquiry was made; and the libelant is likewise positive that the steamer had come to a standstill at the time he stepped on the pier, whereas the evidence of the ship is to the effect that, although the engines were reversed and had been moving backward a little while, the steamer was still moving slightly forward, and proceeded possibly from 5 to 20 feet. The court saw and heard the witnesses; the libelant being a witness of character and intelligence, who testified with the utmost candor and fairness, and the truthfulness of whose statements and the sincerity of his motives and purposes in all he stated cannot be questioned. His statement as to the gang board should not only be accepted, as against that of the deck hand who claimed not to have heard him make the inquiry respecting the same, because of the manifest truthfulness of what he says, but, moreover, the circumstances strongly bear him out. Had he not been waiting for the gang board, he could and would have stepped off as did the other passengers on the two previous occasions, but he waited, called for the same, and only endeavored to alight when it became apparent, as he supposed, that he was to be carried away from Newport News and on to Smithfield. No warning was given him not to alight; no information given him that the steamer was to stop at any other place in Newport News, either by the captain at the time his ticket was taken up, or this sole representative of the company at the place where passengers were being allowed to disembark from the steamer, and hence he should not be disentitled to recover, because of doing what was apparently a safe thing to do, as five other passengers had just done, in the presence of the officers and employés of the steamer, without remonstrance. The fact is not disputed that this deck hand was in the act of removing his line from the cleat, as claimed by the libelant, at the time he stepped off, nor is it denied that the gangway rail had been removed apparently for passengers to disembark,

and that the other persons mentioned by the libelant had gotten off, and that this deck hand was the only employé of the company on the occasion in question, either on the pier or at or near the gangway, to facilitate either the landing of the boat or to assist and give instructions to passengers wishing to disembark therefrom. It is claimed that ordinarily there was some employé on the pier to receive and make fast the rope from the ship, but on this occasion no one was present. Likewise, the libelant is borne out in his statement that the boat had come to a standstill at the time he stepped off, by the circumstances which corroborate him. He is positive in his statement; he was manifestly watchful and careful in what he was doing, as he was waiting to alight, and had seen other passengers alight without the gang board, and he then called for the gang plank before attempting to get off. The fact that the deck hand had gotten to the pier, and four passengers subsequently disembarked, and the fifth later, during which time confessedly the rope had been round the cleat on the pier, quite conclusively establishes that the boat was at a standstill, and, indeed, it is claimed by the respondent that it only moved from 5 to 20 feet. The libelant evidently lost his balance in stepping from the deck of the boat upon the pier, which was slightly elevated, most likely by the oscillation of the steamer in the water, and if there was any forward movement of the steamer, that had then come to a standstill, it was doubtless caused by the removal of the rope from the cleat, which was being made as the libelant stepped to the pier.

The conclusion reached by the court upon this whole evidence is that the libelant is entitled to recover for the injuries sustained; that, as a passenger upon this steamer, he had the right to assume under the circumstances that this was the place of landing at Newport News; and that the respondent utterly failed to take due and proper care to provide for passengers landing from the steamer, by the employment of proper employés to render such services, either in the matter of informing passengers as to the place of landing or making a safe landing, and, on the contrary, by the course of conduct of its employés, and the sole representative that was then engaged in the double purpose of making fast the ship and landing passengers, invited and caused the libelant to alight as other passengers had done immediately preceding. Respondent suggests the deafness of the libelant, as also weakness in one of his legs, which interfered with his getting ashore. An examination of the libelant, certainly by one who heard him testify and observed his movements, would readily dispel the force of either of these contentions, as there was apparently no deafness, and while there was a slight stiffness in one of his knees there was no such condition as materially affected him in stepping from the deck of the steamer to the pier on the occasion in question, and certainly none such as would tend in any respect to relieve the respondent from liability it may have incurred by reason of placing him in the position of having to make the step. Respondent also introduced a number of witnesses to prove the statement of libelant immediately after the accident as to the cause thereof, and in which it is alleged he blamed himself therefor. The statements of all these witnesses are entirely consistent with what the libelant says, namely, that if he made any such statement in his then

condition of extreme suffering, that he doubtless did blame himself, as he does now, for having stepped ashore, as it would have been far better to have gone to Smithfield, and lost that day, and indeed many others, rather than to have sustained the injury he did, and involve the risk of his life. These statements are not entitled to great weight, especially when they are introduced to impeach the evidence of thoroughly reliable witnesses. The Supreme Court of the United States in Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, stated to some extent its view of this class of testimony, and the court can but feel that employés of corporations frequently weaken, instead of strengthen, their cases in the vigilance displayed in procuring evidence of this character, at a time when the humanities of the case would appear to call for sympathy for the injured persons, rather than to commit them to statements that would deprive them of what might be their just dues.

The damages to be awarded is as usual difficult to estimate. Libelant was most seriously hurt, and suffered greatly, and his head is somewhat permanently disfigured. Why he was not killed is a miracle. His head was terribly lacerated and torn; his life greatly endangered. He supposed that his brains were oozing out. To every one his skull appeared to be crushed, and, fortunately, it was not, as the doctor after a careful examination discovered. The flesh wounds were most painful and serious. He was confined to his house some three weeks, and from his business about a month; but having the constant care of competent physicians, he has apparently recovered from permanent injury, though he still suffers occasionally with his head. He is a man of large business affairs, was detained a month from his work, had incurred doctors' bills of some $185, lost certain of his effects—clothing and apparel, including his gold eyeglasses—$20 in currency from his person, and a valuable overcoat, and, besides, suffered great pain and anxiety, and may yet suffer as a consequence thereof, on account of all of which the court thinks an award of $1,700 would be reasonable, and a decree may be entered therefor.

TIFT et al. v. SOUTHERN RY. CO. et al.

(Circuit Court, S. D. Georgia, W. D. January 14, 1908.)

1. EQUITY—PARTIES—INTERVENTION.

A court of equity, until its final and conclusive decree, has power to afford redress to every litigant who, because of the wrong he has sustained, is entitled to participate in a fund unlawfully wrung from him by the defendants, of which the court has jurisdiction, not only to avoid a multiplicity of suits and because he has no adequate remedy at law, but because he is a proper party to the suit; he being entitled, without regard to the amount of his claim or the locality of his residence, to intervene by petition in his own behalf.

2. SAME—PERSONS ENTITLED TO INTERVENE.

A bill having been filed by certain shippers to restrain the filing and enforcement of a schedule of unreasonable lumber rates promulgated by an association of railroads, the court denied an injunction pendente lite on the railroads' agreement, in the event that the rates should be finally determined to be excessive, to repay such excess to the complainants.

The rates having been so declared, the railroads filed a supersedeas bond of $500,000, and appealed to the United States Supreme Court, where the decision was affirmed. *Held*, that the railroad companies, after such affirmance, were not entitled to contest the right of each shipper other than the complainants to recover for overcharges made under such excessive rates in a separate suit, but that other shippers who had paid excessive charges under such rate were entitled to intervene and share in the fund which the railroads were bound to pay into court for the settlement of such claims.

Motion to Annul Order of Reference.

W. A. Wimbish, for complainants.
Albert S. Brandeis, for defendant Louisville & N. R. Co.
John I. Hall, for defendant Georgia Southern R. Co.
Merrill P. Callaway, for defendant Southern R. Co.

SPEER, District Judge. The question before the court is presented on a motion of Albert S. Brandeis, general solicitor for the Louisville & Nashville Railroad Company. With Mr. Brandeis appear on the record quite a number of solicitors, to wit, for the Nashville, Chattanooga & St. Louis Railroad Company, for the Seaboard Air Line Railway Company, for the Atlantic Coast Line Railroad Company, for the Central of Georgia Railroad Company, for the Georgia Southern & Florida Railroad Company, and for the Southern Railway Company. The motion is made to modify an order, filed on the 31st of August, 1907, and, so far as it may be modified, that it be "set aside and held for naught the same as if it had never been passed." It is made in the case of Tift et al. v. Southern Railway Company et al., 138 Fed. 753.

This was a bill in equity to restrain the filing and enforcement of a schelule of unreasonable rates. Without attempting an extended history of this important litigation, it will suffice to say that, pending the application for an injunction, a proposition was made in judicio by the general counsel representing the numerous defendant corporations, for whom Mr. Brandeis now appears, substantially to the effect that if the court would refuse the injunction, and allow the rates to stand and be collected by the railroad companies, his clients would repay the sum of such excess charges to the complainants, in case the latter should prevail in their suit. This proposition was regarded as equitable by the court, was approved, and the injunction sought to restrain the collection of the rates, in consideration of the promise, was denied. The court, by suitable orders and conditions therein, invoked the assistance of the Interstate Commerce Commission to determine whether or not the excessive rates, which amounted to two cents a hundred pounds on all lumber shipped to Ohio river points and northward, were in fact arbitrary and excessive. All the parties went before the commission. After inquiry, that honorable body, in an elaborate opinion upon the facts, held that the rates complained of were so excessive as to be in violation of law. Complainants then renewed before this court their application for an injunction, and submitted the report of the commission. It was agreed by counsel that all of the evidence submitted before the commission should be admitted as original evidence before this court. This was done. Both sides were, however, permitted to

introduce other evidence. Treating the report of the commission as prima facie correct, and in no sense contradicted by the other evidence and testimony submitted, the court in its final decree held the rates to be arbitrary and excessive, and, in view of the stipulation of the defendants' counsel aforesaid, also held that restitution of the amounts thus illegally exacted should be made. The facts and principles of law determined may be found in the case of Tift et al. v. Southern Railway Company et al. (C. C.) 138 Fed. 753, and in the decision of the Supreme Court, on appeal between the same parties, affirming the same, 206 U. S. 428 et seq., 27 Sup. Ct. 709, 51 L. Ed. 1124, opinion by Mr. Justice McKenna.

On the return of the mandate of the Supreme Court, this court, in order to make its decree for restitution effective, passed the order following:

"Upon motion of counsel for the complainants in the above-entitled cause, it is ordered:

"First, that leave to intervene is hereby granted to the following classes of persons, to wit: (1) The complainants to the original bill in said cause. (2) Members of the Georgia Sawmill Association at the date of the filing of the original bill in said cause and subsequent thereto. (3) Members of the Georgia-Florida Sawmill Association, which is represented to be the successor of the Georgia Sawmill Association. (4) Other shippers of lumber from points of origin to points of destination affected by the advance in rates made effective June 22, 1903. Subject to the right of the defendants to contest the propriety of the interventions referred to in clause 4 of this order, the justness of the claims filed, or their liability for interest.

"Second, that the classes of persons named in the first paragraph of this order may file their interventions herein in the clerk's office of this court; that as said interventions are filed the master in said cause is hereby authorized to receive the petitions of intervention subject to the matter of reference in said cause.

"Third, that in prosecuting the reference contained in the final decree in the said above-described cause, which decree is dated July 8, 1905, the master is directed to investigate and report the amount, with interest at the legal rate, separately stated, of the just claims of the classes of person named in paragraph 1 hereof.

"Fourth, for the purposes of the investigation required by the reference in said final decree and this order, the master is hereby authorized to hear evidence within or without this district, to subpœna witnesses, to compel the production of papers and documents, and to exercise such other authority as may be expedient and necessary to a full and complete investigation and report."

As stated during the argument of Mr. Brandeis, the words, "subject to the right of the defendants to contest the propriety of the interventions referred to in clause 4 of this order, the justness of the claims filed, or their liability for interest," were intended by the court to leave each claim open to any defense usual in such cases. The present effort to modify or reverse this order would, if successful, annul the decision of the Supreme Court, and defeat the substantial purpose of the entire litigation. It is strenuously insisted in support of the motion to modify the order that it permits those who were not parties to the cause at the time it was brought to come now by intervention and ask that their claims may be heard. It is insisted that those not parties to the original bill should bring separate proceedings, and that the defendant companies, should, as to each, have the right to utilize all of the de-

fensive tactics which might be available if such separate claims were brought. Great stress is laid upon the final expression of Justice McKenna, in the opinion of the Supreme Court in this case, as follows:

"What the court may award upon the coming in of the report of the master we cannot know. Presumably it will make the reparation adequate for the injury, and award only the advance on the old rate, and to those who are parties to the cause."

It is urged that this is conclusive that no other parties save the original complainants can now intervene in the principal suit and have their claims against either or all of these combined railroads heard. It is very clear, however, that the question of who are proper parties to this litigation was not before the Supreme Court, and is, therefore, not determined by this closing sentence of the opinion. If this had been true, and if the expression of Justice McKenna could properly be construed to import that they only are parties who actually joined in the original bill, the contention of Mr. Brandeis would seem unanswerable.

If each complainant against the unlawful exactions of the combined railroads must have been heard separately, as now insisted, the case before the court, which has been sustained by every United States court having jurisdiction, could not have been entertained for a moment. In contemplation of equity, there is here a fund for distribution among the parties plaintiff. We are perhaps not at liberty to ignore the supersedeas bond of $500,000, filed by the defendant companies. This is obviously subject to the proper and just demands of the plaintiffs, which may be ascertained by the master and approved by the court. There is, however, another and a not less important pledge, or even trust, in the control of the court. It is the sum total of the excessive rates on lumber, unlawfully exacted from the shippers by the combined defendant companies, terming themselves the "Southeastern Freight Association." These companies promised in open court to pay this sum. All parties were present or represented. They promised to pay it in case the complainants prevailed, provided the court would withhold its injunction and allow them to collect the rates. This was done. They did collect these illegal rates, not only from the shippers who were the original complainants, but presumably from many others, and from other states. This was done even after the final determination of the supreme appellate court of the land that such collection was in violation of public law, and after its mandate had been made the judgment of this court.

Now, who are parties complainant to such a suit in equity, still pending, with all of its original powers to compel obedience to its injunctive process, and restitution to each one his share of a fund, thus accumulated? Whatever may be the archaic doctrines of pleading, which were announced at periods in the history of jurisprudence when facts like those before this court were neither possible nor comprehensible, in these days a court of equity has, and must have, if it be worthy of its mission, until its final and conclusive decree, the power to afford redress to every litigant, who because of the wrong he has sustained is entitled to participate in a fund unlawfully wrung from him and from others in like case. Not only to avoid a multiplicity of suits (U. S. v. Union Pacific Ry. Co., 160 U. S. 1, 50, 52, 16 Sup. Ct. 190, 40 L. Ed. 319;

Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 460, 10 Sup. Ct. 462, 33 L. Ed. 970), not only because there is no adequate remedy at law (Van Patten v. Chicago, M. & St. P. Ry. Co. [C. C.] 81 Fed. 545, 551), but because he is a proper party to the suit, without regard to the amount of his claim, and to the locality in which he resides, he may intervene by petition interesse suo, and ask his share of the fund in the hand of the court, or which the defendants are obliged to put there. "When any person," says Mr. Daniel in his Chancery Practice (chapter 26, par. 7, p. 1057), "claims to be entitled to an estate or other property sequestered, whether sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered. This inquiry is called an examination pro interesse suo, and an order for such an examination may be obtained by a party interested as well where the property consists of goods and chattels or personalty as where it is real estate." See Krippendorf v. Hyde, 110 U. S. 283, 4 Sup. Ct. 27, 28 L. Ed. 145. This may be done at any time, pending the litigation, and before the final decree, if in the discretion of the court it is permissible. Said the Supreme Court of the United States in Ex parte Jordan, 94 U. S. 248, 24 L. Ed. 123, Chief Justice Waite speaking for the court:

"It is true that the petitioners were not parties to the suit until after the bill was taken as confessed; but it is clear that the decree pro confesso did not end the case, because, before the final decree was rendered, it was found necessary to have the reference before a master, to compute, ascertain, and report. Before the master could comply with this order, proof had to be taken. * * * When this reference was made, the petitioners were defendants and actors in respect to the litigation. They certainly had the right to contend before the master, and to except to his report."

There the interveners were not only permitted to come in after decree pro confesso, in the same manner and with like effect as if named in the original bill, but where the Circuit Court who heard their intervention refused their appeal, the Supreme Court issued its mandamus to compel the allowance of the appeal. The interveners, therefore, have every right, even to the ultimate, of the original complainants. It is analogous to the rule in admiralty, which provides that any person having an interest in any proceeds in the registry of the court shall have the right by petition and summary proceeding to intervene pro interesse suo, for the delivery thereof to him, and upon due notice to adverse parties, if any, the court shall, and may, proceed summarily to decide thereon, and decree therein according to law and justice. The utilization of this remedy in cases of insolvent corporations is widely practiced. Besides, whatever might be objected as to the rights of the interveners in other cases must fail here. Said Associate Justice McKenna, in rendering the opinion in this case (206 U. S. 440, 27 Sup. Ct. 709, 51 L. Ed. 1124):

"We do not understand that the assignment of errors questions the truth of the recital in the decree that the reference was made in pursuance of the stipulation in open court, and it is upon the stipulation we rest our decision."

As before stated, this stipulation created the fund for distribution. The fund is here. What recourse adequate at law is there, then, for a shipper in Alabama, Florida, or elsewhere, if we are to shut the door of this court in his face? There is no such stipulation elsewhere, and no fund elsewhere, which constitutes the sum total of all the moneys which have been illegally gathered from those engaged in perhaps the greatest shipping industry of the Southern States by the railway companies composing the Southeastern Freight Association. While we do not, and never will, join in the senseless and selfish crusade against the great lines of railway, which have done so much toward the happiness, improvement, and enrichment of mankind, after all it is occasionally true that they accomplish great wrongs. Their officers are sometimes afflicted with the errors of judgment common to an imperfect humanity. It is not always an equal contest between a private citizen, even where he has a right, and the organized powers of a great railway or combination of railways; and courts should not be solicitous by strained and technical construction of the rules of pleading to defeat the right of a person, especially where it has been substantially determined as just by all the authorized powers of the government intrusted with that duty.

For these reasons, the court feels obliged to deny the motion, so attractively presented by the solicitor for the Louisville & Nashville Railroad Company. If counsel agree, the master may, if he thinks proper, file separate reports upon the claims of the interveners of the separate and distinct classes, so that the rights of those holding undisputed claims need not necessarily be complicated by the desire of a defendant, or defendants, to litigate the claims of others.

In re WALSH BROS.

(District Court, N. D. Iowa, E. D. March 3, 1908.)

No. 596.

1. BANKRUPTCY—LIENS—ATTACHMENT—VACATIONS.
   An adjudication in bankruptcy discharges any attachment pending against property of the bankrupt, and releases the property therefrom, unless the bankruptcy court orders that the lien be preserved for the benefit of the bankrupt's estate, under the express provisions of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450].

2. SAME—SEIZURE OF PROPERTY.
   An adjudication in bankruptcy, after the attachment of certain of the bankrupt's property, operates as a seizure of the property by the bankruptcy court from the date of the adjudication, and on the appointment and qualification of a trustee the title and right thereto passes to the trustee, who becomes the legal custodian of the property until it shall be awarded to whomsoever it rightfully belongs.

3. SAME—POSSESSION OF SHERIFF.
   Where a sheriff, after having attached property of a bankrupt, was informed of the adjudication and requested by the referee to hold the property for the referee until a trustee could be appointed, the attachment having been dissolved by the adjudication, the sheriff was in possession as custodian of the bankruptcy court, so that a seizure from the sheriff

on writs of replevin constituted a direct interference with the court's custody of the property.

4. SAME—CONTEMPT.

Where attorneys for the sellers of personal property to a bankrupt had knowledge of the bankruptcy adjudication against the buyer at the time they sued out writs of replevin, under which they took the property from the possession of the sheriff, who was holding it under attachment, which had been vacated by the bankruptcy adjudication, and such attorneys, claiming that their clients were entitled to rescind the sales for fraud, shipped the property out of the state and the jurisdiction of the bankruptcy court, they were guilty of contempt equally with their clients, which could be purged only by their returning the property, paying its value to the trustee, or executing bonds to pay the value to the trustee, on its being finally determined that the trustee was entitled to the property.

In Bankruptcy. On citation for contempt.

H. J. Fitzgerald, for trustee.
Ellis & Ellis and Frank Lingenfelder, pro se.

REED, District Judge. Walsh Bros., a copartnership engaged in the buying and selling of farm implements at Charles City, Floyd county, this state, was adjudged bankrupt by this court January 17, 1908, upon its own petition, and the matter was referred to the proper referee the same day. December 18th, prior to the bankruptcy, a writ of attachment was sued out of the district court of Iowa in and for Floyd county against the bankrupt and levied upon its property by the sheriff of that county, and he held it under that writ at the time of the adjudication in bankruptcy. The referee received the record in the bankruptcy proceedings January 18th, and on that day informed the sheriff of the bankruptcy, and requested him to hold the property which he had levied upon for him (the referee) until a trustee for the bankrupt estate could be appointed. January 22d, the Moline Plow Company, an Illinois corporation, by Ellis & Ellis, its attorneys at Charles City, sued out of the state court in and for Floyd county a writ of replevin for a part of the property seized by the sheriff, upon the ground that it had been sold by it to the bankrupts upon their false representations made to the company to induce such sale. The writ, being against the sheriff, was placed in the hands of the coroner of Floyd county, pursuant to the statute of the state, for service, who thereunder took from the sheriff property of the bankrupts so held by him of the value of some $800, and on the same day (January 22d) delivered it to the Moline Plow Company, on board the cars of the Chicago, Milwaukee & St. Paul Railway Company, at its station in Charles City, and it was shipped out of the state. January 24th the J. I. Case Plow Works, a Wisconsin corporation, and the Staver Carriage Company, an Illinois corporation, by Frank Lingenfelder, an attorney at Charles City, sued out of the state court separate writs of replevin for other goods so held by the sheriff, upon the grounds that they severally were induced by the fraud and misrepresentations of the bankrupts to sell them such goods. The J. I. Case Plow Works further alleged that it sold the goods to the bankrupts under a written contract whereby it reserved the title to the same until the purchase price should be paid. Each of the writs was delivered to the coroner for service, who upon the

same day (January 24th) took from the sheriff property of the alleged value of some $1,325, and delivered it to the respective plaintiffs in the replevin suits, on board the cars of the Chicago, Milwaukee & St. Paul Railway Company, in Charles City, and such property also was at once shipped out of the state. Ellis & Ellis and Frank Lingenfelder, attorneys for the respective plaintiffs in the replevin suits, and the coroner, were each informed of the bankruptcy proceedings before the replevin suits were commenced or the writs of replevin served by the coroner. February 3d a trustee was appointed for the bankrupt estate, who duly qualified as such, and on February 10th presented to this court petitions reciting the foregoing facts, and asked for such orders as would secure the return to the trustee of the property, or its value, so taken from the custody of the court and removed from the state. A citation was accordingly issued to the several plaintiffs in the replevin suits, their attorneys, and the coroner to appear in court upon a day certain and show cause why they should not return to the trustee the property so taken and be adjudged in contempt for seizing the same and removing it from the state, which citation was duly served upon the attorneys and coroner in this district, and upon the plaintiffs in the replevin suits in Illinois and Wisconsin, respectively. Ellis & Ellis, Lingenfelder, and the coroner have appeared pursuant to such citation and filed separate answers for themselves only, in which they respectively deny any intent or purpose on their part of wrongfully interfering with the property in the custody of this court, and aver that the property, when seized by the coroner, was not in its custody or of any of its officers, but was in the exclusive custody and control of the sheriff under the writ of attachment. They further aver that the property taken under the writs of replevin was not the property of the bankrupts, but belonged to the respective plaintiffs in the replevin suits, and that the title thereto did not pass to the trustee in bankruptcy.

It is urged that, if the plaintiffs in the several replevin suits sold the property replevined by them respectively to the bankrupts, under such circumstances as will entitle them to rescind the sales and reclaim the property, the title to such property would not pass to the trustee in bankruptcy. The merits of this contention will not be heard or considered upon this hearing. It is admitted that the property had been delivered to the bankrupts pursuant to contracts of purchase thereof, and was in their possession when it was seized by the sheriff under the attachment, and was in his custody at the time of the adjudication in bankruptcy. The adjudication in bankruptcy discharged the attachment and released the attached property therefrom, unless the court of bankruptcy shall order the lien preserved for the benefit of the bankrupt estate. Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]. The adjudication also operated as a seizure of the property, and it was in custodia legis from that time; and upon the appointment and qualification of the trustee the title and right thereto passed to the trustee, who then became its legal custodian for the court of bankruptcy, and that court will award it to whomever it rightly belongs. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316. The seizure of the property upon the writs of replevin was

therefore a direct interference with the rightful custody of the court of bankruptcy and wholly unauthorized. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. R. A. 1183, above.

The sheriff in an affidavit says that he was informed by the referee of the adjudication in bankruptcy and requested by him to hold the property for the referee until a trustee could be appointed, but that he continued to hold it under the writ of attachment. If he did continue to so hold it, he held it wrongfully; for the attachment was dissolved by the adjudication, and he could not thereafter rightly hold it, except for the referee or the court of bankruptcy. It is wholly immaterial whether or not he agreed with the referee to so hold it. If he remained in possession of the property, he could rightly do so only as custodian for the court of bankruptcy. It is clear, however, that he retained it at the request of the referee, and was therefore in fact the custodian of it for the time being for the court of bankruptcy, and the taking of the property from him was the taking of it directly from that court.

It is admitted in the answers of the attorneys and coroner that each was informed by the referee of the bankruptcy before the replevin suits were commenced. They therefore had actual as well as constructive knowledge thereof, and must be held responsible for the seizure and removal of the property from the district. The haste with which the property was placed upon the cars and shipped from the state leaves no room to doubt that it was the deliberate intention of the several plaintiffs in the replevin suits, and their attorneys and agents, to remove it beyond the territorial jurisdiction of the court before a trustee could be appointed, and thus attempt to evade the effect of the bankruptcy proceedings, and deprive this court of its rightful jurisdiction over such property. The attempt will not be permitted to succeed, and the court will take such measures as will save to the creditors all rights under the bankruptcy proceedings.

Messrs. Ellis & Ellis are attorneys of long experience and practice in the state courts, and one of that firm appears and states that they were employed prior to the bankruptcy proceedings to recover the property from the bankrupts, and that upon the facts as placed before them they in good faith believed that the property was obtained from the Moline Plow Company upon such false representations by the bankrupts as would entitle that company to rescind the sale and reclaim the property, and that they believed the only way to protect and save the rights of that company was by the replevin suit. Upon being informed that the orderly procedure would have been to present the claims of his client to the court of bankruptcy, and that that court would fully protect the rights of his client, he at once replied that, if they had so known or understood that the bankruptcy court had jurisdiction to do so, the replevin suit would not have been commenced, and offered to deposit with the clerk the value of the property taken by the Moline Plow Company, or give a sufficient bond to pay to the trustee its value in the event that the court of bankruptcy upon a hearing upon the merits shall finally determine that that company is not entitled to rescind the sale and reclaim the property. There is no reason to doubt the sincerity of the statement and good faith of the offer. The at-

torney for the plaintiffs in the other replevin suits makes substantially the same statements that counsel for the Moline Plow Company make, and expresses a willingness to give a like bond for the return of the property taken under their writs, or the payment of its value.

It is obvious that the coroner acted under the direction of these attorneys in seizing this property under the writs of replevin. The attorneys will therefore be held personally responsible, equally with their clients, for its seizure and removal from the district, and are required to return it, or pay its full value to the trustee, within 10 days. But they may execute within such 10 days, or cause to be executed by their respective clients, to the trustee in bankruptcy of this estate, separate bonds for the full value of the property taken or caused to be taken by each upon the respective writs of replevin, with resident sureties to be approved by the clerk of this court, conditioned to pay to such trustee the full value of the property taken or caused to be taken by them, respectively, upon said several writs of replevin, upon its being finally determined by the court of bankruptcy that the trustee is or was entitled to such property, which bonds will be accepted in lieu of the property.

Upon the return of the property, or payment of such value, or the execution of such bonds and approval thereof by the clerk, the Moline Plow Company, the J. I. Case Plow Works, and the Staver Carriage Company may then present to the referee within 10 days thereafter their respective claims to the property taken by them upon such writs of replevin. The trustee will seasonably answer such claims, and the referee will proceed to hear and determine them upon their merits and make such orders as the testimony warrants, which orders may be reviewed by either claimant or the trustee in the usual way. The cost of this proceeding will be paid, one-third by the attorneys for the Moline Plow Company, or by said plow company, and two-thirds by the attorney for the other plaintiffs in the replevin suits, or by said plaintiffs, and will be taxed by the clerk accordingly. Upon payment of such costs this proceeding may be dismissed. It will be continued and held open, however, for such other or further orders as may be necessary, which may be applied for at any time.

It is ordered accordingly.

ROBINSON v. MUTUAL RESERVE LIFE INS. CO.

(Circuit Court, S. D. New York. December 26, 1907.)

1. INSURANCE—MUTUAL COMPANIES—MEETINGS—NOTICE.

The by-laws of a mutual insurance company contained no provision for notice of a special meeting at which amendments of the by-laws might be adopted, but declared that notice of annual meetings should be given by publication for three consecutive days, at least five days prior thereto, in two daily newspapers published in New York. Insurance Law N. Y., Laws 1892, p. 2013, c. 690, § 209, requires every mutual insurance company to cause amendments proposed to any by-laws to be mailed to its members, so as to give them not less than five days' notice of the time and place where they are to be considered. *Held*, that such article amounts to a requirement that reasonable notice should be given, and that

five days' notice was not sufficient, where the amendments proposed were complicated and the members were scattered over the United States and foreign countries.

2. SAME—MISAPPLICATION OF FUNDS—INJUNCTION—SUIT BY MEMBERS.
A bill by the holder of an assessment policy in defendant company, on behalf of himself and all others similarly situated, charging that defendant had fraudulently misapplied a fund collected as a reserve fund from assessments for the benefit of the owners of such policies, and had fraudulently charged liens against them to the amount of about 30 per cent. of their face value, had fraudulently assessed the assessment policy holders for the purpose of maintaining a reserve required by law for the level premium insurance, in which the assessment policy holders were not interested, and that the officers of defendant company had wasted and misapplied its assets, so that it was insolvent, stated a ground for equitable relief, in so far as it prayed for an accounting for the cancellation of the liens, and the ascertainment of the amounts of the assessment policies.

Julius M. Mayer and Wm. Hepburn Russell, for the motion.
E. B. Hatch, opposed.

WARD, Circuit Judge. This is a petition by the complainant for an injunction restraining the respondent, its officers and agents, and certain persons holding proxies from adopting proposed amendments to the respondent's by-laws at a meeting called for December 10, 1907. Upon this petition an order to show cause why the injunction should not issue was granted, with a temporary restraining order against the holders of the proxies using them for any other purpose at the meeting than to organize and adjourn the same.

The complainant became a member of the respondent while it was doing business on a purely assessment plan under the name of the Mutual Reserve Fund Life Association. His contract of insurance, dated March 20, 1884, was expressed in a policy which was to be (article 10) "governed by, subject to, and construed only according to the constitution and by-laws and regulations of said association and the laws of the state of New York. * * *" It was provided in the constitution and by-laws (article 12) that they might be amended at any annual or special meeting called for the purpose by a two-thirds vote of the members present in person or by proxy. January 23, 1901, the by-laws were amended so as to subject assessment policies to a lien for their equitable share of any deficiency of the reserve required by the by-laws or by the policies to be determined by the actuary as an interest-bearing loan constituting a lien upon the policy, and also that the by-laws might be amended by a majority, instead of a two-thirds vote. The complainant alleges that this was done to enable the association to report itself as solvent to the insurance department of the state of New York, either by deducting the amount of these liens from its liabilities or by crediting them as loans in its assets.

April 17, 1902, the directors of the association reincorporated under chapter 690, p. 1930, Laws 1892, and amendments thereto, changed its name to Mutual Reserve Life Insurance Company, and added to its business insurance on the level premium plan. January 23, 1903, the by-laws were again amended to their present form. The Supreme Court of the United States in the case of Polk v. This Same

Defendant, 28 Sup. Ct. 65, 52 L. Ed. ——, has decided that the reincorporation under the changed name did not create a new corporation and was not in violation of the contract rights of the policy holders. The petition states that F. A. Burnham, then president of the association, passed the first amendment to the by-laws imposing liens upon the policies by voting about 33,000 proxies given for a previous meeting and not good for the meeting at which they were voted. Reference was made to the report of the Armstrong legislative investigating committee, which was submitted by both parties to me, and shows that the proxies were good for ten years for any purpose, and were therefore properly voted. I am quite satisfied that these liens, which the complainant says amount to about $2,000,000, or, as the respondent admits, to about $700,000, are necessary to satisfy the insurance department of the state of New York that the respondent is solvent.

The respondent notified its members, who are about 50,000 in number, scattered all over this country, Canada, and foreign countries, that a meeting would be held in New York City December 10, 1907, to consider certain proposed amendments to the by-laws. The circular setting forth the proposed amendments and the existing by-laws, a letter of explanation from the president, who had lately come into the company, and a blank proxy running to him and to two other persons representing the management, were mailed to members living in foreign countries November 15th, to members living within a radius of New York that could be reached within 24 hours December 2d, and to members living in other parts of the United States November 25, 1907. The amendments are long, complicated, technical and very difficult to be understood. The amendment specially affecting the assessment above mentioned is to sections 2 and 3 of article 7, and it authorizes the company's actuary to report between December 15th and 30th in every year, beginning in 1907, the condition of the company in respect to assets and liabilities, and if his report shows a deficiency in the net value of the funds applicable to assessment policies in force the board of directors are required to assess the policies with their equitable share of the deficiency, together with a margin for shrinkage not exceeding 12½ per cent., the assessment to be a lien and charge against the policies; the first of such liens to cover any outstanding charges, liens, or deficiencies theretofore levied upon or accrued against the policies. The apparent purpose of this provision is to remove all doubt as to the validity of the liens theretofore assessed, and I understand it to be admitted that liens to the amount of about $700,000 must be established to be carried as assets if the company is to continue in business.

I refer to the circular of the president, not because there was any obligation on his part to issue one, but because it is relied on as explaining to the policy holders the complicated situation of affairs. In it he called their attention very fully to features of the proposed amendments with reference to the method of collecting assessments in the future, but said nothing on the subject of these prior assessments, and I am satisfied that an ordinary person, reading both documents, would not appreciate the importance of the amendment in respect to them.

The officers of the company certainly appreciated the situation of the holders of assessment policies on this point, because August 21, 1907, the president reported to the board of directors:

"That uncertainties have existed in the past and do exist at the present time in the minds of some at least of the assessment policy holders of the company as to the status of their policies is apparent to me from correspondence which has been brought to my attention from time to time during the past three months. I regard it as of vital importance, not only as regards the question of fairness to individual policy holders, but as regards the interests of the corporation as a whole, that these uncertainties shall be resolved."

Although this language was used with reference to a proposal to the assessment policy holders to transfer their insurance from the assessment to what is known as the level premium plan, it shows that the president felt the necessity of advising the members of the precise condition of their assessment policies in view of the uncertainty of many on the subject, and that was what he proposed should be done. But at the meeting of November 8, 1907, this resolution was rescinded and the course actually pursued of sending out the notice, letter of explanation, and proxy above referred to was substituted; the president saying on this subject:

"It will be noted, from a reading of the proposed amendments, that if they are adopted the carrying out of the provisions thereof will necessarily convey to policy holders full information as to the status of their policies, and will thus supersede and render unnecessary such special notice as was contemplated by the resolution of August 21, 1907."

Of course, the carrying out of the amendments, if adopted, would inform the members; but the information proposed in the August resolution would have given them timely information, in the light of which they could have acted upon the proposed amendments much more intelligently. There is no provision in the by-laws as to the notice to be given of a special meeting at which amendments to the by-laws are to be considered; but section 2 of article 11 provides that notice of annual meetings shall be given by publication for three consecutive days at least five days prior thereto in two daily newspapers published in the city of New York, which was done. Section 209 of the insurance law (Laws 1892, p. 2013, c. 690) requires every mutual insurance company to cause amendments proposed to any by-law to be mailed to its members, so as to give them not less than five days' notice of the time and place where the same are to be considered. I think this amounts to a requirement to give members reasonable notice, and that, in view of the very complicated amendments proposed and the very insufficient explanation accompanying them, the five days' notice given in this case was not reasonable.

At the meeting of December 10th the restraining order being in full force, nothing was left to be done but to organize and adjourn. No secretary was appointed, nor any tellers; but each party has submitted a stenographic report of what occurred, which reports in some respects differ. Confining my attention entirely to the report furnished by the officers of the company, I am compelled to say, without passing upon the truth of the charges made upon one side or the other, and allow-

ing for the natural heat which a prolonged contest creates, that the treatment of the objecting members was most high-handed. Assuming, without finding, that the meeting of December 10th was properly organized and adjourned, is the complainant entitled to relief?

He has filed a bill, on behalf of himself as a member and policy holder of the respondent, and of all others in a similar situation, charging that the respondent has fraudulently misapplied a fund collected as a reserve fund created out of assessments upon the holders of assessment policies for their own benefit; has fraudulently charged liens against those policies to the amount of about 30 per cent. of their face value; has fraudulently assessed the assessment policy holders for the purpose of maintaining a reserve required by law for the level premium insurance, in which they are not interested; and, finally, that the officers heretofore in control of the respondent at the time the bill was filed have wasted and fraudulently misapplied the assets, so that the respondent is insolvent. Conceding that, since the decision of the United States Supreme Court in the Polk Case, the Mutual Reserve Fund Life Association and the Mutual Reserve Life Insurance Company are the same corporation, and that the contract rights of the assessment policy holders were not invalidated by the reincorporation; and conceding, also, for the purposes of argument, respondent's contention that the complainant has no standing to ask the court to wind up the business of the respondent, even if insolvent—still I think there is enough left in the structure of the bill to give this court equitable jurisdiction of the complainant's prayer for an accounting and for the cancellation of the liens and the ascertainment of the amounts of the assessment policies, if he can make good the charges in the bill.

The restraining order heretofore granted is continued until an order be prepared and entered requiring respondent to mail to its members at least 30 days before the date of an adjourned meeting a notice that the meeting called for December 10th has been adjourned to the date fixed as aforesaid, because the notice originally given was in the opinion of the court too short to afford an opportunity for sufficient deliberation, especially with reference to the amendment of sections 2 and 3 of article 7 of the by-laws with reference to liens theretofore imposed upon the assessment policies.

NEWCOMB et al. v. BURBANK et al.

(Circuit Court, S. D. New York. December 10, 1907.)

DISCOVERY—BOOKS AND PAPERS—INSPECTION—PHOTOGRAPHIC COPIES.

Rev. St. § 721 [U. S. Comp. St. 1901, p. 583], provides that the courts of the United States in actions at law may require production of writings containing evidence pertinent to the issue in cases and under circumstances where they may be compelled to produce the same by the ordinary chancery rules. *Held*, that where plaintiffs sued on a document alleged to have been signed by defendants' decedent, which defendants claimed was a forgery, and defendants alleged that plaintiffs had in their possession letters purporting to have been signed by deceased, written in the same handwriting as the document sued on, in which reference was made thereto, defendants were entitled to an order under such section requiring plaintiffs to produce such letters for defendants' inspection

and to permit photographic copies to be made thereof under proper restrictions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 118.]

Hawkins & Delafield, for the motion.
Dailey & Williams, opposed.

WARD, Circuit Judge. The plaintiffs, as executors of Mary Newcomb, deceased, have sued the defendants, as executors of Ambrose B. Burbank, deceased, upon a document whereby Burbank gave Newcomb securities of the value of $100,000. This document has been examined by experts employed by the defendant, who state that it is a forgery. The defendant alleges that the plaintiffs have in their possession eight letters, purporting to be signed by Burbank, written in the same handwriting as the documents sued upon, in which reference is made to that document, or to the gift, or to the bonds; and he applies for an order, under section 724, Rev. St. U. S. [U. S. Comp. St. 1901, p. 583], upon the plaintiffs to permit an inspection and the taking of photographic copies of these letters.

The plaintiffs do not deny that they have the letters, or that they are in the same handwriting as the document sued upon. If forged, their existence certainly will aid the defense, and the defendant is entitled to such discovery as chancery practice will permit. Three of the letters have already been examined by experts on behalf of the defendant. At the argument I was inclined to think that the court had no power to compel the plaintiffs to permit the letters to be photographed; but section 724 is and should be liberally construed. It says nothing about permitting copies of the papers produced to be made; but that is always allowed. Photographing is a form of copying, and the only form which will reproduce erasures or alterations, or, as in this case, will furnish a fac simile of the handwriting that may be compared with writings known to be genuine. Therefore I will grant the motion as to the letters dated December 10, 1897, May 2, 1899, September 15, 1900, June 27, 1901, and December 31, 1902, which have not been examined by experts on behalf of the defendant

The order must be in such terms as will make it certain that the letters will not be injured or the possession of the plaintiffs disturbed; and, if the parties cannot agree on these points, they will be settled by the court on notice.

NEWCOMB et al. v. BURBANK et al.

(Circuit Court, S. D. New York. March 24, 1908.)

1. WRIT OF ERROR—FINAL JUDGMENT—VACATION OF JUDGMENT.
An order setting aside a judgment and dismissing the complaint is a final order, to review which a writ of error lies.

2. SAME—CIRCUIT COURT OF APPEALS—JURISDICTION—MATTERS OF DISCRETION.
The Circuit Court of Appeals has no power to review matters of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3811.

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.]

3. JUDGMENT—ORDERS—VACATION.

Where an order was entered by the trial judge setting aside a judgment and dismissing the complaint, an application to vacate such order should be made to the judge who made the original order.

Hawkins & Delafield, for the motion.
Dailey & Williams, opposed.

WARD, Circuit Judge. This is a motion to vacate an order of the trial judge dismissing the complaint and setting aside the judgment entered thereon.

Although the judgment is a final one, to which a writ of error lies, the plaintiffs can get no relief thereby, because the Circuit Court of Appeals, unlike the Appellate Division of the Supreme Court of New York, has no power to review matters of discretion. The application involves, not merely the opening of a default, but the setting aside of an order deliberately made by another judge of this court, with a knowledge of all the facts, and resulting in a final judgment. It is certainly not in the course of orderly procedure for me to do this, even if I have the power.

The plaintiffs' remedy will be to apply to the judge who made the order, or to revive the action brought by their testatrix in the Supreme Court of the state of New York, or to bring a new action.

THE FLUSHING.

(District Court, E. D. New York. February 8, 1908.)

TOWAGE—LOSS OF TOW—LIABILITY OF TUG.

Libelant engaged respondent tug to tow a scow from New York to Larchmont Harbor, Long Island, where her cargo of dirt was to be delivered to a dredge. The scow was taken in tow about noon, but did not reach the harbor until after dark, and was then anchored by the tug, which proceeded with another tow, and then to her anchorage. During the night a hurricane arose, and the scow dragged her anchor and was wrecked on the shore. Libelant alleged that the loss was due to the fault of the tug in not starting with the tow earlier, in leaving her anchored outside the harbor in a dangerous place, and in failing to stand by or come to her assistance. The claimant claimed, on the other hand, that the scow was left inside the harbor at the place called for by the contract and that the towage was finished. *Held*, on conflicting evidence, that the burden of proof resting on libelant was not sustained on either ground; it further appearing that when the scow was left the weather was fine, and there were no indications of a storm, and no warning of it had been given by the Weather Department when the towage was begun, and that after the storm commenced the tug could not have gone to the assistance of the scow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 36.]

In Admiralty.

Foley & Martin, for libelant.
James J. Macklin, for claimant.

CHATFIELD, District Judge. The libelant has not sustained the burden of proof which rests upon her. Diametrically opposite state-

ments of the occurrence upon which the libel is based are shown by the testimony produced.

The libelant's story is that upon the 19th of December, 1905, one William V. O. Driscoll, an agent of the libelant, who was the owner of the scow Driscoll, made an arrangement with the owners of the steam tug Flushing to tow a load of cellar dirt from New York to Larchmont Harbor, to the dredge of one McSpirit, at a place called "The Hammocks," at the head of that harbor; that upon the following day, about noon, the tug Flushing took in tow the scow, loaded with dirt, and, having started too late to reach the dredge before dark, the captain of the tugboat left the scow at anchor near the outer end of the Larchmont Breakwater, and practically in the open waters of Long Island Sound, while the Flushing took a barge filled with coal to Mamaroneck, some distance beyond; that the captain of the Flushing promised the scowman at the time of leaving the scow at anchor to return the following morning and take the scow to its place of destination. The libelant further claims that the captain of the scow called the attention of the captain of the tug to a dark cloud in the southeast, and asked as to the safety of the anchorage through the night; that assurances were given by the captain of the tug that the place of anchorage was safe; and that at this time a moderate breeze was blowing from the southeast. About 11 o'clock the wind freshened into a violent storm from the same direction, and the scowman worked until 5 o'clock the next morning, when the scow, under the influence of the wind, which was still blowing, was carried upon some rocks, and then upon the shore, some quarter of a mile south of the Larchmont Clubhouse, but in the same indentation or cove upon which the clubhouse is located. The scow was wrecked, a portion of her cargo lost, and the libel has been filed for the damages resulting from what is claimed to be negligent towing, in that a start was not made at such an hour as to allow sufficient time to reach Larchmont Harbor before dark, that there was a failure to stand by the scow after anchoring, neglect in anchoring the scow in an unsafe place, in not maintaining a proper lookout for changes in the weather, and in not going to the aid of the scow when the storm arose. Testimony was further offered to show that upon the following morning a tug of the same fleet as the Flushing attempted to enter Larchmont Harbor, but was unable to or did not do so; and it is claimed by the libelant that the entire trouble was caused by the desire on the part of the captain of the Flushing to take the barge which he had in tow to Mamaroneck, and that he endeavored to save the time and avoid the risk which would have been necessary in towing the scow Driscoll to a safe anchorage further in Larchmont Harbor.

The claimant offers evidence to show that the original arrangement (some previous conversation having been had as to these several dredging operations between the owners of the scow and the owners of the tug) was to tow the scow of cellar dirt to the neighborhood of the dredging operations in Larchmont Harbor, and that the instructions given to the captain of the tug were to take the scow to Larchmont Harbor, to a point where she could be kedged or warped into the position desired for delivering her load of dirt; that the towing opera-

tion began about 1 o'clock on December 20th; that under the influence of a flood tide the tug towed the scow, in company with a barge loaded with sewer pipe, up the East river, arriving at Larchmont Harbor in the neighborhood of 6 o'clock; that the tug took the scow into Larchmont Harbor some half or three-quarters of a mile, and left it at anchor in about 12 feet of water, it being then high tide, in the neighborhood of or opposite to Rock Island, as shown upon the government chart; that the tug then turned around, went out of the harbor, took the load of sewer pipe to Mamaroneck, and eventually arrived at the float where the Red Star tugs were accustomed to tie up for the night at City Island, on the opposite side of Long Island Sound, and some distance further west or back toward New York City; that in the neighborhood of 11 o'clock upon the night of December 20th a hurricane or storm of unusual violence from the northeast descended, not only upon this portion of the Sound, but upon the entire region generally, and that from then on until the morning of the 21st the wind continued or increased in velocity and blew at such a rate that the Flushing was unable to proceed east in Long Island Sound, while a larger tug of the same company, attempting to proceed eastward, was compelled to turn back at the mouth of Larchmont Harbor. The captain of the Flushing further testifies that he made no attempt with the Flushing to return, that he had made no promise to the scowman to do so, and that he completed the towing of the Driscoll and left her at a point in Larchmont Harbor, which complied in every way with his instructions to tow the scow to the dredging operations in that harbor.

The general storm from the northeast, with a high velocity of wind, is clearly shown by the records of the weather observer of the United States for this region, and an added fact of significance is that the fall of the barometer did not precede, but was contemporaneous with, the storm itself. It is difficult to believe the story of the captain of the Flushing upon all points, inasmuch as he testifies that he did not know anything about Larchmont Harbor beyond the Yacht Clubhouse; that it was dark, and that he could see no lights; that he did not study the chart, had never heard of McSpirit's dredge, and did not know where it was located, nor see any of its lights, nor hear its whistle. To further add to the perplexity of the situation, the scowman testified that his scow drifted, under the influence of the wind blowing, in the same direction through all its wanderings, and finally brought up in a different cove from that where it certainly was found. The two points, where he locates the anchorage, and where he locates the scow as bringing up, are on a line running approximately southeast by northwest, and it will be remembered that he testified that this occurred under the influence of a southeast wind; while the place indicated by the captain of the Flushing as the point of anchorage is almost directly northeast of the point where the scow was found upon the shore, and the captain of the Flushing and the witnesses on the part of the claimant all testify that no wind blew from any direction except the hurricane from the northeast.

This peculiar and apparent massing of testimony according to inconsistent theories necessarily indicates the influence (probably unconscious) upon the recollection of the witnesses of a study of the chart

and a discussion of what happened. It is unnecessary to more than state the proposition that a tug is bound to know the channels, the depth of water, the risks which she undertakes; that she is under obligation to use skill, caution, and attention to her duties; and that she is responsible for the care of the boat which she is towing until the destination is reached, in so far as that care is dependent upon the skill, knowledge, and attention with which she and her officers perform their work. These various duties and responsibilities are set forth at length in the case of Thompson v. Winslow (D. C.) 128 Fed. 73, as shown by the numerous cases therein cited. It is with a full appreciation of the duty resting upon a tug undertaking such a towing contract that the conflict in the evidence in this case has been considered. Numerous inconsistencies, and either impossible or extravagant statements of the witnesses on both sides, lead the court to the conclusion that the story of neither is correct in its entirety; and it has been necessary, therefore, to work out what must have happened upon the night of December 20th before passing upon the responsibility of the claimant for the injuries which resulted to the Driscoll at that time.

Some items of the testimony must be taken up in detail, in addition to those already referred to; and, first, the testimony of Hendrickson, the scowman, to the effect that he was a mile or three-quarters of a mile from the nearest land, which would put him well out in the Sound and at least half a mile beyond the end of the breakwater; that the tug went right out into the Sound, and not back upon her course; that he saw no red light, although he places the point of anchorage, on the chart, within 400 or 500 feet of the end of the breakwater, where the red light was maintained by the government; and that the wind, which was then blowing straight down the Sound, was from the southeast direction (the course of the shore there is in reality nearly northeast and southwest)—all indicating uncertainty in a matter which, as he himself says, occurred in the dark, and when he could see nothing except his anchor chain, which, of course, led directly into the wind, even if the wind shifted in its direction. Further, his testimony that he did not see the red light at the end of the breakwater, but did see a white light or small lantern placed either upon Rock Island or a stake still further up the bay, would indicate that the place of anchorage was much inside of where he locates it upon the chart. McSpirit, the owner of the dredge, tells about the lights of the tug, which he saw half a mile to a mile out from the dredge. The outer end of the breakwater is exactly one mile from the dredge, and he testifies that the lights of the tug were at a point inside of the breakwater. But he further testified that the tug was some mile and a half away when he heard it whistling. This would make the tug come in over half a mile before it reached the point where he saw its lights; and yet both Hendrickson, the scowman, and the captain of the tug, agree that the whistles were blown at the time of anchoring, the captain of the tug testifying that they were blown as a signal to cast off the lines. McSpirit testifies that the red light was upon the end of the breakwater, and Rinklin, his foreman, testifies that he could not see the boats, but locates (some distance from the outer end of the breakwater, and near a shoal called the "Hen and Chickens," exactly one mile from the dredge) the place

where the scow was when at anchor; he again agreeing with McSpirit that the tug was from 1¼ miles to 1½ miles away at the time of whistling. Rinklin, however, remembers that the wind throughout the entire period was from the direction of Mamaroneck, and from the northeast. The weather was also then clear and fine. The witness Chase testifies that he and another man went out in a rowboat a distance of 1½ miles and found the scow outside of the breakwater, and that he was gone 1¾ hours; while Brown, another witness from the dredge, places the boats at a distance of 2 miles from the dredge, or at least a mile out in the Sound beyond the extreme outer edge of the breakwater. According to the witness Horton, flood tide at this point runs west past the breakwater and does not run up into Larchmont Harbor. He was of the opinion that there was not much difference between slack water and ebb and flood tide in Larchmont Harbor.

According to the chart put in evidence, the average height of high water at New Rochelle, which is not far from the point in question, is 7.6 feet; and it may be remarked in passing that the large expanse of mud flats shown in Larchmont Harbor, under an average depth of 2 and 3 feet at low water, makes it almost impossible to agree with Mr. Horton that there is little flood and ebb tide in and out of Larchmont Harbor. It would seem to be a necessary inference that, if the scow Driscoll reached Larchmont Harbor at high water in the neighborhood of 6 o'clock upon the evening of December 20th, and that the strong wind or storm came in the neighborhood of 11 o'clock, the heavily loaded scow would not have been likely to go adrift from the point where Capt. Howell locates her on the chart in 2 feet of water at low tide. On the other hand, the rising tide from midnight until 6 o'clock the following morning, when the scow landed upon the rocks, must certainly have had a considerable effect upon a deeply loaded scow dragging at an anchor, almost sufficient in weight to hold her against a storm. The engineer of the tug testifies that he saw the red light at the end of the breakwater and that the tug proceeded some 30 minutes after that before dropping the scow. These various inconsistent bits of testimony lead to the conclusion that the tug left New York so as to take advantage of the flood tide to Throgg's Neck, where the tides meet, with the idea that, if that point could be reached at about the turn of the tide, the ebb tide would then be utilized from that point to the Larchmont Breakwater, and subsequently to Mamaroneck, with the load of sewer pipe; that the tide did not turn before the tug reached Larchmont Harbor, and that thereby time was lost, so that in the dark the exact locality of the dredging operations could not be ascertained; that the scow was left at anchor somewhere between a line drawn from Long Beach Point to Umbrella Point and Rock Island, the scow having been left in about 12 feet of water, and the tug drawing at that time 8½ feet; that the tug then left the scow, no sufficient indications of bad weather having been observed, and none of the government bulletins or signals having been encountered or observable during the trip up the East river and through the Sound, inasmuch as these signals were not displayed until after 4 p. m.; that the scow would have been entirely safe, and no harm have come

to her, except for the extraordinary storm which broke in the neighborhood of 11 o'clock that night; and that subsequently to the descent of this hurricane from the northeast the scow drifted, under the combined influence of this wind and of the flood tide, and ultimately struck the rock called "North Ledge," and then drove on the shore.

This leaves the sole remaining question one as to the responsibility of the tug from the standpoint of having started so late that she was unable to do what might have prevented the accident, or from not standing by or returning to the scow after danger developed. The cases of Cokeley v. The Snap (D. C.) 24 Fed. 504, and Philadelphia & R. R. Co. v. New England Transp. Co. (D. C.) 24 Fed. 505, plainly set forth the responsibility under such circumstances, where reasonable care and prudence required the tugboat to stand by a tow at anchor, or to seek refuge from an impending storm; while in the case of Brown v. Cornell Steamboat Co., 121 Fed. 682, 58 C. C. A. 430, no negligence was imputed to a tugboat leaving its tow in a usual and safe place, the danger being caused by a storm of exceptional severity, and under such circumstances that the tugboat could not return, after the breaking of the storm, to render assistance to its tow. The latter case also announces the doctrine that the tugboat is not responsible for the size of the anchor of the scow; but that that is a matter for the scow alone.

It does not seem that negligence can be imputed from any delay in the time of starting in the case at bar. The slight miscalculation as to the duration of the flood tide may have delayed the progress of the boats. But, if the court is correct in its finding as to the facts, this delay did not prevent the tow from being left sufficiently far enough up in Larchmont Harbor to be in a reasonably safe place, and the place of anchorage was in such a location that the captain of the tug cannot be held negligent for anticipating that from the weather conditions then observable the scow might reasonably be expected to safely ride through the night. The case, therefore, seems to fall under the doctrine of Brown v. Cornell Steamboat Co., supra, rather than of Cokeley v. The Snap, supra; and while the peculiar condition of the testimony has made it necessary to go further than to examine the question whether the libelant sustained his burden of proof, and while the court has endeavored to determine what the facts were, in order to find if negligence was shown, yet the decision must be placed upon the ground that the libelant has failed to prove, by a preponderance of credible testimony, that the scow was left at anchor in such a position as to show negligence on the part of the tug in so doing, or that negligence in towing had occurred prior to that time

The libel will be dismissed.

Ex parte CHADWICK.

(Circuit Court, N. D. California. February 13, 1908.)

No. 14,607.

1. HABEAS CORPUS—FEDERAL COURTS—REVIEW OF STATE COURT'S JUDGMENT.
The United States Circuit Court will not, on application for a writ of habeas corpus, review a judgment of a state court convicting one of crime on an objection that the judgment is void and that his detention thereunder is a deprivation of liberty without due process of law, in violation of the federal laws and Constitution, the judgment having been affirmed by the state appellate court, where the remedy by writ of error from the United States Supreme Court to review the judgment of the state court has not been exhausted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 38–45.

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

2. COURTS—WRIT OF ERROR FROM FEDERAL SUPREME COURT—APPLICATION—TO WHOM MADE.
Under Rev. St. U. S. § 999 [U. S. Comp. St. 1901, p. 712], providing that, when a writ of error is issued by the United States Supreme Court to a state court, the citation shall be signed by the Chief Justice, etc., of such court, rendering the judgment complained of, or by a justice of the United States Supreme Court, etc., one's remedy to review a state court judgment in the United States Supreme Court is not exhausted by a refusal of his application to a justice of the state court for a writ of error from the United States Supreme Court; but, on such refusal, application must be made to a justice of the latter court before the remedy is exhausted.

William Hoff Cook, Asst. Dist. Atty., for city and county of San Francisco.

Frank J. Murphy, for petitioner.

VAN FLEET, District Judge. This is an application by the petitioner for the writ of habeas corpus to discharge him from the custody of the state authorities, by whom he is held in confinement under a judgment of the superior court of the city and county of San Francisco convicting him of a felony and adjudging him to suffer imprisonment in the state prison. In the view I take, it will be unnecessary to recite the facts set forth in the petition further than to state that, basing his claim upon certain alleged defects in the proceedings of the state court, the petitioner's contention is that the judgment is void, as in excess of the jurisdiction of the court, and that his detention thereunder is in violation of the Constitution and laws of the United States, as involving a deprivation of his liberty without due process of law. Having taken an appeal upon this ground to the appellate court of the state, where the judgment was affirmed, and thereafter made application to the presiding justice of the last-named court for a writ of error from the Supreme Court of the United States, which was refused, he makes this application.

Without inquiring into the merits of the question raised by the petitioner as to the validity of the judgment complained of, I am constrained to hold, under the principles announced in Ex parte Collins (C. C.) 154 Fed. 980, that upon the facts stated the petitioner's ap-

propriate remedy is by writ of error from the Supreme Court of the United States to review the judgment of the state court, and that he must be referred to that remedy. See, also, In re Frederich, 149 U. S. 77, 13 Sup. Ct. 793, 37 L. Ed. 653. It very clearly appears, from the doctrine of the case last cited and those referred to therein, that it may now be regarded as the settled policy of the federal courts not to interfere by habeas corpus with the prosecution of criminal offenses in the state courts in any instance—other than certain recognized exceptions, of which this case is not one—where the remedy by writ of error may be invoked; and having regard to the more or less intricate, and at times somewhat delicate, questions of jurisdiction arising between the states and the United States, growing out of the dual system of government provided for in the Constitution, the general soundness of the considerations underlying this policy may not well be questioned. It is not a question of power that actuates this attitude on the part of the federal courts, but a rule of comity, the reasons for which are aptly stated in the case of Frederich, above cited, where, after referring approvingly to the leading case of Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, in which it was held that the Circuit Court has the discretion in cases like the one at bar, instead of granting the writ of habeas corpus, to require a petitioner to pursue his alternative remedy by writ of error, it is said:

"In the recent case of In re Wood, 140 U. S. 278, 290, 11 Sup. Ct. 738, 35 L. Ed. 505, after reaffirming the rule laid down in Ex parte Royall, the court added: 'After the final disposition of the case by the highest court of the state, the Circuit Court, in its discretion, may put the party who has been denied a right, privilege, or immunity claimed under the Constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus.' We adhere to the views expressed in that case. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes [U. S. Comp. St. 1901, p. 575], than to award him a writ of habeas corpus; for, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged."

These principles are peculiarly applicable to the case of the petitioner here. It is not contended that the superior court was without original jurisdiction in the case; but the claim is that in the course pursued it exceeded its jurisdiction and thereby rendered a void judgment. It is therefore obvious that if, upon a writ of error, the Supreme Court should sustain the petitioner's contention, it would be within the power of the court to remand the cause to the state court with such appropriate direction as would enable it to proceed, and in a way to avoid a further transgression of petitioner's rights; whereas, were this court required to discharge the petitioner upon habeas corpus, that opportunity would be entirely swept away.

Petitioner has evidently proceeded upon the theory that, having applied to the presiding justice of the state appellate court and been there

refused the writ of error, he has done all that he is called upon to do in pursuit of that remedy, and that that fact takes the case out of the rule of Ex parte Collins, supra, where the application for habeas corpus was made after the writ of error had been allowed. But a glance at the statute providing for the granting of the writ will show that in this view petitioner is in error. Section 999, Rev. St. [U. S. Comp. St. 1901, p. 712], provides that, when the writ "is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, or judge, or chancellor, of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States," etc. In order, therefore, to show such compliance with the statute as to exhaust his remedy thereunder, it must appear that application has been made to the different functionaries or tribunals authorized therein to grant the writ. It does not appear that any such application has been made in this case to the Supreme Court of the United States, or any justice thereof, and in this respect, therefore, the remedy remains. The rule of convenience suggested by the late Judge Sawyer in In re Ah Jow (C. C.) 29 Fed. 181, finds no sanction in, but is distinctly at variance with, the principles of In re Frederich and the cases there discussed; nor, under existing facilities, is there much, if any, greater hardship involved in making an application to the Supreme Court than in making one here.

For the reasons stated, the application for the writ must be denied, and the petition dismissed; and it is so ordered.

THE SENECA.

NEW YORK & CUBA MAIL S. S. CO. v. DE BUHR.

(District Court, S. D. New York. February 28, 1908.)

COLLISION—STEAMSHIP AND BARK MEETING IN FOG—VIOLATION OF RULES.

A collision off the New Jersey coast at night in a dense fog between a steamship south-bound and a meeting bark *held* due solely to the fault of the steamship; the evidence showing that she was going at an excessive speed, not less than eight knots an hour, and that on hearing the foghorn of the bark on her starboard bow, instead of stopping and navigating with caution, as required by article 16 of the International Rules [U. S. Comp. St. 1901, p. 2869], her master, misunderstanding the number of blasts, ported the helm and proceeded without reduction of speed across the course of the bark, which was sailing free at a speed of about four knots and giving three blasts of her foghorn, properly indicating her course, which was not changed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 43, 51.

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

In Admiralty. Suit and cross-libel for collision.

Convers & Kirlin (J. Parker Kirlin, of counsel), for the Charles Loring.

Wing, Putnam & Burlingham (Harrington Putnam, of counsel), for the Seneca.

HOLT, District Judge. These are a libel and cross-libel filed to recover damages growing out of a collision between the bark Charles Loring and the steamship Seneca, three or four miles off the New Jersey coast, opposite Seagirt, on February 2, 1907, about 5:50 p. m., during a thick fog. At the time of the collision the bark Charles Loring was bound up the coast, on a voyage from Savannah to New York. She was steering a course north by east half east, and was running free, with the wind light from the southwest. A fog set in thick about 4:45 p. m. The Loring thereupon shortened sail, and thereafter was making three or four knots an hour. From the time the fog set in until the collision a mechanical foghorn on the bark sounded a signal of three blasts, indicating that she was sailing with the wind abaft the beam, at regular intervals of less than a minute. While proceeding in this manner, a whistle was heard, and at nearly the same time the masthead and green lights of a steamer, which proved to be the Seneca, were seen bearing on the starboard bow of the bark. After a short interval the steamer opened up her red light, and headed in on a turning course across the bark's bow. She continued swinging under a port helm, and soon shut out her green light, and while swinging across the course of the bark the collision occurred. The stem of the steamer passed the bark; but her bow collided with the bark's jibboom, carrying away the jibboom, bowsprit, and stem, crushing in the bow, and doing such damage that the bark filled shortly after the collision. Her crew were rescued by boats from the Seneca, and the result of the collision was that the bark, cargo, and crew's effects were a total loss. The man at the wheel, the captain, and all the witnesses on the bark testify that she never changed her course until the collision, and that the three-blast fog signal was continuously sounded until the collision.

The evidence on the part of the Seneca shows, in substance, that the Seneca was bound from New York to Newport News. She had left New York that afternoon, had passed the Scotland Lightship at 4:36, and from that point was steering south 7/8 west. She went at full speed, which was about 13 knots an hour, until 5:40 p. m., when she met the fog. Her speed was then reduced from 60 to 46 revolutions of her engines a minute. This reduction left her speed at least 8 knots an hour, and probably more, and this speed was maintained until the collision. Shortly after the reduction of speed, the men on the Seneca heard the whistle of a tug with a tow on the starboard bow, which passed them, bound north; the tug and the steamer exchanging very frequent signals. About the time this tug and tow got abeam of the steamer, the lookout heard what he understood to be one blast of a foghorn on the steamer's starboard bow. Various other persons on the Seneca claim to have heard the same one blast. But the chief officer testifies that he heard two blasts. Rule 15 [U. S. Comp. St. 1901, p. 2868] prescribes that a sailing vessel under way in fog shall sound, when on the starboard tack, one blast; when on the port tack, two blasts; and when with the wind abaft the beam, three blasts. The master of the Seneca, assuming, from hearing one blast of the horn, that it came from a vessel on the starboard tack, heading southeast, immediately ordered the steamer's helm to be put hard aport, and this

was done, causing the steamer to swing rapidly to starboard. The witnesses on the steamer testify that shortly after they heard two blasts of a foghorn off the port bow, but the Seneca's answer states that the second signal heard from the bark was a three-blast signal. Soon after the horn had been heard a second time, the Loring was seen through the fog, on the Seneca's port bow. As soon as the second officer on the bridge saw the bark, he reported to the captain that the vessel was not heading offshore, and he had better starboard. The captain replied that he had the wheel hard aport, and that there was no time to starboard. He immediately gave orders to stop and back the engines full speed, but almost immediately the collision occurred.

I think the Seneca was clearly at fault in the following respects: (1) The general rule applies that a steam vessel is presumptively at fault for a collision with a sailing vessel, under rule 20 of the International Rules [U. S. Comp. St. 1901, p. 2870]. (2) The Seneca was going at an excessive speed in a fog, in violation of rule 16. (3) She also violated rule 16, because, hearing, apparently forward of her beam, the fog signal of a vessel, the position of which was not ascertained, she did not stop her engines and navigate with caution until danger of collision was over.

I do not think that the Loring was at fault. It is claimed that she changed her course; but, in my opinion, the evidence preponderates that she did not. It is claimed that her lights were not properly placed; but the evidence shows that they were placed where they had always been carried on the Loring, and where lights on barks are usually carried, and I think they were in a proper place. It is claimed that the foghorn was not sounded from a proper position on the bark; but the evidence, in my opinion, does not support this contention. It is claimed that the bark did not have a proper lookout. The evidence shows, in my opinion, that she did not have a proper lookout; but it also shows that the absence of a lookout had nothing to do with the collision. The steamer was sighted by several men as soon as she could be seen, and, when sighted, her lights bore green to green. If the steamer had held her course, there would have been no collision. The collision was clearly due to the fact that the master of the Seneca, hearing what he supposed was one blast of a foghorn, assumed that the bark was sailing southeast on a starboard tack, and that by porting he would pass under her stern, when in fact she was sounding a three-blast signal, indicating that she was sailing before the wind. Having heard a foghorn, a point off his starboard bow, the master of the Seneca should have stopped his engines and navigated with caution until danger of collision was over, instead of porting without reducing his speed at all.

The fact that so many of the witnesses from the Seneca testify that the second signal heard on board the Seneca was one of two blasts is significant. There is no doubt that the signal given on the Loring was a three-blast signal. All the witnesses on the Loring so testify. She was sailing before the wind in a fog. The rule required her to give three-blast signals. It is inconceivable that, if she was giving signals at all, she should not, for her own protection, have given the signal required by the rules. The answer admits that the second signal heard was a three-blast signal, and yet all the witnesses on the Seneca testify

that what they heard was a two-blast signal. All admit that they heard a signal; but, if they heard any signal at all, how could so many make the same mistake? The entries in the Seneca's log are also significant. The statute requires that, in every case of collision, the master shall immediately cause a statement thereof, and of the circumstances under which the same occurred, to be entered in the official logbook. The entry in the Seneca's log, in reference to this collision, is as follows:

"5:40 p. m. Shut in foggy; slowed to ½ speed; fresh S. S. W. wind.
5:49. Heard a fog horn. Stopped and backed full speed.
5:51. Collided with bark Charles Loring bound north; the bark striking the Seneca on port bow about 60 feet from stem above the water line.
5:55 p. m. Lowered lifeboat No. 2 with second officer and four men, and rescued the bark's crew.
7:35 p. m. Boat arrived with bark's crew.
7:40 p. m. Started ahead slow. Weather foggy. Fresh S. W. wind."

Such an entry, so meager, so evasive, so destitute of any statement of the real circumstances under which the collision occurred, not only is a clear violation of the duty imposed on the master by the statute, but it affords strong grounds for the inference that the master, when he made it, knew that the Seneca was at fault.

My conclusion is that there should be a decree for the libelants in the suit against the Seneca, with a reference to ascertain the amount of damage, and that the cross-libel against the Loring should be dismissed.

THE HENDRICK HUDSON (two cases).

(District Court, S. D. New York. February 28, 1908.)

1. SHIPPING—LIABILITY OF VESSEL FOR CAUSING DANGEROUS SWELL—INJURY TO SMALLER VESSELS.

There is no distinction between harbor and river navigation in respect to the liability of a large vessel for causing dangerous swells by which other lawful and properly handled vessels are injured; nor is it any defense against such liability that the larger vessel was proceeding on her ordinary course and at her customary speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.

Liabilities of vessels for injuries caused by creation of swells, see note to The Asbury Park, 78 C. C. A. 3.]

2. SAME.

While a canal boat was lying at a dock at a narrow and deep place on the Hudson river loading with ore, the large steamer Hudson, running between New York and Albany, passed at a speed of about 18 miles an hour, causing such heavy swells as to dash the canal boat against the pier with such force as to cause a leak. She was then removed to a bulkhead, where she was improperly and insufficiently fastened and left without attention, and during the night she filled and sank on the shelving bottom near the edge of the deep channel. When the Hudson passed on the next day, her swell caused the canal boat to break her lines and slide off into the deep water, and she became a total loss. Another boat, properly moored near by, was not injured. Attempts were made to signal the Hudson as she approached; but they were ineffectual, and not seen. *Held*, that she was liable for the injury caused on the first day, which was the direct result of the swell, when the canal boat was in a proper place and properly cared for, but that she was not the proxi-

mate cause of the sinking of the boat on the next day, which was due to the negligence and inattention of those in charge, and was not liable for the loss of the boat or her cargo.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.]

In Admiralty.

J. J. Macklin and La Roy S. Gove, for M. K. Neville.

Wray & Callaghan, for Hudson Iron Co.

Wm. M. K. Olcott and Harrington Putnam, for the Hendrick Hudson.

HOUGH, District Judge. On August 29, 1907, Neville's canal boat Cosgrove was lying about three-quarters loaded with iron ore at Ft. Montgomery dock on the Hudson river. The river at this point is narrow and very deep, and the Hudson passes daily on her trips between Albany and New York, ordinarily maintaining, while so passing, a speed of about 18 miles an hour. When bound for New York on the afternoon of the day mentioned, her displacement waves created such swells and suction at the dock where the Cosgrove lay as to dash her against the same and cause her to leak. No planks were broken; but at least one was started, and she was considerably shaken. Being about 18 years old, and having her log sides strengthened with king-posts, she probably leaked more easily than a newer vessel would have done. After the Hudson passed some 10 tons more cargo were laden on the Cosgrove, when it was ascertained that she was making water so rapidly that the hand pumps available could not keep her clear. She was thereupon removed from the dock, taken some distance down stream, and fastened to a bulkhead. When so fastened her stern was distant some 8 feet from shore, and her bow angled out into the river. She had three lines out, one at the stern, one near the stern, and one at the bow. The bowline led aft, an improper arrangement, and the whole scheme of mooring was careless and inefficient. During the night the Cosgrove was not pumped, and nearly filled with water, and by the next morning between 11 and 12 o'clock was hard aground, on an underwater shelf of land, and near water approximately 100 feet deep. Shortly before noon of August 30th the Hudson passed on her return trip to Albany, again created swells, and as the result of the suction caused thereby the bow of the Cosgrove tended to go further out in the river. She snapped her bowline, and slid off toward deep water. The water in her then surged forward toward the bow, and put such strain upon the remaining lines that they immediately parted, so that the Cosgrove and her cargo slipped off the shelf aforesaid, and sank in water so deep that both hull and cargo are a total loss.

It is said that both on the 29th and 30th the approaching Hudson was warned by the waving of a red handkerchief to slacken speed. At this point the large steamers keep near the opposite bank of the river, and therefore pass at such a distance that the signal sworn to was not seen, and was in my opinion wholly ineffective and insufficient. There can be no doubt that the injury of the 29th was directly caused by the swells of the Hudson; but it is urged that The Daniel Drew, 13 Blatchf. 523, Fed. Cas. No. 3,565, permits such a vessel as the Hud-

son to pursue her usual speed, about her usual business, and prevents her from being absolutely liable for injuries occasioned to smaller craft by swells or motion caused by her passage through the water.

There is in this case no evidence of reasonable notice or warning to the Hudson of any danger to vessels at the Ft. Montgomery pier, and the Hudson was on both days proceeding at her usual speed and on her usual course. In The New York (D. C.) 34 Fed. 757, Cornwall v. New York (D. C.) 38 Fed. 710, and Mould v. New York (D. C.) 40 Fed. 900, there was proof of warning to the libeled steamboat, and evidence that the steamer endeavored (though unsuccessfully) to prevent the very kind of damage that was anticipated and did occur. The Connecticut (D. C.) 45 Fed. 374, The Monmouth (D. C.) 44 Fed. 809, The New Hampshire (D. C.) 88 Fed. 306, The Majestic, 48 Fed. 730, 1 C. C. A. 78, are all cases of harbor, as distinguished from river, navigation, and no evidence of warning is shown. It is therefore argued that a difference exists between the obligations of vessels navigating the harbor and those navigating the river in respect of displacement waves. I see no just ground for such distinction. The rule is laid down generally in The Majestic, supra. It was there said:

"Nor will it do to say that the Majestic was navigating in the way and at the speed customarily adopted by vessels of her class. If such way and speed caused injury to a seaworthy craft of a kind properly in these waters and properly handled, the custom will have to be modified or the privilege paid for."

There is no intimation here of any difference between river and harbor waters with respect to the obligations of large, swift, and powerful steamers navigating either or both, and it must be held that, whether upon river or in harbor, if a vessel in the ordinary prosecution of her business causes swells or water motion dangerous to other properly handled vessels within the sphere of her displacement effect, the fact of injury thereby to the smaller and weaker, but lawful, craft, gives rise to a cause of action in the latter. In so far as The Daniel Drew, supra, affords any basis for larger claims on the part of the swifter vessel, it has been overruled by The Majestic, supra.

The libelant Neville is therefore entitled to a decree for such damages as he sustained on August 29th.

There is no evidence that the libelant Hudson Iron Company sustained any damages on August 29th. When the Hudson passed on August 30th, there was lying near the stranded Cosgrove another and smaller vessel. She was properly handled and properly made fast, and sustained no injury from the expected swells. The Cosgrove was left to meet this anticipated danger with insufficient lines, improperly made fast, and no crew. Before any recovery can be had for the damages then received, it must be shown that the swells of the Hudson were the proximate cause of the total loss of the Cosgrove and her cargo. It may be admitted under The Majestic, supra, that a "properly handled" small craft may recover; but the Cosgrove was not handled at all. In my judgment she was unnecessarily exposed to danger, and the remarks of the court in Mould v. The New York, supra, at page 902 of 40 Fed. are applicable. Neville will, therefore, not recover for

the ultimate loss of his boat, but only for such an amount as would have been necessary to restore her to service after the damages of August 29th.

The libel of the Hudson Iron Company will be dismissed, without costs.

SAVAGE v. HOFFMANN.

(Circuit Court, S. D. New York. April 6, 1908.)

1. LITERARY PROPERTY—SUBJECTS OF OWNERSHIP—ACTORS' METHODS.
   A theatrical manager, claiming the exclusive right to produce an opera, has no literary property in the manner in which actors appearing in it dance or posture; they, if any one, having the right to complain of an imitation.

2. COPYRIGHT—ABANDONMENT OF RIGHTS.
   A notice, printed on the face of a publication of the songs and pianoforte score of an opera, that they could not be used for stage performances except with the consent of the owners' agents, even if a valid reservation in Germany, where the publication was made, does not prevent the publication being by the law of the United States an abandonment of the words of the songs.

3. SAME—MOTION FOR PRELIMINARY INJUNCTION—EVIDENCE.
   On a motion to temporarily enjoin a vaudeville performer from singing a song from an opera which complainant claims the exclusive right to produce, the court may consider the fact that the songs and pianoforte score of the opera had been published, as showing an abandonment of the words of the songs, though there is no proof that the publication was authorized by the composer and the authors of the opera, as would be necessary on final hearing.

4. SAME—RELIANCE ON COPYRIGHT—EFFECT ON COMMON-LAW RIGHTS.
   Where one takes the benefit of the copyright law to protect his rights in literary property, he cannot rely upon his common-law right.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Copyrights, § 1. Rights of authors to control of publication, disposition, or use of their productions independent of statutory copyright, see note to Bobbs-Merrill Co. v. Straus, 77 C. C. A. 620.]

5. SAME—PRELIMINARY INJUNCTION—PROOF—SUFFICIENCY.
   Since a preliminary injunction should only be granted on a perfectly clear case, the District Court will not temporarily enjoin a vaudeville performer from singing a song from, and using the orchestration of, an opera which complainant claims the exclusive right to produce, where his title is doubtful.

Fromme Bros., for complainant.
Nathan Burkan, for defendant.

WARD, Circuit Judge. A restraining order having been granted in this cause, a motion is made to continue the same. The complainant alleges that he owns the exclusive right of producing in all languages in the United States and Canada the opera composed by Franz Lehar, words by Victor Leon and Leo Stein, called "Die Lustige Wittwe." He is now producing the opera under the title "The Merry Widow" at the New Amsterdam Theater in this city; Lina Barbanell taking the title role, "Sonia," and Donald Brian, "Danilo." It is shown that the defendant has been giving a series of imitations

in a vaudeville performance, one of which, occupying from eight to ten minutes, is as follows: A male assistant, dressed exactly as Brian does in the role of "Prince Danilo," sings a song called "Maxim's" from the first act of "The Merry Widow"; the orchestra playing the chorus as in that opera. The defendant then appears costumed exactly like Barbanell as "Sonia," while the orchestra plays the waltz which is the finale of the first act of "The Merry Widow," and she and her male assistant dance. Then the orchestra plays the popular "Merry Widow Waltz," which the defendant and her assistant dance separately. The defendant then sings the four words, "I love you so," while she and her assistant dance the waltz together, in imitation of Barbanell and Brian. This is followed by a burlesque of the waltz to rag time.

The complainant asks that the defendant be restrained from imitating the postures of Barbanell and Brian, from singing the song called "Maxim's," and from using the orchestration of "The Merry Widow." Obviously the complainant has no literary property in the manner in which Barbanell and Brian dance or posture. They, if any one, have the right to complain. The manner and method of every dancer and actor is individual, and utterly unlike the railroad scene, which was held the subject of literary property in Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552.

This leaves for consideration the "Maxim" song and the orchestration. The complainant's title is supported by the affidavits of one Sliwinski and of one Corey. Sliwinski says he is a member of the firm of Felix Block Erben, who are the sole general agents of Franz Lehar, Victor Leon, and Leo Stein, and that by an agreement dated November 28, 1905, between the firm and Lehar and Stein, the firm has become the exclusive owner of the opera called "Die Lustige Wittwe," including all rights of translation; that neither the firm, nor Lehar, nor Stein, has ever published or authorized the publication of a book of the said opera (that is, the libretto), and that the firm has transferred to George Edwardes, of London, the sole right to produce the opera in all languages in the United States and Canada. Corey says that he is the complainant's attorney in fact; that the complainant is unable to verify any affidavit, because he is in Europe, but that the complainant told him that George Edwardes had transferred to the complainant the sole right to produce the opera in all languages in the United States and Canada by contract dated March 16, 1906, which contract is not produced. This, of course, would be perfectly insufficient testimony upon final hearing; but I will consider for the purposes of this motion the allegations as properly proved.

The defendant offers in evidence a publication of the songs and pianoforte score of the opera in Leipzig and Vienna by L. Doblinger, on the face of which is printed a notice from Lehar, Leon, and Stein that the same cannot be used for stage performances except with the consent of their agents, Felix Block Erben. This reservation, even if good where made, does not prevent the publication being by our law an abandonment of the words of the songs. Wagner v. Conried (C. C.) 125 Fed. 793; The Mikado (C. C.) 25 Fed. 185; Daly v. Walrath,

40 App. Div. 220, 57 N. Y. Supp. 1125. While there is no proof that this publication was authorized by the composer and authors of the opera, as would be necessary on final hearing, still the court may take it into consideration on a motion for a preliminary injunction.

Coming, now, to the orchestration, Chappell & Co., Limited, have published an orchestration of the opera by Howard Williams and the words of the songs by Adrian Ross in this country under our copyright law. Both complainant and the defendant use the words and orchestration of this publication. The publication bears on its face a notice that application for all performing rights must be made to the complainant. As Chappell & Co., Limited, would, under section 4966, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3415], be entitled to enjoin public performances, it is fair to presume that the complainant derives his rights, in part, at least, through them. If so, he has taken the benefit of the copyright law, and cannot rely upon his common-law right. Jewelers' Mercantile Agency v. Jewelers' Publishing Company, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666.

A preliminary injunction should only be granted on a perfectly clear case, and, as I have doubts as to the complainant's title, the restraining order is vacated, and the complainant left to prove his rights on final hearing.

In re OTTO F. LANGE CO.

(District Court, N. D. Iowa, E. D. March 12, 1908.)

1. BANKRUPTCY—PREFERRED CLAIMS—STATE TAXES—CIGARETTE "TAX."

Code Iowa, § 5006, provides a penalty by fine and imprisonment for selling cigarettes in violation of its provisions; and section 5007 imposes an annual tax on every cigarette dealer, which tax is declared to be in addition to all other taxes and penalties, and shall constitute a perpetual lien on all property used in connection with the business, but that payment of the tax shall not be a bar to prosecution under any law prohibiting the manufacture and sale of cigarettes. *Held*, that such imposition constituted a "tax," within Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing that the bankruptcy court shall order the trustee to pay all taxes legally due by the bankrupt, in advance of the payment of dividends to creditors; the word "tax" in the latter section not being used in any restricted sense, but broadly to include all obligations imposed by the state and general governments under their respective taxing or police power for governmental or public purposes.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886, 7813.]

2. COURTS—JURISDICTION OF FEDERAL COURT—CONSTRUCTION OF BANKRUPTCY ACT.

The meaning of the word "tax," as used in Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], is for the ultimate determination of the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1331.]

In Bankruptcy. On certificate of referee.

P. J. Nelson, Co. Atty., for Dubuque County.
Mullany & Stuart, for trustee.

REED, District Judge. The Otto F. Lange Company, an Iowa corporation having its principal place of business in the city of Dubuque, in Dubuque county, this state, was adjudged bankrupt by this court in November, 1907. It was a retail dealer in tobacco and cigars, including cigarettes, and Dubuque county has filed a claim for taxes, including a cigarette tax for $150, due from the bankrupt to the county, and asks that it be allowed as a preferred claim against the bankrupt estate. The cigarette tax is for the six months immediately preceding the bankruptcy, and is imposed upon the bankrupt under section 5007 of the Iowa Code of 1897. The trustee objects to its allowance as a preferred claim on the ground that it is not a tax within the meaning of section 64a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). The referee sustained this contention, and upon request of the county certifies the question to the court for determination.

Section 64a of the bankruptcy act provides that:

"The court shall order the trustee to pay all taxes legally due, and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors. * * *"

That the bankrupt owed this cigarette tax, and that it was due at the time of the bankruptcy, is not disputed. Section 5006 of the Code of Iowa of 1897 provides a penalty of fine and imprisonment for selling cigarettes in violation of its provisions. Section 5007 is as follows:

"Sec. 5007: There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered, or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering, or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state."

The validity of these sections has been upheld by the Supreme Court of the state and the United States Supreme Court. Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968, 67 L. R. A. 624, 104 Am. St. Rep. 304; Id., 196 U. S. 276, 25 Sup. Ct. 237, 49 L. Ed. 477. There can be no question, therefore, of the validity of the tax, or that it is a lien upon the bankrupt's property. The trustee relies upon In re Ott (D. C.) 95 Fed. 274, where it is held that the mulct liquor tax imposed by section 2432 et seq., of the Iowa Code, was not a tax within the meaning of section 64a of the bankruptcy act. That the tax imposed by section 5007 of the Code is of the same nature as the mulct liquor tax, and is assessed and levied in the same

manner, may be conceded, though the payment of the liquor tax, and compliance with other provisions of the law imposing it, will bar a prosecution for a violation of the prohibitory liquor law of the state, while the payment of the cigarette tax will not bar a prosecution for a violation of section 5006. The decision in Re Ott rests wholly upon decisions of the Supreme Court of the state to the effect that the mulct liquor tax is not a general tax, so as to become a lien upon property prior to valid existing liens thereon at the time the tax is assessed, and is not of the same effect in this respect as general taxes. It was therefore held, following these decisions, that the mulct liquor tax is not a tax within the meaning of section 64a of the bankruptcy act. If the state decisions are to control then the later decisions of the Supreme Court of the state clearly establish that both the mulct liquor tax and the cigarette tax are imposed under the taxing power of the state, and are therefore taxes within the meaning of that term, levied to meet the burdens upon the general public as a result of the sales of intoxicating liquors and cigarettes. Hodge v. Muscatine, 121 Iowa, 482, 96 N. W. 968, 67 L. R. A. 624, 104 Am. St. Rep. 304; Newton v. McKay, 130 Iowa, 596, 102 N. W. 827.

There are authorities which hold that a tax is not a "debt," within the technical meaning of that word (Lane Co. v. Oregon, 7 Wall. 71, 75, 78, 19 L. Ed. 101); and if the word "debt" had been used in section 64a, instead of the word "tax," the question would arise whether or not it would include taxes imposed by law upon the bankrupt. It is obvious that the word "tax," as used in the bankruptcy act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the state and general governments under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term "tax" as used in the bankruptcy act.

Nor is the meaning of the word "tax" as used in the bankruptcy act to be determined by the state courts, so as to conclude the federal courts. That is a federal statute, the interpretation and meaning of which is to be determined ultimately by the federal courts. In New Jersey v. Anderson, 203 U. S. 483, 491, 27 Sup. Ct. 137, 140, 51 L. Ed. 284, it is said:

> "The bankruptcy act is a federal statute, the ultimate interpretation of which is in the federal courts. It is doubtless true * * * that, if the highest court of the state should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a federal court, in passing upon the bankruptcy act, would not compel the state to accept a preference from the bankrupt's estate upon a different view of the law. Conceding that the doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication in the federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the federal Constitution is involved, still

a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a federal law, providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The state court may construe a statute and define its meaning; but whether its construction creates a tax, within the meaning of a federal statute giving a preference to taxes, is a federal question, of ultimate decision in this court."

This decision seems to put the question at rest. The claim in question is defined by section 5007 of the Iowa Code as a tax, and is declared a perpetual lien upon all property real and personal, used in connection with the business of selling cigarettes. The trustee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt held it, and subject to all equities with which it was impressed in his hands. Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782.

Whether or not such a lien would take precedence over other valid liens upon the property at or prior to the levy of such tax is a question not here involved. The conclusion, therefore, is that the county is entitled to priority of payment of this cigarette tax owing by the bankrupt at the time of its adjudication, as well as the other taxes due from it; and it will be so certified to the referee.

It is ordered accordingly.

BRANDENSTEIN et al. v. HELVETIA SWISS FIRE INS. CO.

(Circuit Court, S. D. New York. January 29, 1908.)

1. COURTS—UNITED STATES COURTS—JURISDICTION—ACTION AGAINST ALIEN—ATTACHMENT.
   Where the United States Circuit Court had jurisdiction of a suit by plaintiffs against the R. & M. Co., in which a claim owing to the latter by defendant was attached, and would have had jurisdiction of such a suit by plaintiffs against defendant, the fact that the R. & M. Co. could not have sued the defendant in the United States Circuit Court, because both were aliens, did not deprive such court of the power to attach the debt owing from defendant to the R. & M. Co.; the R. & M. Co. being entitled to sue defendant in the state court.

2. ATTACHMENT—ACTION IN AID OF ATTACHMENT.
   Where a debt is attached under the Codes of New York or California, judgment cannot be issued against the debtor attached in the original action, as in case of garnishment; but a new action must be brought against the person attached, to enforce the attachment lien.

3. SAME—JURISDICTION.
   Where a debt owing by a nonresident was attached in a suit in California, an action to enforce the attachment lien was not required to be brought in the court out of which the attachment issued, but might be properly brought and prosecuted in any other competent jurisdiction.

Sullivan & Cromwell (Royall Victor, of counsel), for plaintiffs.

Wallace, Butler & Brown (Frederick B. Campbell and Charles M. Turell, of counsel), for defendant.

HOLT, District Judge. This is a demurrer to a complaint. The complaint alleges, in substance, that the plaintiffs are partners, doing business in San Francisco, Cal.; that the defendant is a corporation organized under the laws of Switzerland, doing business in the Northern District of California, having an agent in California and one in New York, duly appointed and authorized to receive personal service of all legal process; that the Rhine & Moselle Fire Insurance Company of Strassburg is a corporation organized under the laws of Germany, also doing business in California, and having an agent there, duly appointed and authorized to receive personal service of process; that in December, 1906, the plaintiffs commenced an action at law in the United States Circuit Court for the Northern District of California against the said Rhine & Moselle Fire Insurance Company to recover $34,500 upon six policies of fire insurance, issued and made payable in California; that an attachment was issued in said action, and duly served upon the defendant, the Helvetia Swiss Fire Insurance Company, and the plaintiffs thereby attached an indebtedness due from the Helvetia Company to the Rhine & Moselle Company of more than $100,000; that thereafter judgment was duly recovered in said action against the Rhine & Moselle Company for $35,523.31, the amount sued for, with interest and costs, which remains unpaid; and that this action is brought to recover said amount from the Helvetia Company because of the lien of said attachment.

One of the claims made in support of the demurrer is that the United States Circuit Court in California had no jurisdiction to issue an attachment against the defendant, because the right to attach or garnish a claim in the hands of a third party depends upon the right of the defendant in the action to sue such third party upon such claim; that a suit could not have been brought in the United States Circuit Court by the Rhine & Moselle Company against the Helvetia Company, because both are aliens, and the United States Circuit Court has no jurisdiction of suits between aliens; and that therefore the original attachment in California was void. There are various expressions in the cases to the effect that an attachment or process of garnishment cannot take place unless the laws of the state in which the attachment is made would authorize a suit by the defendant against the party garnished; but I cannot see that the principle has any application in this case. The Rhine & Moselle Company could have sued the Helvetia Company upon the debt attached, under the laws of California, in the state courts of California. The United States Circuit Court had jurisdiction of a suit by the plaintiffs against the Rhine & Moselle Company, and would have had jurisdiction of such a suit by the plaintiffs against the Helvetia Company. I think that the mere fact that the Rhine & Moselle Company could not sue the Helvetia Company in the United States Circuit Court did not deprive the United States Circuit Court of the power to attach a debt due from the Helvetia Company to the Rhine & Moselle Company. If it could bring such an action in the state courts, the right of attachment, in my opinion, existed.

The other claim made in support of the demurrer is that the action to enforce the lien of an attachment must be brought in the same court in

which the attachment was obtained, and various cases are cited tending to support the position that, in those states where the regular garnishee or trustee process is authorized, that rule obtains. But, as I understand it, there is a substantial difference between the process by attachment, such as is provided for by the Code of New York and by the Code of California, which is substantially adopted from the Code of New York, and the garnishee process, as established in some of the states. By such a process the debtor of the defendant who is garnished is required to answer in the original suit. The question of his liability is tried in the original suit, after the liability of the defendant is determined, and a judgment is entered in the original suit, not only against the defendant, but against the party garnished. But in an action in New York or California, in which an attachment is obtained, under which a debt is attached due from a third party to the defendant, no judgment is entered against the third party. After a judgment is entered against the defendant, a separate suit must be brought to enforce the alleged lien created by the attachment, and in that suit the party whose debt is attached can defend upon any ground of defense that exists. Such a suit, in my opinion, may be brought in any court where the defendant may be found. If this ground of demurrer is sound, any person owing a debt which has been attached can nullify the attachment by moving out of the jurisdiction of the court in which the attachment was obtained. In the case of a true garnishee process, he cannot do that, of course, because the judgment may be entered in the original suit. But as no such judgment can be entered against the third party in the original suit under the laws of New York and California, and a separate action is necessary, I cannot see any reason why such action should be required to be brought in the same court in which the original action was brought.

My conclusion is that the demurrer should be overruled, with leave to answer within 20 days, upon payment of costs.

In re MORRIS.

(District Court, M. D. Pennsylvania. January 28, 1908.)

No. 985.

BANKRUPTCY—PREFERRED CLAIMS—RENT—COSTS.

A landlord's claim for rent of the premises where the bankrupt's goods were lodged at the time of his bankruptcy is a preferred claim, which is payable in full out of the proceeds of such goods, undiminished by anything except the costs of sale.

In Bankruptcy. On certificate from referee, sur exceptions to trustee's account.

C. A. Van Wormer, for exceptions.

J. C. Ingham, contra, for trustee.

ARCHBALD, District Judge. On a sale of the bankrupt's effects by the trustee some $880.50 was realized, out of an appraised value of $2,015.75. This was little enough; but it is now proposed, in

addition, to take it all for the costs. There seems to be no remedy against this, so far as general creditors are concerned; but the landlord has interposed a claim for one month's rent of the premises where the goods were lodged at the time of bankruptcy, $135, which I do not see how it is possible to pass by. Rent, under such circumstances, is a preferred claim, as it has been many times decided. Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451; In re Hoover, 7 Am. Bankr. Rep. 330, 113 Fed. 136; Wilson v. Trustee, 8 Am. Bankr. Rep. 169, 114 Fed. 742, 52 C. C. A. 374; In re Mitchell, 8 Am. Bankr. Rep. 324, 116 Fed. 87; In re Duble, 9 Am. Bankr. Rep. 121, 117 Fed. 794; In re Bishop, 18 Am. Bankr. Rep. 635, 153 Fed. 304. And it must therefore be taken care of at all hazards, undiminished by anything except the costs of making a sale of the goods. In Re Bourlier Cornice Co., 13 Am. Bankr. Rep. 585, 133 Fed. 958. Cf. In re Prince & Walter, 12 Am. Bankr. Rep. 675, 131 Fed. 546; In re Renda, 17 Am. Bankr. Rep. 521, 149 Fed. 614; In re Williams (C. C. A.) 156 Fed. 934.

The other costs must accordingly give way, and thereupon distribution will be made as follows:

Amount to be distributed		$880 50
One month's rent due landlord		135 00
		$745 50
Referee's fees		100 00
		$645 50
Costs of administration:		
Paid appraisers at Pittston	$ 35 00	
" " " Towanda	6 00	
" M. J. Buckley, constable, serving subpœnas	6 40	
" A. Coplan for serving notices	2 35	
" witnesses at sundry hearings	31 80	
Allowed to clerk at trustee's sale	5 00	
Telegrams, telephone messages, postage, etc.	2 90	
Subpœnas	1 25	
Watchman, 23 days	46 00	
Personal expenses of trustee	18 75	
Rent for use of premises by trustee	225 00	
Advertising sale in Pittston Gazette and posters	28 25	
Advertising sale in Wilkes-Barre Record	7 00	
Trustee's commissions	45 00	
To J. C. Ingham:		
Expenses	$ 15 80	
Attorney's fees	134 00	
	149 75	
To Lilley & Wilson, attorneys for bankrupt	35 00	
		$645 50

Strictly speaking, the costs of advertising and conducting the sale should appear first in this schedule; but it makes no difference in the result, and it is more convenient to arrange them as they stand.

Let the money be paid out by the trustee as so directed.

[Per contra, see In re West Side Paper Co., 159 Fed. 241.—Ed.]

ALDER CO. v. FLEMING.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1908.)

No. 1,418.

1. DEATH—STATUTES—CONSTRUCTION.

Act Mont. 1872 (Comp. St. 1887, div. 5, § 981), created a cause of action for wrongful death, and section 982 required such action to be brought by and in the name of the personal representative of the deceased persons, that the amount recovered should be for the exclusive benefit of the widow and next of kin, and that the damages should be in such sum as the jury deemed just and fair compensation with reference to pecuniary injuries resulting from the death to the wife and next of kin of the deceased, not exceeding $20,000. Code Civ. Proc. 1887, § 14, provided that, when death resulted from wrongful act, the deceased person's heirs or personal representatives might maintain an action therefor, and that in such action such damages might be given as under all the circumstances were just; and Code Civ. Proc. 1895, § 579, contained the same provision. *Held*, that Code Civ. Proc. 1887, § 14, was not intended merely to prescribe who might bring an action created by the act of 1872, nor did section 579 take away any of the causes of action growing out of the death of a deceased person, but that such section preserved the right of action created by the act of 1872, and was sufficiently broad to create a liability, though none existed at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 11.]

2. SAME—CONSTRUCTION.

Code Civ. Proc. Mont. 1895, § 579, declares that when the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may sue for damages against the person causing the death, and recover such damages as may be just under all the circumstances. *Held*, that such section did not create two different measures of liability, one to the deceased and the other to his heirs, but that there could be only one recovery, which must embrace all damages, whether the action is by the personal representative of the deceased or by his heirs.

3. MASTER AND SERVANT—DEATH OF SERVANT—ASSUMED RISK—QUESTION FOR JURY.

In an action for death of a servant, evidence *held* to require submission to the jury of the question whether decedent assumed the risk of the incompetency of a fellow servant, by whose alleged negligence decedent was killed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant §§ 1068–1088.

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

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

George F. Shelton, W. M. Bickford, and W. H. De France, for plaintiff in error.

John A. Shelton, John N. Kirk, and R. L. Clinton, for defendant in error.

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

ROSS, Circuit Judge. This action was brought by the widow of William F. Fleming, deceased, as administratrix of his estate,

to recover damages because of his death. The action was tried with a jury, which returned a verdict in favor of the plaintiff for $6,000, for which judgment was entered. The case is brought here upon writ of error by the defendant below.

The deceased lost his life while working for the Alder Company in the Kearsage mine, in Madison county, Mont., at a place therein reached by a tunnel about 400 feet long, from which a shaft had been sunk 150 feet, and from that a drift 67 feet in length to tap the vein, so that at the time of his death he was working on a level 150 feet below the tunnel. Over the mouth of the tunnel there had been erected years before a wooden building in which were the boilers that furnished steam to run the hoisting engine, a blacksmith shop, a sawmill, and a storeroom, for the storage of material used in the mine. The track running through and out of the tunnel passed through this building, and over the track cars carrying ore and waste from the mine ran. At the time of the accident Fleming was on the night shift. He had worked in the mine for about six months, and was necessarily familiar with the presence of the building and its character; for he passed through it in going to and coming from his work. Early in the morning of the day he lost his life, a fire was distovered in the building at the mouth of the tunnel, and immediately upon its discovery the foreman of the mine went up the hill to a shaft designated as the "Apex Shaft," which had been sunk by another company about 600 or 700 feet above the mouth of the tunnel, and which connected other stopes with the tunnel in the Kearsage mine. This shaft was covered with planking in which were fitted doors, and those doors the foreman opened. The decedent lost his life by reason of inhaling the smoke and gas from the burning building that descended into the mine.

Among the grounds alleged for a recovery were the maintenance by the company of the building over the tunnel, in violation of a statute of the state of Montana prohibiting the erection of such a building within 50 feet of the mouth thereof, and the employment by the mining company of one Charles Bradshaw as fireman, assistant engineer, and watchman in and about the mine, who, the complaint alleged, was by reason of his excessive use of intoxicating liquors incompetent and unfit for such employment, and through whose drunkenness at the time of the accident it was alleged the fire occurred which caused the death of the deceased. The complaint also alleged the heirs of the deceased to be his widow, the plaintiff, William Fleming, aged 24 years, James Fleming, aged 21 years, Patrick Fleming, aged 17 years, Mary Ann Harrington, aged 27 years, Julia Daly, aged 25 years, and Annie Fleming, aged 11 years; that at the time of the death of William F. Fleming the deceased had an earning capacity of $100 a month; that the plaintiff and the said minor children were wholly dependent upon him for support and maintenance; and that by his death the plaintiff suffered damage in the sum of $20,000, for which sum she prayed judgment and costs of suit.

At the trial the plaintiff was permitted, over the objections of the defendant, to give evidence as to who the heirs of the deceased were, and as to the amount of pecuniary support that was given by the de-

ceased to his widow and minor children, and also testimony as to the expectancy, according to the life tables, of one of the age of Fleming at the time of his death, and the cost of an annuity furnishing $100 a month. The grounds of these objections were the contention on the part of the defendant that the personal representative of the deceased had no authority in law to maintain an action for the benefit of the heirs; that the right, if any, of the plaintiff to recover as a personal representative of the deceased, was limited in extent to the damage suffered by the estate by reason of the death; and that neither the pecuniary damage suffered by the heirs, nor the injury to their feelings, the loss of the society of the deceased, nor evidence of the cost of an annuity based on his expectation of life, were proper to be considered in an action brought by his personal representative. Upon the close of all of the evidence in the case the court below instructed the jury that, in so far as the alleged negligence in the maintaining of the building by the company at the mouth of the tunnel was concerned, the deceased had assumed the risk thereof, and that no recovery could be had on that ground.

The testimony was, without substantial conflict, to the effect that Bradshaw was a drunkard; but the court left it to the jury to say whether his incompetency by reason of his drunkenness was the proximate cause of Fleming's death, and whether his drunkenness and consequent incompetency were known to the deceased under such circumstances that he necessarily assumed the risk thereof by continuing in his employment with Bradshaw as a fellow servant; the defendant's answer having taken issue as to the alleged drunkenness of Bradshaw being the proximate cause of the death of the deceased, and also having affirmatively alleged that the deceased assumed the risk of the unfitness and incompetency of Bradshaw, and therefore could not recover. The answer also put in issue all of the other material averments of the complaint, and the plaintiff's reply took issue with the affirmative allegations of the answer. The defendant also objected at the threshold of the trial to the introduction of any testimony on the part of the plaintiff, on the ground that the complaint failed to state a cause of action, in that at the time of the accident in question there was no law of the state of Montana authorizing or permitting an action to be maintained for the death of a person by his personal representative or heirs.

It is conceded that no such action could be maintained at common law; but many of the states have enacted a statute authorizing an action for damages in such cases. Montana unquestionably did at one time; but for the plaintiff in error it is contended that prior to this accident that statute was repealed, and that no such action was ever thereafter authorized by the state of Montana. It appears that in January, 1872, the Legislative Assembly of the territory of Montana enacted a law similar to the English statute known as "Lord Campbell's Act"; section 981 of the Montana statute reading as follows:

"Whenever the death of a person shall be caused by a 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, then and in every such case the person who, or the corporation or company which, would have been liable if death had not

ensued, shall be liable for 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."

Section 982:

"Every such action shall be brought by and in the name of the personal representative of such deceased persons, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages, not exceeding twenty thousand dollars, as they shall deem to be fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person; provided that every such action shall be commenced within three years after the death of such person."

Comp. St. Mont. pp. 911, 912.

On the 16th of February, 1877, the Legislative Assembly of the territory of Montana enacted a Code of Civil Procedure, section 14 of which is as follows:

"Where the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Comp. St. Mont. 1887, p. 62.

These provisions of the statutes of Montana remained in force until the enactment of the present Codes of that state, which, under their provisions, took effect July 1, 1895. Section 3482 of the latter Codes is as follows:

"No statute, law, or rule is continued in force because it is consistent with the provisions of the Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued or any action or proceeding already taken, except as in this Code provided; nor does it affect any private statute not expressly repealed."

Section 3483 of the present Code of Civil Procedure of the state of Montana is in this language:

"Subject to the provisions of the next preceding section [section 3482 above quoted], and section 3455 and section 3456, the following statutes and parts of statutes are hereby repealed, to wit: * * * Also section 981 and section 982 * * * of the Compiled Statutes."

Section 3455, here referred to, reads as follows:

"No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions."

And section 3456:

"When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation

is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code."

Section 14 of the act of February 16, 1877, above quoted, was re-enacted in the Code of Civil Procedure of February 14, 1895, and is found in section 579 thereof in these words:

"When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

The argument for the plaintiff in error is that under the territorial legislation of Montana the cause of action for the death of a person was created solely by the act of 1872, above quoted; that the effect of the act of February 16, 1877, was only to prescribe who might sue for such damages; and that when the state of Montana, by the adoption of its Codes in 1895, repealed sections 981 and 982 of the Compiled Statutes, being the provisions of the act of 1872, and enacted only the above-quoted provisions of section 579 of the Code of Civil Procedure, it in effect took away any and all causes of action growing out of a death of a person. We are unable to give that construction to section 579 of the Code of Civil Procedure of the state. In the first place, we do not agree with counsel for the plaintiff in error that the sole purpose of section 14 of the act of 1877 was to prescribe who might bring an action growing out of the cause of action created by the act of 1872; for the latter act, as will have been seen by section 982 of the Compiled Statutes, provided, among other things, that "in every such action the jury may give such damages, not exceeding twenty thousand dollars, as they shall deem to be fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person," which provision was so far changed by the act of February 16, 1877, of the territorial legislation as to declare that in such action "such damages may be given as under all the circumstances of the case may be just."

When the state of Montana came to adopt its system of Codes in 1895, it enacted upon the subject in question the precise provision that had theretofore been adopted by the state of California in section 377 of its Code of Civil Procedure, under and by virtue of which the Supreme Court of California had theretofore, and since has, sustained a number of actions growing out of the death of individuals. See Beeson v. Green Mountain M. C., 57 Cal. 20; McKeever v. Market Street Ry. Co., 59 Cal. 294; Cook v. Clay Street Hill Ry. Co., 60 Cal. 609; Nehrbas v. Central Pacific Co., 62 Cal. 336; Wolford v. Lyon Gravel Mining Co., 63 Cal. 484. No decision of the Supreme Court of Montana to the contrary being brought to our attention, we are of the opinion that the statute of that state declaring that the heirs or personal representatives of a deceased adult person may maintain an action for damages for the death of such person when caused by the wrongful act or negligence of another, in which action such damages may be given as under all the

circumstances of the case may be just, is sufficiently broad and comprehensive to create a liability, though none existed at common law.

Nor is one so made liable for the death of another under two different measures of liability, one to the deceased and the other to his heirs, as is further contended by the plaintiff in error. Northern Pacific Railroad Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513. Whether such action be brought, as in the present case, by the personal representative of the deceased, or by his heirs, there can be but one recovery, and that may, by the express terms of the statute in question, embrace such damages "as under all the circumstances of the case may be just."

There only remains to consider whether the court below erred in leaving it to the jury to determine from all the facts and circumstances of the case whether the incompetency of Bradshaw, by reason of his drunkenness, was the proximate cause of Fleming's death, and whether his drunkenness and consequent incompetency were known to the deceased under such circumstances that he necessarily assumed the risk thereof by continuing in his employment with Bradshaw as a fellow servant. That the court below did not err in either of these respects is, we think, well illustrated by the case of Northern Pacific Railroad Company v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296. That case was brought by Mares against the railroad company to recover damages for personal injuries alleged to have been sustained by him while in the employ of the company, by reason of its alleged negligence. Upon the conclusion of all of the evidence the defendant moved the court to dismiss the action, which motion was denied, and thereupon the defendant requested an instruction to the jury to return a verdict for the defendant, which request was likewise refused. There was evidence in the case tending to show that one Bassett had been in the employ of the defendant as engineer in the yard where the plaintiff was injured for about a year; that during that time he had by his conduct frequently shown his negligence, recklessness, and unfitness for the place; that complaints had at different times been made of his negligent and reckless conduct to the defendant's representatives at Fargo; that, notwithstanding such complaints, he was retained in the same service, except during short intervals, when he had been discharged two or three times for misconduct; that the plaintiff at the time of the injury had only been in the employ of the defendant about two weeks, and only about one week of that time with Bassett; that he worked as night brakeman; that on the night of the injury, and about 15 or 20 minutes before the accident, the yardmaster called up the switching crew, who had been asleep for a short time, and ordered plaintiff to direct Bassett to move his engine so as to commence switching cars at the point named; that they were in haste to get ready for a train soon to come in from the East; that the plaintiff, as directed by the yardmaster, urged Bassett to move promptly, on account of which angry words passed between them; that thereafter, while under the direction of the yardmaster, they were backing some cars, and while he was standing on top of and near the rear end of the head car, which was the farthest from the engine, the plaintiff gave a signal to the en-

gineer to back seven or eight car lengths; that it was the duty of the plaintiff to give such signals and of the engineer to obey them, and to continue backing until he was signaled to stop; that when he had backed about three car lengths, without any warning to the plaintiff, and without any reason or necessity therefor, he very suddenly, recklessly, and negligently reversed his engine without shutting off the steam, giving the train so sudden and violent a jerk as to throw the plaintiff off and inflicted the injuries complained of. The Supreme Court said:

"We think the court was clearly right in refusing to give the peremptory instructions asked for by the defendant, that if the plaintiff knew, or even had opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, it was the plaintiff's duty absolutely to refuse to work with him any longer, and that his failure to do so would prevent him from recovering in this suit. The duty of the plaintiff under such circumstances is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a co-employé known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. The qualification was correct—that it was for the jury to say, from all the attending circumstances, whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his co-employé, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself and entail great injury and loss to others."

The judgment is affirmed.

TOOKER et al. v. ALSTON.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1907.)

No. 2,523.

1. FRAUD—ACTION FOR FRAUD AND DECEIT—SUFFICIENCY OF EVIDENCE.

Evidence that defendants falsely represented to plaintiff that there was a solid ore body under a tract of land on which they, with another, owned a mining lease, when in fact it had previously been mined until abandoned as practically worked out, and that they concealed an opening into the old workings, and by such means induced plaintiff to buy the interest of their co-owner and a part of the interest of one of defendants in the lease, which was practically worthless, was sufficient to sustain a verdict for plaintiff in an action for fraud and deceit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 8.]

2. SAME—DECEPTION CONSTITUTING FRAUD—DUTY TO INVESTIGATE.

The rule that a purchaser of property is bound to avail himself of the ordinary means of information to ascertain the character and value of the property, and that, if he does not, he cannot recover because of misrepresentations made by the seller, cannot be invoked by one whose active fraud prevented the making of such inquiries or investigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 21.]

3. DAMAGES—ACTIONS FOR FRAUD AND DECEIT—MEASURE OF DAMAGES.
The measure of damages recoverable in an action for fraud and deceit by which plaintiff was induced to buy property is the difference between the price paid for the property and its value at the time he bought it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 60–62.]

4. FRAUD—RELIANCE ON REPRESENTATIONS.
In an action for fraud and deceit inducing a purchase of property, it is not a defense that plaintiff made other investigation and inquiry respecting the property, if the fraudulent conduct of defendant was a material, although not the sole, inducement to the purchase.

5. SAME—EVIDENCE—FALSE REPRESENTATIONS TO OTHERS.
In an action for fraud and deceit in inducing plaintiff to buy property by false representations as to its character and value, evidence that defendants made similar representations to others to induce them to purchase is relevant and material.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 50.]

Sanborn, Circuit Judge, dissenting.

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

This was an action by W. W. Alston to recover damages from L. A. Tooker, D. B. Loy, and C. A. Reed for their fraud and deceit in inducing him to purchase interests in a mining lease. A trial to a jury resulted in a verdict and judgment for $6,500 against Tooker and Loy, who for convenience will be referred to in the opinion as the "defendants." There was no evidence that Reed participated in the conduct complained of, and the jury found in his favor. Tooker and Loy seek a reversal of the judgment against them. Attention will be confined to the ten assignments of error, though their brief takes a wider range and questions are argued that do not properly arise.

H. H. Bloss (I. V. McPherson, on the brief), for plaintiffs in error.

J. L. McNatt (A. E. Spencer and R. E. Scofield, on the brief), for defendant in error.

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

HOOK, Circuit Judge (after stating the facts as above). The denial of defendants' request for a directed verdict in their favor is presented by the first assignment of error, and the question is whether the verdict against them is sufficiently supported by the evidence. There was substantial evidence of the following facts:

The Boston-Aurora Zinc Company, a Maine corporation, as the owner of 10 acres of land in southwest Missouri, executed a mining lease thereof, dated November 18, 1904, to Tooker, Loy, and Reed. It required the immediate commencement and continuance of mining operations in a minerlike manner and in good faith, the installation on the premises within 90 days of a 100-ton concentrating plant, which should remain thereon and be operated, and the payment of a royalty of 15 per cent. Subject to these requirements and their continued observance, the lease ran for 10 years. It became effective May 13, 1905. Some years before there had been extensive mining operations on the leased ground at a depth of 120 feet below the surface, in part by means of a drift from adjoining property, and in part by a shaft or shafts on the leased ground, penetrating the drift. A large area had been mined and the valuable ore extracted. The old drift was

about 40 feet wide and from 25 to 40 feet in height. With the exception presently to be mentioned the mining operations had ceased about 5 years before the transactions between plaintiff and defendants, the mine had been abandoned as worked out, and the machinery and mining structures removed. In one place in the old drift, where it was about 40 feet in height, some mineral of value had been left in the roof and in a leg supporting the roof. The roof at this point was about 80 feet from the surface of the ground.

Within the year preceding the transactions involved in this case a couple of miners sunk a shaft, the bottom of which, being about 80 feet from the surface, penetrated this mineral. The rights they had, though it does not appear what they were, were sold to Tooker and Loy. From the bottom of the new shaft a drift was driven, resulting in the formation of a small chamber. During these operations the floor at the bottom of the shaft broke through into the old abandoned drift; the opening being about 3 feet in diameter. When defendants obtained the lease in November, 1904, they cast about to find a purchaser, and to make their proposition attractive it was necessary for them either to conceal the existence of the former mining operations or to minimize their extent and prevent those solicited to purchase from learning that in fact the ground had long since been practically abandoned for mining purposes. To this end the opening from the bottom of the new shaft into the old drift was concealed by boards upon which earth and mineral were thrown. It was represented that the new shaft was in virgin ground, in undeveloped territory, and therefore that the mine was of exceeding richness, requiring years to exhaust. Not far from the top of the new shaft a considerable area of the surface, about 100 by 150 feet, had sunk because of the withdrawal of support in the abandoned workings. The extent of this depression was so considerable it became necessary to account for it, and it was represented to be a "blow-out," a condition not infrequent in that mining country. A blow-out was understood to be due to natural causes, and not to subterranean mining operations. Among those upon whom these and other devices were practiced, and to whom the misrepresentations were made, was the plaintiff, a citizen of North Carolina, who as a traveling salesman visited the town in which defendants resided, and near which the mine was located, in January, 1905. The plaintiff was without experience and wholly unfamiliar with mines and mining operations.

An agent of defendants, who says he was similarly deceived by them, engaged him in conversation, spoke of defendants' mine. extolled its value, and introduced him to Tooker, who in turn induced him to visit the premises. Shortly before their arrival the son of Tooker, who was at the surface, shook the rope, and, having attracted the attention of the two workmen who were in the old drift, told them that his father had telephoned he was going to bring a man to look at the mine, and for them to come up into the new shaft and fix it up. One of these men testified that this was the agreed plan, and that they were working there merely for the purpose of keeping the lease alive; that the defendants said they desired to sell, and not to work, the mine. The two workmen came up, placed the boards over the opening, and scattered

some earth around the edges. They washed the walls off with water to give the ore an attractive appearance. Shortly afterwards the plaintiff went down the shaft, accompanied by the superintendent of an adjoining mine, to whom Tooker had introduced him. Tooker remained on the surface, as was his course on other occasions when he took prospective purchasers there. The superintendent said: "It just looks bully. It is just dandy—a bully good mine, or looks like it." When they returned to the surface, plaintiff asked him his opinion, and he replied: "It is a fine thing, if it is in solid ground." Tooker thereupon replied, "There is no question about it. It is in solid ground." Whilst plaintiff was in the town Tooker so attended him that he had little opportunity to secure disinterested advice. Tooker was more active than Loy; but the latter was cognizant of what was being done and assisted when occasion required.

Various misrepresentations were made of the richness of the mine, its value, and what could be done with it, for which, if alone regarded, an action might not have been maintained (Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Union Pacific v. Barnes, 12 C. C. A. 48, 64 Fed. 80; Kimber v. Young, 70 C. C. A. 178, 137 Fed. 744); but they are adverted to here for their relevancy to the entire transaction. They represented to plaintiff that Reed was a farmer living 25 miles distant in the country; that he was an undesirable partner, because he would not assist in putting up the mill required by the lease; and that his third interest could be bought for $4,000. Plaintiff was dissuaded from visiting Reed and trying to buy for a less sum. They also represented that they could incorporate, and that the property would stand a large capitalization. Finally plaintiff purchased the Reed interest, paying Loy, who assumed to act for Reed, $4,000 for it. The plaintiff then left, and did not return until April. During his absence Loy wrote him that he had put a price of $25,000 on the property. Plaintiff wired in reply his interest was not for sale. When he returned Loy refused to incorporate, and Tooker proposed to plaintiff that they buy Loy out. This was done, and plaintiff paid Loy $4,000 for two-thirds of his third interest; it being understood that Tooker purchased the remainder of Loy's interest at the same rate.

Though the bill of sale to plaintiff and Tooker recited the payment of $6,000, it is questionable whether Tooker's purchase was genuine, since at the time of the trial Loy appears to be still associated with Tooker in control of the property. Neither of them testified at the trial, and their versions of the transactions do not appear. Probably part of the $6,000 paid by plaintiff was for Loy's interest in an old mill bought and removed to the leased ground; but it appeared that as the result of both transactions plaintiff paid at least $7,000 for a five-ninths interest in the mining lease. There was also substantial evidence that the leasehold interest was practically worthless. The life of the lease depended upon continued mining operations conducted in a minerlike manner and in good faith, and also upon the continued maintenance and operation of a 100-ton concentrating plant on the premises. It is not as though plaintiff's interest were in the land itself, in which event he might safely await the invention of new processes for the profitable

reduction of low-grade ores or await discoveries of other veins of mineral in the ground. There was proof that the mine had been abandoned as worked out and no longer profitable, and that the mining, upon the results of which defendants relied, was the removal of mineral left in the old workings to support the roof. After a year's experience the most favorable showing of defendants was that the mine was "holding about even." It appeared, however, that they were in debt, and some of their bills were four or five months past due. The plaintiff, relying on what was said and done by defendants, suffered a loss of the difference between what he paid and the value of what he got at the time he got it. Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279. It was also shown that defendants, shortly before meeting plaintiff, attempted to deceive two other men, Stone and Moulton, by the same devices, but failed.

In conclusion: There was substantial proof that defendants fraudulently concealed and disguised the physical condition of the property in question; that, having done so, they made false statements, not promissory in character, nor of mere opinion, but as to existing facts within their knowledge, of which plaintiff was ignorant; that the statements were material, and were made with intent that plaintiff should rely thereon and be deceived; that plaintiff did rely thereon, and was deceived into paying over $7,000 for that which was of little or no value. Under familiar rules of law, such proof required submission of the case to the jury, and was sufficient to uphold their verdict for the plaintiff. There were evidences upon the surface of the ground of prior mining operations, which, had they been pursued by plaintiff, would have led to knowledge of the real condition of the property. The general rule is that a purchaser must exercise common prudence, and if he fails to avail himself of the ordinary means of information the law gives him no redress. Andrus v. St. Louis Smelting Co., 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054. But defendants cannot invoke this rule, because of their active efforts to conceal the condition of the mine, to thwart investigation and inquiry, and in misrepresenting the significance of conditions that were apparent. Such conduct brings the case within the salutary exception designed to avoid encouragement to fraudulent and deceitful practices. Strand v. Griffith, 38 C. C. A. 444, 97 Fed. 854; Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320. See, also, Stewart v. Wyoming Ranche Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439. It was no defense that part of what plaintiff was induced to purchase by defendants' fraud and deceit belonged to another party. Sigafus v. Porter, 28 C. C. A. 443, 84 Fed. 430.

The next four assignments of error relate to the refusal of the trial court to give certain instructions requested by defendants. The instruction set forth in the first of these was fully embodied in the general charge. The court was not required to repeat it, or to give it in the language of counsel. By the instruction in the next one counsel sought the declaration of a rule that if the plaintiff made an investigation himself, and consulted with others as to the condition of the mine or its value, there is a presumption of law that he acted

upon information so gained, and not upon the representations of defendants. There is no such presumption of law. In Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 56 Fed. 139, this court held that it was not a defense that plaintiff also made some other examinations and inquiries, if the conduct of defendants was a material, though not the sole, inducement to the transaction in question. In the case at bar the trial court charged the jury that it was incumbent upon the plaintiff to show that he relied upon defendants' representations, believed them to be true, and, so believing, acted thereon. In another the instruction asked and refused was that the jury should find for defendants unless it appeared that the mine was worthless. Obviously this is not the law. The instruction set forth in the fifth assignment was that the jury should "disregard the testimony set out in the deposition of John B. Stone." This, also, was rightly refused. It was not denied that the deposition was properly taken upon sufficient notice. The real point of defendants' objection was that Stone was allowed to testify that, shortly before the transaction with plaintiff, defendants attempted to induce him to purchase an interest in the lease, and in doing so made the same representations and used the same devices for concealment, which he described. Without considering other reasons for sustaining the action of the court, it is sufficient to say that Stone's testimony was relevant and material. Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340, and cases there cited.

In view of familiar and oft-repeated rules of practice, needing no citation of the authorities, the remaining five assignments of error may be disposed of by describing them briefly. The sixth assignment challenges as an entirety a substantial part of the court's charge, embracing different rules applicable to different phases of the case. The seventh is as follows:

"The court erred in the entire charge to the jury, and for purposes of abbreviation it will not be copied in this assignment of errors."

In the eighth, complaint is made in general terms of the admission of the testimony of three witnesses upon various subjects. In the ninth, it is said that the court erred in entering judgment on the verdict in favor of plaintiff, when by the law of the land the judgment ought to have been for the defendants. And the tenth is that the court erred in overruling defendants' motion for a new trial.

The judgment is affirmed.

SANBORN, Circuit Judge (dissenting). My understanding of the facts and of the law of this case, briefly stated below, is such that I am unable to concur in the opinion of the majority. The only averments in the complaint of actionable misrepresentations were (1) that the new shaft was sunk in virgin or undeveloped ground; (2) that the ore in the sides and bottom thereof would easily run 10 per cent.; and (3) that this ore would continue on downward for at least 40 feet, growing better under normal conditions. There was no substantial evidence that the third alleged misrepresentation was ever made. There was no substantial evidence that the second alleged misrepresentation was false. The undisputed evidence was that

the new shaft was in virgin undeveloped ground to its full depth, which was about 80 feet, but that there was a hole in the bottom of it into the old drift beneath, and that this hole had been covered with planks, and earth when the plaintiff inspected it. The undisputed evidence was that he knew, before he inspected the shaft and before he bought this property, that there had been a mill upon it, and that a run of ore beneath the 80 feet, through which the new shaft was sunk, 40 feet in height, across this land at the 120-foot level, had been worked out. The old shaft was about 80 feet distant from the new shaft, and he had seen this upon the ground, and the cave-in, the edge of which was within a few feet of the new shaft. He testified, and this portion of his testimony was not contradicted:

"Q. You stated in your direct examination that one of these 'runs,' as you call it, northeast and southwest, across there had been worked out—one of these runs of ore? A. Yes, sir; that was 40 feet or so. Q. Who told you that? A. L. A. Tooker. Q. Tooker told you that the run had been worked out? A. Yes, sir; Tooker and his son both told me that first, in the beginning, and Loy, too, because when we went up town I always met him and told what I had seen, and what had been said and represented. It was more than natural, I suppose, I went to tell them parties, and we were partners— Q. Just answer the questions. Then you knew, from what Mr. Tooker told you, there had been a run there worked out through that ground below there—you knew that? A. Yes, sir; he told me there was $25,000 taken out of there. It run direct 40 feet, too. Q. How deep was that run of ore through that ground? A. I don't know, only just what be claimed. Q. I am asking what he claimed? A. That it was, well, 80 feet ores here, and then it was 40 feet more. Q. Below that? A. Yes, sir; that would be 120 feet. Q. Then the run of ore he claimed was 120 feet? A. Yes, sir; 120 feet, I suppose. That is my best recollection it is that; but there is mud in it 12 or 15 feet there."

He was not a stranger in Joplin, where this land was situated. He had been selling whips to customers in that town and visiting it yearly for several years. Before he made his first purchase he inquired of his customers about the defendants, and took the manager of an adjoining mine down into the new shaft, and inquired of him about this mine and about the one which adjoined it. With all this knowledge he bought one-third of the lease in January, 1905, and paid $4,000 for it. The plaintiff bought subject to the rule, "Caveat emptor." Notice of facts and circumstances sufficient to put a reasonably prudent person upon inquiry is notice of all the facts which a diligent inquiry would have disclosed. The facts that there had been a mill upon this property, which had been removed; that there was an old shaft, and a cave-in upon it; that the new shaft was sunk but 80 feet; that $25,000 had been taken from a run of ore in this land below the 80-foot level; and that that run had been worked out—constituted ample notice of the extent and character of the old workings, because it was such notice as would have inspired an ordinarily prudent man to investigate and learn their extent and character; and hence it estopped the plaintiff from asserting any damage from the alleged misrepresentations about them, and threw the risk of them upon him, because his failure to learn them was the result of his own failure to comply with the rule, "Caveat emptor." The purchaser assumes the risk of defects in the article bought of which he has, or by reasonable diligence may obtain knowledge.

In April, 1905, about three months after the first purchase, the plaintiff and Tooker bought another third of this property for $6,000. The plaintiff bought and paid for two-thirds of this third, and Tooker bought and paid for one-third of it. The only averment of any additional misrepresentation made to induce this second purchase was that Tooker falsely pretended to buy his third; but the record is barren of evidence that he did not actually purchase it. The bill of sale ran to Alston and Tooker. Alston and Tooker both made the note for $2,667 in part payment of the purchase price.

There is another significant fact, which should not be overlooked in the determination of this case. This was not a sale of a lease of a barren mine. The evidence established the fact that, after Alston purchased, ore of the value of $19,000 was taken out of the mine before the trial. It is true that there was evidence that the mining operation had been holding about even, counting expenses and product; but there was uncontradicted evidence that the owners were still operating the mine, that at the time of the trial they had 100 tons of paying ore broken down and were working upon a face of good mineral, 25 feet high and 12 to 20 feet wide. When the plaintiff purchased, he thought the lease was worth from $12,000 to $18,000; but it was a lease of a mine, and its value was necessarily unknown. It could be determined only by a thorough exploration of the land, by subsequent prospecting or working. The subsequent work demonstrated that there was $19,000 worth of ore in the mine when he purchased his interest in the lease. The remaining value in it is still unknown, because valuable ore is in sight and still remains to be removed. The burden was upon the plaintiff to prove that the lease was worth less than $12,000 or $18,000, and how much less; and there seems to me to be no sufficient evidence of the plaintiff's damage, if he suffered any.

In view of the indisputable facts that Alston knew that there had been a run of ore worked out upon the 120-foot level, beneath the 80-foot level within which the new shaft was sunk, from which $25,000 worth of ore had been taken from this land, and that there had been an old shaft upon it, which he saw before he purchased, it seems to me that there was no substantial evidence in this case to sustain a verdict in his favor in the light of the decisions of the Supreme Court in Slaughter's Administrator v. Gerson, 13 Wall. 379, 384, 385, 20 L. Ed. 627; Southern Development Company v. Silva, 125 U. S. 247, 252, 8 Sup. Ct. 881, 31 L. Ed. 678; Farnsworth v. Duffner, 142 U. S. 43, 48, 12 Sup. Ct. 164, 35 L. Ed. 931; Shappirio v. Goldberg, 192 U. S. 232, 241, 24 Sup. Ct. 259, 48 L. Ed. 419.

2. There was substantial evidence that the plaintiff made an independent investigation of the character, condition, and value of the mine before he bought his interest in the lease upon it, and the court refused to charge the jury in response to the request of counsel for the defendants that, if they believed that the plaintiff made such an independent investigation and that the defendants made false representations to him before the purchase, the law presumes that he acted upon the results of his independent investigation, and not upon the misrepresentations of the defendants, and that if he acted upon the former they must find for the defendants. It is true, as the majority of the court

suggests, and as we held in Sioux Nat. Bank v. Norfolk State Bank, 56 Fed. 139, 5 C. C. A. 448, that if a false representation is a material, but not the sole, inducement to a contract or transaction, the party injured may sometimes maintain an action upon it; but that is not the question which the request of the counsel for the defendants presented here. That question was whether, when there have been false representations and an independent investigation before a purchase, the legal presumption is that the buyer acted upon the false representations or upon his own investigation. There is no doubt that if he acted solely upon his own investigation he could not recover from the party who made the false representations. Proof that the false representations induced the purchase is essential to a right of recovery. The question seems to be susceptible of but one true answer. The false representations and action induced by them are each essential elements of an alleged fraud. Fraud is never presumed. The legal presumption always is that a fraud and the elements of it do not exist until each of them is clearly proved. On the other hand, there is no wrong or fraud in an independent investigation by a purchaser and his action thereon. That is the course which the rule, "Caveat emptor," requires the purchaser to pursue, and it is the natural and customary method followed by buyers of reasonable prudence. The logical, and to my mind the inevitable, result is that where there have been false representations, and an independent investigation by a purchaser, the legal presumption is that he acted upon his own investigation, and not upon the false representations, and that if he did so in this case the defendants were not liable. The refusal to give this charge seems to me to have been fatal error. Anderson v. McPike, 86 Mo. 293, 300; Farrar v. Churchill, 135 U. S. 609, 615, 10 Sup. Ct. 771, 34 L. Ed. 246, and the authorities from the Supreme Court cited supra; E. Bement & Sons v. La Dow (C. C.) 66 Fed. 185, 188; Billings v. Aspen Mining & Smelting Co., 51 Fed. 338, 348, 2 C. C. A. 252; Fauntleroy v. Wilcox, 80 Ill. 477, 480.

3. The testimony of John B. Stone was, in my opinion, immaterial and prejudicial to the defendants, and the court should have stricken his deposition from the record. The evidence he gave detailed statements made to him by the defendant Tooker in November, 1904, in an attempt either to sell an interest in the lease to him or to induce him to sell it for the defendants; but the only material statement made to him, which was proved to be false, was that there had been no mining in the land below the level of the bottom of the new shaft, and this testimony was immaterial in this suit, because no such false representation was made to Alston, but, on the other hand, Tooker told him that the run of ore below the 80-foot level had been worked, and $25,000 worth of ore had been taken from it before Alston made his purchase. The other statements of the defendants which Stone recited were immaterial, because they were not proved to be untrue, and because they were not calculated to deceive, and did not deceive him. His entire testimony was, in my opinion, the relation of a transaction between other parties than the plaintiff, hearsay and immaterial.

For these reasons I think the judgment ought to be reversed, and that a new trial should be granted.

HEROLD, Internal Revenue Collector, v. KAHN et al.

(Circuit Court of Appeals, Third Circuit. February 7, 1908.)

No. 49.

1. TAXATION—PAYMENT OF TAXES UNDER PROTEST—RECOVERY.

When taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal, and intends to sue to compel repayment, sufficient foundation for such suit is established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1003, 1004.]

2. INTERNAL REVENUE—INHERITANCE TAX—PAYMENT UNDER PROTEST—RECOVERY.

Payment of an inheritance tax under protest, upon the internal revenue collector's threat that, unless it should be promptly paid, it would be collected with a penalty and interest at 1 per cent. per month, was made under such duress as made the payment involuntary, for the purpose of a suit to recover it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, §§ 83, 84.]

3. SAME—ASSESSMENT OF TAX—VALUE OF LIFE ESTATE—MORTUARY TABLES.

War Revenue Act June 13, 1898, § 29, 30 Stat. p. 464 [U. S. Comp. St. 1901, p. 2308], imposes inheritance taxes in certain cases, but provides no method of assessing the value of life estates. Section 31 (30 Stat. p. 466 [U. S. Comp. St. 1901, p. 2310]) makes all administrative, etc., provisions of law, including laws governing the assessment of taxes not theretofore especially repealed, applicable to the act. Rev. St. § 3447 [U. S. Comp. St. 1901, p. 2277], provides that, when the mode of assessing any tax imposed is not provided for, the Commissioner of Internal Revenue may establish the same, etc. *Held* that, even if mortuary tables may be resorted to in ascertaining the value of a life estate where the life tenant is living, the value should be based upon the actual duration of the tenant's life, and not upon a fictitious duration derived from such tables, where he has died before the assessment, though his death is unknown when the assessment is made, and though under section 30 the tax related back to the time of testator's death.

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

See 147 Fed. 575.

Harrison P. Lindabury, for plaintiff in error.

Robert H. McCarter and Conovers English, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This case comes before the court on writ of error to the United States Circuit Court for the District of New Jersey, to review a final judgment of that court, entered December 11, 1906.

Suit was brought by the defendants in error, in the Supreme Court of the state of New Jersey, against the plaintiff in error, to recover legacy taxes assessed and paid under the act of Congress of 1898, known as the "War Revenue Act." The suit was removed, under the statute in that behalf, to the court below, and finally resulted in the judgment now under review. The case was tried by the court below without a jury, trial by jury having been, by agreement of the parties,

expressly waived. Pursuant to the request, of counsel, the court made certain findings of fact in the case, and entered the same as a special verdict therein. From these findings of fact, we summarize the following:

The defendants in error are the duly qualified executors of the last will and testament of Abraham Wolff, who died October 1, 1900, leaving to survive him two daughters as his only issue, viz., Addie W. Kahn and Clara W. Wertheim. By his last will and testament, the testator gave all the rest, residue, and remainder of his estate, real and personal, to his trustees, the survivors and survivor of them, and his successors, upon the following trusts:

"1. To divide, set apart and hold the same in as many equal portions or shares as I shall leave daughters me surviving and the issue of a deceased daughter, allotting, however, and turning over to the issue of a deceased daughter only the portion or share which their parent would have taken if living, that is to say per stirpes and not per capita, and as to the share of a surviving daughter, to invest and keep invested the personal estate and proceeds of real estate of such share, if sold, in such securities as by the Thirty-sixth article of this my will they are authorized to invest in.

"2. To collect and receive the rents, issues, interest and income of the portion or share so to be set apart for each of my said daughters and to apply the same to her use so long as she shall live free from any control of her husband.

"3. Upon the death of such daughter leaving issue her surviving, to dispose of her share or portion among such issue in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue in shares per stirpes and not per capita, and if she shall leave no issue her surviving, to continue to hold her share or portion for the benefit of her sister, if living, for life, in trust to collect and receive the rents, issues, interest and income thereof, and to apply the same to her use so long as she shall live, and upon or in case of her death, to divide the same to and among her issue, if any, in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue, in shares per stirpes and not per capita, and in default of such issue to divide the same to and among the following persons in the proportions herein provided, that is to say: [naming them]."

On May 19, 1903, the said executors, pursuant to the requirement of section 30 of the war revenue act (Act June 13, 1898, c. 448, 30 Stat. 465 [U. S. Comp. St. 1901, p. 2308]), filed with the plaintiff in error, as internal revenue collector, a schedule and return, together with an affidavit, showing the legacies and distributive shares arising from the personal property of every kind belonging to the estate of Abraham Wolff, including therein the life interests of the two daughters, under the foregoing sections of his said will. This affidavit was filed with the return, for the purpose of bringing to the attention of the collector certain items not included in the return, which the executors claimed were not taxable. These disputed items have no relation to the claim in suit. According to this return, the amount of the said testator's residuary estate was $5,295,537.94. The inventoried valuation of one-half of the said residuary estate, which, by the terms of the said will, was trusteed for the benefit of the said Clara W. Wertheim, was the sum of $2,647,768.97. By a letter dated July 10, 1903, the executors were advised by the collector that the commissioner at Washington was not satisfied with the return, in reference

to matters having no bearing on the issue before us, and they were requested to forward a new return, for transmission to the department.

Following this, correspondence ensued between the attorneys of the executors and the said collector, and also the Commissioner of Internal Revenue, at Washington, with the result that Mr. Carnochan, one of said attorneys, went to Washington on the 13th of August, 1903, and had a personal interview with the solicitor of the Internal Revenue Department, in reference to the various items which the executors claimed should not be taxed, but which the department claimed were taxable. Mr. Carnochan, at this interview, stated to the said solicitor that, until the legal questions relating to the taxability of said items were determined, it would not be possible to file a new return. At the same time, he stated that the executors were willing to have the legal questions involved determined in any suitable way. The solicitor stated that he would consider the matter. Under date of September 2, 1903, the attorneys for the executors wrote to the Commissioner of Internal Revenue at Washington, referring to the interview of Mr. Carnochan with the solicitor of the department, and stated that:

"He [Carnochan] was informed that the course of business was such that the matter could not be formally reported to your department from the collector of Newark, until the latter part of last month, August, and that then the matter would be taken up and a determination reached as to certain items, the taxability of which was more or less discussed with the solicitor."

The letter then asks:

"Is there anything further, by way of proof or brief, that your department desires in the matter? We understand that no assessment has yet been made."

Under date of September 8, 1903, the said attorneys received the following letter from the deputy commissioner:

"This office is in receipt of your letter of the 2d inst., relative to the estate of Abraham Wolff, in which you ask if anything further, by way of proof or brief, is desired in the matter. In reply, you are advised that no further information is desired, and that action will be taken in the matter in the near future."

No further information or communications were had, from either the collector or the Internal Revenue Commissioner, until under date of October 26, 1903, a letter from the collector, the plaintiff in error, was received by the executors, inclosing a notice and demand for taxes assessed against the estate of Abraham Wolff, and addressed to the defendants in error, as executors. This notice was as follows:

"You are hereby notified that a tax under the internal revenue laws of the United States, amounting to $107,398.16, the same being a tax upon legacies and distributive shares, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. Demand is hereby made for this tax, which is due and payable within one year of death of testator when death occurred on or after July 1, 1901, and in case testator died before July 1, 1901, tax must be paid before July 1, 1902, but in all cases payment of tax before distribution is imperative and unless paid on or before the time when due and payable, it will be my duty to collect the same with a penalty of 5 per centum additional, and interest at 1 per centum per month.

"Payment may be made to me at Newark P. O. Building.

"$107,398.16. Herman C. H. Herold, Collector."

Under the same date, the attorneys for the executors received a like letter from the collector, inclosing a copy of said notice. Following the receipt of this notice and demand one of the said attorneys, on behalf of the executors, on November 4, 1903, personally called at the office of the plaintiff in error, collector as aforesaid, with a certified check for the amount of money specified in the notice, and paid the tax. At the same time, he stated on behalf of the executors that the tax was paid under protest, and in addition, filed with the said collector a written protest, in which they asserted that the whole of the said tax was illegal and invalid, illegally and improperly assessed, that they paid the same only under protest, and only because of the requirement of the department, and to prevent proceedings to compel collection, and for interest and penalty. They then proceed, as follows:

"They particularly protest that the said tax is illegal and invalid, and is illegally and improperly assessed, so far as it includes a tax on life interests created by said will, and they pay the same only under protest, and only for the reasons above given."

The said Clara W. Wertheim, the life beneficiary of the share of the residuary estate here in question, died without issue on the 15th day of August, 1903, 2 years, 10 months and 14 days after the death of the said testator, and 2 months and 20 days before the said payment of tax. On April 4, 1904, a petition was filed by the executors, asking to have $26,637.59, of the total amount paid by them, refunded. This petition did not embrace the taxes, for which recovery is sought in this suit, but only such part as had been in dispute between the executors and the commissioner before the assessment on the so-called residuary life estate was made. The claim made under the foregoing petition was subsequently on April 11, 1905, allowed to the extent of $13,983.36. Almost immediately thereafter, and before payment to the executors of the amount of such allowance, the plaintiff in error was notified by them that they intended to file a further petition, asking that another portion of the taxes paid be refunded. This notification was given, in order that the department might withhold, if it cared to, the rebate allowed under the first petition, until the second petition could be filed and its merits determined. Such a petition was subsequently filed, on May 15, 1905, for the return of $37,673.13, with interest, being the overpaid tax in suit herein. There was considerable correspondence between the counsel of the executors and the department, with reference to the subject-matter of this second claim, but it was later altogether disallowed, and this suit was thereupon instituted.

Upon this state of facts, the plaintiff in error makes in this court two contentions:

First. That the payment of the tax in question, assessed upon the interest of Mrs. Wertheim in the residuary estate of her father, though made under protest, was not involuntary, and therefore no recovery can be had.

Second. That, notwithstanding Mrs. Wertheim's death prior to the assessment of the tax upon her interest, as aforesaid, said tax was properly assessed as on the value of the life estate, computed from the date of the death of the testator by the life tables adopted and used for that purpose by the Department of Internal Revenue.

In support of the first contention, counsel for plaintiff in error cites a number of decisions of the Supreme Court, from which the proposition is sought to be deduced that, in addition to the protest, there must be disclosed something like actual duress, under which the payment sought to be refunded is made, as, where duties are paid in order to obtain possession of the goods held in the custody of a collector of customs. Undoubtedly in such cases, and especially where the goods are perishable, the owner or claimant is compelled to pay the duties, in order to obtain possession of his property and avoid the loss incident to its detention. But these are not the only cases in which payment under protest will support an action for a refunding of money paid. Every demand by one clothed with official legal authority to make the demand, imposes a certain compulsion on the one upon whom the demand is made. Such a demand is always exigent and places a recusant in a position of disadvantage. Especially is this so in regard to the payment of taxes, state or national. The proper administration of the fiscal affairs of the government, require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that encourages the payment under protest of disputed taxes. Though there is some conflict in the dicta of the Supreme Court, we think that the true doctrine is that, when taxes are paid under protest that they are being illegally exacted, or with notice that the payor contends that they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for such a suit has been established. Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 42 L. Ed. 432; City of Phila. v. Collector, 5 Wall. 720, 731, 18 L. Ed. 614.

In the case at bar, however, there was more than the simple payment of the tax under protest as to its illegality, as it was paid upon the demand of the collector, coupled with a threat that unless promptly paid, the same would be collected with a penalty and interest at 1 per centum per month. Payment made upon such a demand from a government official, acting within the general scope of his authority, constituted such a duress as clearly made such payment involuntary. This view disposes of the question, without reference to the consideration upon which the learned judge of the court below properly enough, if we assume his finding of fact in that respect to be correct, based his opinion, viz., that there was not that full knowledge of all the facts and circumstances of the case as would make the payment voluntary, in that the fact of the death of the life tenant before the assessment was made was not known to the plaintiffs below.

We come now to the more important question, as to the valuation made by the plaintiff in error of Mrs. Wertheim's beneficial interest in her father's residuary estate. As appears from that part of the will recited above, the testator's whole residuary estate, real and personal, was given to trustees, and the survivor of them to divide, set apart and hold the same in as many equal portions or shares as he should leave daughters to survive him, and to invest and keep invested the personal estate and proceeds of real estate, if sold, of each share, and "to collect and receive the rents, issues and income of the portion or share so to

be set apart for each of my said daughters, and to apply the same to her use so long as she shall live, free from any control of her husband." No question is made in this respect, and it is therefore assumed that Mrs. Wertheim, under this provision of her father's will, had a beneficial life interest in the corpus of the fund or estate, the income of which she was to enjoy during her life. The pertinent portions of sections 29 and 30 of the war revenue act of 1898, are as follows:

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say," etc.

"Sec. 30. That the tax or duty aforesaid shall be due and payable in one year after the death of the testator, and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector," etc.

It will be remembered that a return was made by the executors, pursuant to the requirement of section 30 of the said war revenue act, and filed with the plaintiff in error, as internal revenue collector, May 19, 1903. The executors had qualified as such under the will of the testator, November 7, 1900, and this return, therefore, was filed about 2½ years thereafter. As the estate was large, presumably the interval was occupied in reducing it into possession, so as to be able to ascertain the amount of the residuary estate, in the income of which the daughters were interested. At all events, no demand seems to have been made upon them in this interval, and they certainly have not disobeyed the injunction of the statute, that no payment or distribution to legatees or parties entitled to a beneficial interest should be made before payment of the tax to the collector. As we have seen, the return of May, 1903, was not satisfactory, and resulted in a correspondence and personal in-

terviews between the attorneys for the executors and the officers of the Revenue Department, extending over two or three months. It is not denied that no assessment was made of the tax to be collected on Mrs. Wertheim's interest until about October 26, 1903, or at least two months after her death, when the demand was made from the executors for a sum which included a tax upon what was claimed to be the value of Mrs. Wertheim's life interest in the residuary estate under her father's will.

The inventoried amount of one-half of said residuary estate being returned as $2,647,768.97, the Commissioner of Internal Revenue assessed the clear value of the life interest, as computed under the life tables, to be $1,870,367.08, upon which the tax prescribed by section 29 of the said revenue act was at the rate of $2.25 per hundred, and amounted to the sum of $42,081.91, and this was the sum which was paid by the executors under protest November 4, 1903. No method of assessing the value of such a life interest is prescribed by the statute of 1898. It is claimed, however, by the Commissioner of Internal Revenue, that, inasmuch as section 31 of the act makes all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes not theretofore specifically repealed, applicable to said act, the Commissioner, under section 3447 of the Revised Statutes [U. S. Comp. St. 1901, p. 2277], has the right to prescribe the mode of assessing taxes, and that under this authority mortuary tables may be resorted to, for the purpose of ascertaining the present value of a life estate. We may assume for present purposes that this contention on behalf of the plaintiff in error, is correct, but it does not follow that such tables can be resorted to or used to ascertain a life expectancy, when the period of that life has already been determined. No implication of authority for such a practice, can be derived from the statute, nor from any necessity which may exist in the case of a life still continuing. It is true, that when resort is had to such tables to assess the value of a life interest of a beneficiary still in being, it may happen that such life terminates after such assessment and payment of the tax, at a time far within the expectancy fixed by the life tables. Such hardships cannot be avoided, but at the date the assessment in this case was made, the life in question had already determined, and its precise duration as a basis of valuation was fixed. This fact could not be ignored whenever brought to the attention of the proper taxing authorities, and the fact that it was not known at the time of the assessment, cannot alter the requirements of the situation.

The contention is made that, inasmuch as the statute provides that the tax shall be due and payable in one year after the death of the testator, and shall be a lien upon all his property from that date, the tax, whenever imposed, relates to that time. Upon this point, we cannot do better than quote from the opinion of the learned trial judge:

"The defendant contends that the interest of the deceased in the estate was subject to the tax from the time of the death of the testator, and that whenever imposed the tax related back to that time; nevertheless the clear value of each interest had to be ascertained, and as the interest to be assessed in this case was a life interest, and its value depended upon the duration of a life, such duration had to be determined, and it was just here that the mistake

was made; it would hardly be pretended in reason, that if the life tenant had died the day after her father, that a tax, the amount of which had been thereafter determined by the use of mortality tables, would be legal even though it be admitted that such tax rightly imposed would relate back to the death of the parent. The duration of life in the case supposed, would have been determined and the value of the life interest ascertained by its known duration. Each interest liable to taxation must be valued independently. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. As already said, life tables are not the best evidence or conclusive evidence, their use is only justified when no better evidence is obtainable. Cases somewhat similar to the one at bar, but arising previously thereto, were brought to the attention of the court by counsel, from which it appeared that the Commissioner of Internal Revenue had in such cases granted like relief to that sought in this case; but when the facts in this case were brought to his attention for review, his reply was that the cases above referred to were either erroneous, or had been overruled, presumably by himself."

The reasoning contained in the opinion of the learned trial judge is clear and convincing, and fully supports the conclusion reached by him, that the value of Mrs. Wertheim's life interest in the residuary estate of her father, should be based upon the actual duration of her life, and not upon a fictitious duration derived from the life tables.

The judgment of the court below is affirmed, subject to the correction of errors, if any, in mere calculation on the basis hereby approved.

NATIONAL BANK OF COMMERCE v. WILLIAMS et al.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1907.)

No. 1,656.

BANKRUPTCY—LIENS—CONDITIONAL SALE CONTRACTS.

A series of notes or contracts executed by a lumber company on the delivery to it of rails and other materials for the construction of a logging railroad, each calling for the payment of a sum stated, describing the property delivered, and providing that the title should remain in the seller until full payment was made, and that any equity therein acquired by the maker by reason of partial payments should stand pledged for the remainder due and be held by the maker as trustee, were valid and enforceable contracts under the law of Louisiana, and, on the bankruptcy of the company after having made partial payments, constituted a lien on the property described for the remainder due thereon.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Western District of Texas.

M. W. Davis and V. M. Clark, for petitioner.

C. A. Keller, George R. Gillete, and William C. Berry, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On May 1, 1903, J. E. Brady, of the city of Toomey, state of Louisiana, had lumber mills at that place known as the "Toomey Lumber Mills." On the date above named he made, at Houston, Tex., with H. E. Miller, a representative of Walter A. Zelnicker Supply Company, a contract to buy 1¼ to 1¾ miles of 20-relay iron rails, and such splices as are with them, at prices

named f. o. b. Fants, Tex., H. E. Miller's inspection to govern, with freight allowed to Toomey, La.; one 13-ton narrow-gauge Shay locomotive, at a price named, Walter A. Zelnicker Supply Company inspection to govern; with other material described in the contract; providing for a cash payment on acceptance of the contract, and for the giving of four notes for the balance of the purchase price, specifying dates, etc.; and further providing that "for the purpose of securing the payment of said notes, the buyer is to execute and deliver to the seller, at the time of tender of bill of lading as aforesaid, a deed of trust or mortgage on the property covered by this contract." On December 17, 1903, the Brady-Stein Lumber Company, writing from San Antonio, Tex., to the Walter A. Zelnicker Supply Company, St. Louis, Mo., say:

"We take pleasure to notify you that we have completed the organization of the undersigned stock company which has assumed all assets and liabilities of Mr. J. E. Brady at Jacksonville, as shown on the books of his plant known as the Toomey Lumber Mills at that place. Mr. Brady will remain with the company as director and superintendent and as the largest individual stockholder of the same."

On February 1, 1904, at Jacksonville, La., Walter A. Zelnicker Supply Company contracts in writing to sell, and Brady-Stein Lumber Company, of the city of Jacksonville, state of Louisiana, contracts to buy certain steel rails described, and splices complete with bolts, at prices named f. o. b. Pittsburg, Pa., subject to acceptance by Walter A. Zelnicker; providing for the payment of one-fourth of the price on tender of bill of lading, and for, at the same time, giving three notes for the balance of the purchase price, specifying the due dates. The contract of May 1, 1903, and of February 1, 1904, both in writing, provide that, "for the purpose of securing the payment of said notes, the buyer is to execute and deliver to the seller, at the time of tender of bill of lading as aforesaid, deed of trust or mortgage on the property covered by this contract." Early in February, 1905 (the exact date not shown), the Brady-Stein Lumber Company made a general assignment to a Mr. Gross for the benefit of its creditors. Thereupon an involuntary petition in bankruptcy was filed against the company, and the referee appointed the respondent, Mason Williams, receiver of the company's estate, and he, as such receiver, took charge of the Toomey Lumber Mills and the tramway in connection therewith. Brady-Stein Lumber Company was duly adjudged a bankrupt on the 16th day of February, 1905, and Mason Williams was then appointed trustee and qualified. On March 4, 1905, the Galveston Hat & Shoe Company, one of the interveners and respondents, appeared as a creditor and asked and obtained certain relief, and on the same day, with the consent of that creditor (and no other creditor objecting), the referee made an order authorizing and directing the trustee to operate the mill property and tramway as a going concern. On the 3d of October, 1905, the petitioner filed with the referee its application to have the property involved in this cause set aside to it upon the following state of facts, which having verified by the record, we adopt from the petitioner's brief, viz.: On December 1, 1903, September 1, 1904, and

May 25, 1904, the Brady-Stein Lumber Company, through itself and J. E. Brady, executed its several written obligations to Walter A. Zelnicker Supply Company, of St. Louis, by the terms of which said Walter A. Zelnicker Supply Company bound itself to deliver, and did thereafter deliver, material described in the written obligations to the bankrupt at its place of business in Calcasieu parish, in the state of Louisiana, where the bankrupt then conducted a mill for the manufacture of lumber. This material was used by the bankrupt in the construction of a tramway which was built in connection with the mill and for use in hauling logs to the mill. These writings obligated the bankrupt to pay to Walter A. Zelnicker Supply Company, or order, the purchase money for the materials in several different installments at the times stipulated, and in which is contained the following provision:

"It is agreed and understood that the above described property is to remain the property of the payee, or its assignee, and whatsoever equity we may be entitled to in same by virtue of any payments thereon, is hereby pledged to said payee, or its assignee, and held by us as their trustee until all of said notes shall have been paid. In the event of any of said notes not having been paid at maturity, the payee or its assignee may, without further notice to us and without any liability whatsoever for trespass, take possession of the above said property for its own benefit."

The first clause in each of these writings is in the nature of a promise to pay to the order of the Walter A. Zelnicker Supply Company certain sums with interest at the National Bank of Commerce in St. Louis, Mo. (except one payable at New Orleans), providing that, if placed with an attorney for collection, the makers agree to pay 10 per cent. additional on the amount as attorney's fees, and that the makers and indorsers each and severally waive presentation for payment, protest, notice of protest, and nonpayment, each reciting also that it is one of a series of like tenor and date given to secure certain sums of money, describing the materials. Thereafter the payee transferred and assigned, for a valuable consideration, to the petitioner each and all of these notes, as well as all of the payee's right, title, and interest in and to the property therein described. The bankrupt defaulted in the payment of $2,971.37 of the purchase money which was due before the adjudication in bankruptcy. The bankrupt had possession of the property involved in this suit at the time it made the general assignment referred to, and appears to have had possession at the time the referee appointed respondent Williams receiver, who, as such receiver and as trustee, held possession thereof until the same was sold by consent of parties and order of the referee hereafter noticed. There appear to have been nine of these notes executed, eight of which are claimed by the petitioner, and one was held by the W. A. Zelnicker Supply Company of Mobile. All of the notes, except two, became due before the adjudication of bankruptcy on February 16, 1905; one of each series of notes was recorded in the parish of Calcasieu, La. In addition to its claim for the property, and altogether subject thereto, the petitioner pleaded in the alternative, in a second count, for the enforcement of its lien upon the property as a secured claim for the amount remaining unpaid thereon. Before the hearing of this applica-

tion by the referee, a sale of the property in controversy for the sum of $1,250 was approved by the referee, and his order confirming the sale was duly entered, and the proceeds are now in the hands of the trustee awaiting the determination of this litigation. The petitioner claims all of the property which brought the above sum (having furnished all of the material which went into the construction of the property sold), except that material which is described in the note dated September 30, 1903, payable at the New Orleans National Bank, New Orleans, La. It is conceded by the petitioner that this material was furnished by the Walter A. Zelnicker Supply Company of Mobile, a different corporation from the payee in all the other notes. The interest of the Alabama corporation is determined by the decree of the referee, who applied to it the sum of $681.28 out of the proceeds of the sale of the property.

The trustee in bankruptcy replied to the application of the petitioner with general and special demurrers and special answer and general denial, disputing its right to recover on either its first or second count. The Galveston Hat & Shoe Company and C. M. Campbell & Sons, by leave of the referee, intervened and presented pleadings substantially the same as the pleadings of the trustee, except that each sought the enforcement of an alleged lien upon the property accruing after the adjudication of bankruptcy. On the hearing before the referee it was ordered that the proceeds of the sale, except the amount awarded to Walter A. Zelnicker Supply Company of Mobile, should be turned over to the petitioner. From this order the trustee and interveners each filed a petition for review before the District Court. Upon the record made, the court set aside the order of the referee and denied any relief to the petitioner. The claimant brings the case before us on an appeal from, and on a petition to superintend and revise, the action of the District Court, and presents an agreement of counsel specifying, among other things, "that the petition to revise any matters of law filed as aforesaid in this cause may be consolidated with the appeal heretofore perfected as aforesaid, as they both involve the same matters and are identical in all respects, except as to the method of bringing the cases before said Circuit Court of Appeals." In this court, the trustee, by his attorney, has filed a motion to dismiss the petition to superintend and revise, on the ground that the case is not a proceeding in bankruptcy, but a proceeding on a petition filed by an adverse claimant to recover property from a trustee in bankruptcy, and is, therefore, a controversy "arising in bankruptcy proceedings," reviewable by appeal only.

From our examination of the record, we are satisfied that there is no substantial conflict in the evidence, and that it sufficiently establishes the material facts in the case, leaving only questions of law for our determination. It may be that the petitioner might have had a plenary suit on the cause of action it states, and have prosecuted it as a controversy arising in bankruptcy proceedings, and, if it were necessary in order to do complete justice between the parties, we might give the case it has submitted the benefit of such a construction; but, in our opinion, we may settle the questions at issue on the petition to superintend and revise. Therefore the motion to dismiss that petition is re-

fused, and the appeal is dismissed. There is nothing in the pleadings or the proof to raise a doubt in our minds that the writings presented by the petitioner in support of its claim constitute the contract between it and the bankrupt. It seems clear to us that the property described in these writings went into the construction of the tramway or the logging road that was sold, and that no other property of the nature described in these writings was used in its construction; that, at the time of the adjudication in bankruptcy, the price had not been fully paid; that the contracts were made in Louisiana; that the goods were to be used at a designated place in Louisiana, and for a designated purpose; and that the provision that the property described should remain the property of the payee or its assigns, and whatever equity the buyer might be entitled to therein by virtue of any payments thereon shall be pledged to the payee or its assigns, and held by the buyer as their trustee until the whole price had been paid, is a provision inserted by the parties having in mind the law of Louisiana permitting and providing for the enforcement of such a bargain, and should be upheld by the courts. If nothing had been paid on the price, the payee or its assigns could, under the Louisiana law and agreeably to the terms of the stipulation, take possession of and remove the property for its own benefit as its own. Baldwin v. Young, 47 La. Ann. 1466, 17 South. 883; Mortee v. Roach's Syndic, 8 La. 83; Rev. Civ. Code La. tit. 7, c. 4, art. 2457; Id. c. 5, tit. 7, art. 2471. As fully shown by the indorsements on the notes themselves, there have been partial payments made thereon, and the record shows that pending this litigation, by consent of the parties, the property has been disposed of, and its proceeds in money are held by the trustee subject to the decision of the court. A part of the debt had not matured on the 16th of February, 1905, when the adjudication of bankruptcy was had. On October 5th of the same year the claimant presented its case, substantially as it presents it now, to the referee, and obtained judgment in its favor. Since then these proceedings have been pending. The court of bankruptcy was fully advised as to all the features of the case; that the bankrupt had obtained possession of the property under the contracts we are now considering; and had not fully paid for it. The amount paid was fully and clearly stated; the amount remaining unpaid was a matter of calculation. Whatever construction we might be disposed to put upon the terms of the writings, we could hardly hold that the bankrupt itself or its trustee could hold this property or the proceeds of its sale under the consent agreement without paying fully the unpaid portion of the purchase money. Some of the purchase money having been paid, and the whole of the property having been converted into money, and the stipulation being that the equity which the purchaser acquired in the property by virtue of any payments thereon was pledged to the payee or its assigns and held by the debtor as their trustee until the whole of said price should be paid, it would be manifestly inequitable to suffer the claimant to recover more than the full amount of the unpaid purchase money. It, therefore, seems to us to be substantially immaterial whether the claimant shall be permitted to recover under the first count of his petition or under the second.

The construction of 57n forbidding proofs subsequent to one year after adjudication, etc., for which the trustee contends, is too narrow. Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

We therefore adjudge that the petitioner is entitled to receive, and should be awarded, so much of the proceeds of the sale of the property as shall be sufficient to satisfy the unpaid portion of the purchase price, with interest thereon at the rates stipulated in the contracts and accruing up to the date of the confirmation of the sale of the property and the placing of the proceeds thereof in the hands of the trustee to be held by him subject to final adjudication in this case. The petitioner shall recover costs in this court against all the respondents and costs in the District Court, except such as were incurred on the respondents' petition to review the decree of the referee entered on May 24, 1906, and vacated by the District Court January 9, 1907. And it is so ordered.

BERNARD v. UNION TRUST CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1908.)

No. 738.

1. RECEIVERS—CERTIFICATES—AUTHORIZATION.

Where neither the trustee nor bondholders under a corporate trust deed were parties to a proceeding against the corporation in which a receiver was appointed when an order was passed authorizing the receiver to issue a certificate in payment for certain indebtedness for supplies to the corporation, such bondholders were not concluded by the order in so far as it directed that the certificate should constitute a first lien on the corporation's property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 209.]

2. SAME—PRIVATE CORPORATIONS—PRIOR INDEBTEDNESS.

Where a receiver was appointed for a strictly private corporation and applied for permission to issue a receiver's certificate in payment for supplies furnished to the corporation prior to his appointment, which claim was not secured by any lien on the corporation's assets, it was error for the court, in authorizing such certificate, to direct that it should constitute a first lien on all the corporation's property as against nonconsenting bondholders secured by a deed of trust on the corporation's property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 219–222.]

3. SAME—NEGOTIABILITY—DEFENSES.

A receiver's certificate issued under an order authorizing the issuance of a "negotiable" certificate was not negotiable within the law merchant so as to relieve the purchaser or his assignee from equities arising out of the proceedings in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 215.

Nature of receivers' certificates, see note to Postal Telegraph Cable Co. v. Vane, 26 C. C. A. 350.]

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

C. M. Bernard, for appellant.

Iredell Meares, for appellees.

Before FULLER, Circuit Justice, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. This is an appeal from the decree of the Circuit Court disallowing the priority of lien over the first mortgage bonds of a receiver's certificate issued in the circumstances following:

The Carolina Northern Railroad Company filed in the Circuit Court of the United States for the Eastern District of North Carolina its bill in equity against the Southern Sawmills & Lumber Company, and the court appointed Augustus Mellier receiver December 1, 1902. Mayer & Co., merchants resident in Norfolk, Va., filed their petition in the cause December 26, 1902, setting forth that the Sawmills & Lumber Company was indebted to them by two promissory notes, one for $906.18, payable February 10, 1903, and one for $1,821.28, payable March 12, 1903, charging that Mellier was the president of both corporations, that the bill in equity wherein he had been appointed receiver was a contrivance for continuing his control and management of the companies, and praying that they might become parties plaintiff in the suit of the railroad company against the lumber company above mentioned. On January 6, 1903, Mellier was removed and W. J. Edwards was appointed receiver of the Sawmills & Lumber Company, and May 16, 1903, the said receiver filed his petition in the cause stating that within five months prior to the receivership Mayer & Co. furnished the said Southern Sawmills & Lumber Company "upon the faith of its current receipts, and relied upon being paid out of the same sundry supplies, consisting of powerful leather belts, steam pumps, band saws, rolls of tarred paper, and a great quantity of iron piping, all of which supplies were necessary and absolutely essential to keep said corporation a going concern," and that there was due the sum of $2,727.46, recommending that he be authorized and empowered to issue a receiver's certificate for that amount, the same to be declared by its terms a first lien on all the property of every kind and description of the Southern Sawmills & Lumber Company. On the same day the court authorized and empowered the receiver to issue "a negotiable receiver's certificate for $2,727.46, with interest at 6 per cent. per annum from December 1, 1902, which, when countersigned by the clerk of this court or his deputy, shall be declared by its terms a first lien on all the property of the defendant corporation," and such a certificate was issued, and subsequently assigned to C. M. Bernard. On October 29, 1904, Robert L. Forrest, on behalf of himself and others who might become parties, filed a bill in equity against the defendant corporation, W. J. Edwards, receiver, and the Union Trust Company, in which the Union Trust Company filed a cross-bill, admitting its allegations, and praying for the foreclosure of the mortgage which had been executed June 1, 1901, by the Southern Sawmills & Lumber Company, and duly recorded. It appears from an affidavit in the record that Forrest, one of the bondholders, was present in court on the day when Edwards was appointed receiver, and asked the court's permission, through his counsel, to address it in opposition to such appointment, and was permitted to do so, but he did not enter a formal appearance in the cause, and was not a party to it. The two suits were consolidated, and on January 3, 1905, Edwards was removed as receiver and A. H. Slocumb appointed in his stead. It does not appear from the record that there

were any profits from the operation of the mills by the receivers Mellier and Edwards, and the court below adjudged a liability against receiver Edwards and a surety on his bond in the sum of $10,994.18. The net proceeds of the sale of the property by the receiver Slocumb amounted to about $36,000. The number and amount of the bonds secured by the mortgage does not appear in the record, but it does appear that the funds in the hands of the court are insufficient to pay the bonds in full, and the other claims held to be entitled to priority. The court below finds as a fact that neither the trustee nor the bondholders were parties to the cause when the order was filed authorizing this certificate to be issued, and there is nothing in the record that impeaches the correctness of such finding. "When such prior lienholders are brought before the court they become entitled upon the plainest principles of justice and equity to contest the necessity, validity, effect, and amount of all such certificates as fully as if such questions were then for the first time presented for determination." Union Trust Company v. Ill. Ry. Co., 117 U. S. 460, 6 Sup. Ct. 823 (29 L. Ed. 963). The receiver's certificate here must be considered merely an evidence of indebtedness, and can have no higher character than the debts which it represents. Those debts were for the purchase of supplies by the sawmill company, such as were ordinarily used by companies engaged in a like business, some months before the commencement of the suit in which the receiver was appointed. They were secured by no lien, entitled to no preference. As neither the trustee nor the bondholders came into the court initially asking the aid of equity in the administration of the property, one of the elements is lacking to support the doctrine commonly invoked, that those who ask the aid of the court to maintain their property are to be considered as consenting to all the necessary means. Most of the cases cited have arisen in railway foreclosures, where the power of a court of equity to authorize the issue of certificates by receivers, and to make them a first lien upon the property payable before the first mortgage bonds, has been upheld in numerous cases. In some of them stress is laid upon the fact that a railroad is a peculiar property, in which the public has an interest, and wherever there is a demonstrated necessity for supplies for its maintenance and operation receiver's certificates for such expenses have been allowed priority. So, too, receiver's certificates issued to borrow money to pay taxes are allowed preference, but that rests upon the ground that taxes are always a first lien upon all property, and there is only a substitution of one lien for another. No case has been cited wherein the Supreme Court of the United States has given its sanction to an issue by a private corporation, not affected with any public interest, of receiver's certificates to displace vested liens. The Circuit Court of Appeals for the Eighth Circuit, in Hanna v. State Trust Co., 70 Fed. 5, 16 C. C. A. 586, 30 L. R. A. 201, has expressly declared that the court could not, against the objections of the first mortgagees, displace their liens by the issue of certificates to carry on the business of a corporation whose business was of a private nature. So, too, the Circuit Court of Appeals of this, the Fourth Circuit, has held, in Baltimore Building & Loan Association v. Alderson, 90 Fed. 147, 32 C. C. A. 547, that "in the case of private corporations the court cannot

authorize the issue of receiver's certificates for the purpose of improving, adding to, or carrying on the business of a company without first having the consent of creditors whose liens would be affected thereby." In Wood v. Guarantee Trust Company, 128 U. S. 421, 9 Sup. Ct. 132, 32 L. Ed. 472, the Supreme Court says:

"Thirdly, the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, discharging a great public work. There is a broad distinction between such a case and that of a purely private concern."

It is unnecessary to decide this question, for if it was conceded that it was the proper function of a court of equity to carry on the business of a sawmill, the debt was not incurred by the court for that purpose. The certificate was not issued for the purchase of supplies for the preservation or improvement of the property while it was in the custody of the court, and to keep it a going concern; but for an indebtedness incurred some months before the court took charge of the property, for which the creditor had no lien under the law. There can be no presumption of consent by bondholders or trustee, because neither were parties to the cause in which it was issued. It cannot rest upon the equitable doctrine that there has been a diversion of income or funds to the use and benefit of the mortgage bondholders, for there has been no such diversion. All the authorities agree that the power to issue certificates of indebtedness and to make them a first lien is a power liable to great abuse, and to be sparingly exercised, and no case has been cited or found wherein a certificate issued by the receiver of a private corporation, in circumstances at all analogous to those appearing in this record, has been allowed priority over the mortgage bondholders.

As to the claim of C. M. Bernard that he is an innocent purchaser without notice and for value, it is sufficient to say that although it be true that by the terms of the order the receiver was authorized and empowered to issue a negotiable receiver's certificate, he cannot claim to hold as an innocent purchaser without notice, in the sense which that phrase imports, for certificates of this kind have not the quality of negotiable instruments under the law merchant. They are not commercial paper, and the purchaser or assignee can only recover upon them to the extent of the rights of the first payee. He is put upon inquiry as to all that was done in the cause wherein the certificates are issued and chargeable with notice. As said by the court in Union Trust Co. v. Ill. Midland Co., 117 U. S. 456, 6 Sup. Ct. 809, 29 L. Ed. 963:

"The receiver and those lending money to him on certificates issued and orders made without prior notice to the parties interested take the risk of the final action of the court in regard to the loans. The court always retains control of the matter; its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments."

The decree of the Circuit Court is affirmed.

BENNETT v. AMERICAN CREDIT INDEMNITY CO.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1908.)

No. 1,745.

BANKRUPTCY—CLAIMS—FILING—TIME FOR.

Though creditors of a bankrupt did not file their claim within one year following the adjudication, as required by statute, an assignment thereof filed with the referee by the assignee within the year may be treated as sufficiently presenting the claim to permit an amendment made after the year.

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

J. B. Baskin, for appellant.

W. S. Moberly, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge In the case of In re Bennett, 153 Fed. 673, 82 C. C. A. 531, this court, affirming the judgment of the lower court, in which Judge Cochran delivered a well-considered opinion, held that certain claims against the Hume Cooperage Company, a bankrupt corporation, were entitled to priority under section 2487, Ky. St. 1903, on the ground they were for materials and supplies furnished to carry on the business of the bankrupt. Among these claims was one for $2,336.95. This claim was originally owned by Dennis Bros., of Grand Rapids, Mich., and was sold and assigned by that firm to the American Credit Indemnity Company It was objected to by certain creditors, and finally disallowed by the referee on the ground that it was not duly filed by the claimant within 12 months from the adjudication, which took place on August 26, 1905. The referee found it was filed December 20, 1906, more than 12 months from the adjudication.

A petition for review to this order and finding was presented by the American Credit Indemnity Company. The matter was heard by Judge Cochran, and a careful opinion rendered, reviewing the facts shown by the record. It hardly seems necessary to go over the matter in detail again. The Dennis Bros., in their testimony, claim they mailed the account to the referee on or about September 5, 1905, which was within the year. The referee says he did not receive it. The Credit Indemnity Company insist that after it became the owner of the claim, on August 11, 1906, it mailed to the referee an assignment thereof from Dennis Bros. to it. Of course, if the Dennis Bros. did not mail —that is, file—the claim on or about September, 1905, but the Credit Indemnity Company did mail the assignment to the referee on August 11, 1906, and the latter can be treated as presenting the claim sufficiently to permit of the subsequent amendment which was filed December 19, 1906, this would amount to a sufficient compliance with the statutes, and so the court below held. Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; In re Roeber, 127 Fed. 122, 62 C C. A. 122; Buckingham v Estes, 128 Fed. 584, 63 C. C. A. 20. The fog thrown about the actual transactions seems to have resulted

from the unfortunate lack of promptitude on the part of the referee in attending to his correspondence. Under the circumstances, the best the court below could do was to infer from all the facts in proof what the actual fact in issue was, although direct proof of that fact was lacking. The conclusion reached was in the interest of justice; it saved the claim and awarded it priority along with others of like nature.

We affirm the judgment.

NOTE.—The following is the opinion of Cochran, District Judge, of the lower court:

This cause is pending before me on four separate petitions for review. One petition is by the trustee and certain preferred creditors of the bankrupt. The action of which they complain is the referee's permitting the Cranor-Smith Lumber Company, and other creditors of the bankrupt, to amend their proof of claim and set up a lien after the expiration of one year from the adjudication in bankruptcy. In as much as the petition does not name the other creditors who have been so permitted to do, and the referee in his certificate does not name them either, probably the petition is not good so far as the creditors other than Cranor-Smith Lumber Company are concerned; but this is an immaterial matter as the ruling as to the Cranor-Smith Lumber Company is the same as would have been as to the other creditors had they been named.

The claim set up by the amendment is not of a lien, but of a priority, and is the same priority as has been heretofore adjudged herein. The amendment simply sets up the facts out of which the priority arises and claims it. The original proof covers the fact of indebtedness and its amount. It would seem that the action of the referee in permitting the amendment is correct and that it is upheld by the following decisions, to wit: Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; In re Roeber, 127 Fed. 122, 62 C. C. A. 122; Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20.

In the Hutchinson-Otis Case the creditor had a lien on a seat in the New York Stock Exchange. He did not assert this lien originally. Prior to the institution of the bankruptcy proceedings, but within four months prior thereto, he had attached indebtedness due the bankrupt, and by default he obtained satisfaction of his debt therefrom, first guaranteeing the garnishee from liability to others. Subsequently, the trustee sued the garnishee and the creditor recognized his liability, and paid to the trustee the amount received from him. This undid the satisfaction of the creditor's indebtedness by means of the attachment proceedings. He thereupon filed a petition asserting a claim to the proceeds of the seat in the Stock Exchange, which had been sold by the trustee and the proceeds of which had been received by him. Before the lapse of a year from the adjudication in bankruptcy, the creditor had filed a proof of his claim. It was defective. Judge Putnam, in the report of the case in 115 Fed. 937, 53 C. C. A. 419, says that it failed in very substantial particulars to comply with the general orders of the Supreme Court in reference to such matters. It would seem that it was filed as an ordinary claim, and that no lien was claimed on the Stock Exchange seat. The payment to the trustee which undid the satisfaction through the attachment proceedings was not until after the lapse of a year from the adjudication. So that really during the year there was no right to file proof of the claim. Subsequent to said payment and after the lapse of the year the creditor filed a substituted proof of claim, and alleged that it was secured by the proceeds of said seat in the trustee's hands. Previous thereto the petition claiming said proceeds had been filed. It does not appear just when this petition was filed, but evidently after the payment by the creditor to the trustee of the amount received from the garnishee and the lapse of the year. So that all that was filed within the year was a proof of claim defective in very substantial particulars. No lien on the Stock Exchange seat or claim to proceeds thereof was asserted until after lapse of a year. It was held that the creditor was entitled to said proceeds. It is true that the trustee consented to the filing of the sub-

stituted proof of claim after the lapse of the year, but the decision is not limited to that fact as the ground thereof.

In the Circuit Court of Appeals, Judge Putnam said: "The only ground to which it (the appeal) can relate is the objection to the substituted proof because it was not filed within the year limited by the terms of the statute. This, however, is easily disposed of. Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the district court thought it was equitable to allow the amendment, the appeal cannot be maintained."

In the Supreme Court Mr. Justice Holmes said: "It is argued that the allowance of the amendment is within section 57n, forbidding proof subsequent to one year after adjudication, etc. Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proven. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad."

In the Roeber Case the creditor filed within the year "a document inartificially drawn if considered as a 'proof of claim,'" in which the amount due him was set forth, and claimed a lien on a certain special fund due the bankrupt. It was signed by his attorney, but not sworn to. This claim was litigated and decided adversely to the creditor. This document was permitted to be amended after the lapse of the year, so as to conform to the requirements of the bankrupt act, and then allowed as a general claim. Judge Lacombe said: "Bankruptcy courts have the usual power of courts of justice upon motion and for good cause, to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice and within legitimate exercise of the power of amendment under the authorities."

This case was the reverse of what we have here.

In the Buckingham-Estes Case within the year a petition was filed asserting a resulting trust in certain land which the trustee was about to sell as part of bankrupt's estate, and seeking to recover rents received by the bankrupt before the bankruptcy proceedings. This petition was sustained, and it was ordered that the petitioner be allowed to prove the rents as a debt against the bankrupt, and a reference was made to ascertain amount of rents due. Upon coming in of the report a formal proof of the indebtedness was filed. This was after the lapse of a year from the adjudication. Judge Lurton said: "But if we assume that the formal proof of Mrs. Estes' claim for rents and profits filed January 15, 1903, was not made until more than one year after date of adjudication, it does not appear, and it is not claimed that her petition setting up her claim in the bankrupt proceedings was not filed within one year after the adjudication. It would be a narrow construction of sections 57 and 57n which would not regard a claim so presented and litigated in the bankrupt proceeding as 'proven' within the limitation of the section. A claim 'proven' within the year is amendable after the lapse of the year, and the court below probably regarded her petition as a statement under oath in writing, signed by a creditor setting forth the claim, etc., and therefore subject to amendment to comply with the further formalities of section 57. In this court did not err."

The sole question in any given case is whether the document tendered is a proper amendment, and furtherance of justice requires it to be filed. If so, and the document proposed to be amended was filed within the year, it should be allowed to be filed even though the year has then elapsed. The statute prescribes no limit as to the time within which amendments may be filed. In this case the document tendered is a proper amendment; furtherance of justice required it to be filed and the document proposed to be amended—a formal proof of the claim as required by the act—was filed within the year. The referee's action in this particular is approved, and this petition for review is overruled.

Each of the other three petitioners is a creditor of the bankrupt. Their petitions are embraced in the same document, but each petition is separate, so that it cannot be treated as a joint petition. They had no right to petition jointly and it would have been better for the petitions to have been in separate papers so as to avoid the appearance of petitioning jointly. The petitioners are the American Indemnity Company, J. S. Stults, and the Colonial Coal & Coke Company. In the petition for review the latter petitioner is given as the South and West Coal and Coke Company. This is a mistake, and it may be corrected on the face of the petition. The referee refused to allow each of these creditors to file their claims because they came too late, i. e., after the lapse of one year from the adjudication. The date of the adjudication was August 26, 1905.

The claim of the indemnity company is as assignee of Dennis Bros. It is claimed on its behalf that said Dennis Bros. mailed said claim to the referee after the receipt of notice from the referee of the first meeting of creditors, which was on or about September 5, 1905, and on August 11, 1906, after it had become the owner of said claim it mailed an assignment thereof to him. If said claim as mailed was received by the referee, of course it was filed in time. If it was not, then it was not filed in time unless the filing of the assignment can be treated as a document presenting the claim sufficiently to permit of an amendment, and it was in fact received by the referee. For it was mailed, and in due course of mail should have been received within the year.

I think there can be no question that said claim was mailed at the time claimed. It is testified to by one of the Dennises and in a letter by them to the referee, of date May 24, 1906, it is presupposed that it had been filed. But the referee in his certificate by way of recital and not by distinct statement to that effect says it was not received. This must be accepted as stating his recollection in regard thereto. Yet the record is not without circumstances tending to show that possibly he is mistaken—that he received it, and has in some way mislaid it. Those circumstances are these: The letter of May 24, 1906, from Dennis Bros., calling for information as to whether the claim had been allowed was unanswered; the letter of August 11, 1906, from the indemnity company inclosing the assignment and requesting an acknowledgment of its receipt was unanswered; the letter of September 5, 1906, repeating this request was not answered until shortly before September 20, 1906; three letters of September 27, 1906, October 19, 1906, and November 9, 1906, requesting form of proof of the claim as preferred claim, and two letters of December 19, 1906, and February 20, 1907, requesting information as to whether the proof of said claim as a preferred claim was in proper shape, were unanswered. I am not advised as to how far a referee is expected to answer such communications promptly; but the failure so to do here in so many instances bespeaks to a certain extent of inattention. In view of it, I cannot feel absolutely sure that the proof of claim was not received in due course of mail when first sent, and that in some way it became mislaid, and its receipt has been forgotten.

But it is not stated that the letter of Dennis Bros. of May 24, 1906, and the letter of the indemnity company of August 11, 1906, inclosing the assignment of the claim, were not received by the referee. On the other hand, the referee in his letter to said company of September 20, 1906, begins with the statement "I have received several communications from the American Indemnity Co." Prior to that time it had written him but two letters—one of which was the letter of August 11, 1906, inclosing the assignment. The receipt of these letters by the referee was within the year. Under the liberal rule as to amendments indicated above, I think they are sufficient to permit of an amendment after the lapse of the year. The proof inclosed to the referee on December 19, 1906, may be treated as amendment thereof, and in this way the claim may be saved. They were both notifications to the referee of the position that proof of this claim had been theretofore filed, and if it had not been claimant should have been notified that it had not, so that same could be filed in due time. The action of the referee as to this claim is disapproved. It should be allowed, and given priority along with the other claims of like character.

The case presented by the petition of J. S. Stults is this: His post office address is Columbia, Ky. It was given in the schedule as Columbia, Tenn. The result was that he received none of the notices of the bankruptcy proceedings, and he never made an attempt to prove his claim until after the lapse of the year from the adjudication. It is not stated in his affidavit that he did not in fact know of the pendency of said proceedings during that time—only that he did not receive any such notices. It had been protested before the institution of the proceeding. The slightest inquiry would have informed him that his debtor had gone into bankruptcy. In the absence of a statement that he did not know, and an explanation as to why he made no such inquiry, if in fact he did not make any, it must be accepted that he did not know that this proceeding was pending. A failure to prove his claim in time, therefore, was due to his own carelessness. But, however this may be, the provisions of the bankrupt act limiting the time within which claims may be proven is peremptory, and the fact that he did not receive notice and did not actually know of the pendency of the proceeding is not sufficient to permit him to file his claim after the lapse of the year. An authority directly in point is the case of In re Muskoka Lumber Co. (D. C.) 127 Fed. 886. The action of the referee here is approved.

Then as to the petition of the Colonial Coal & Coke Company. It appears that it filed its claim in due time with the receiver appointed at the beginning of this proceeding, but that he failed to turn it over to the trustee or referee. I do not think that this is a sufficient filing of the claim. It does not come within the case of Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390.

The petition of the trustee and co-operating creditors, of J. S. Stults and the Colonial Coal & Coke Company are overruled, and the action of the referee complained of therein is affirmed. That of the American Credit Indemnity Company is sustained, and the action of the referee complained of therein is reversed, with directions to allow said claim as a preferred claim.

STRAIN v. PALMER et al.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1908.)

No. 1,371.

1. RECEIVERS—CLAIMS OF OTHERS TO PROPERTY—PRACTICE—INTERVENTION.
   One who claims to be the owner of personalty taken from his possession by the receiver in an action against the seller properly presents a petition pro interesse suo, asserting such claim, in the proceeding in which the receiver was appointed.

2. MORTGAGES—DEFAULT—RENTS.
   A real estate mortgage carries with it, in equity, a right to the accruing rents, when there has been a default, and the security is inadequate, and the debtor insolvent; and in such a case the court will appoint a receiver to hold them until the event is ascertained. The mortgage is thus made to operate as an equitable assignment of the rents.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1374, 1375.]

3. SAME—PURCHASER OF GROWING CROPS—PENDING SUIT—RIGHTS.
   Where the bill of complaint in a mortgage foreclosure proceeding charged that the property was of insufficient value to secure the debt, and that defendants were insolvent, the court could enjoin defendants from disposing of the property and appoint a receiver thereof and of the rents, etc.; and hence petitioner who knew of the pendency of the action, could not, while the petition for the appointment of a receiver was pending, defeat plaintiff's rights to subject growing crops to the mortgage by buying the crops, though he did not know what the prayer of the complaint was, nor of the order to show cause why a receiver should not be appoint-

ed, knowledge of the pendency of the suit being sufficient to put him on inquiry as to the nature of the relief demanded and as to all proceedings had in the action. As against one having such notice, the receiver's title and right of possession relates back to the date of the application for his appointment.

4. RECEIVERS—EXPENSES—LIABILITY OF PROPERTY.
Where the court in a mortgage foreclosure proceeding acted within its jurisdiction in appointing a receiver, he could resort to the property in his possession as such receiver for the payment of expenses in connection with the property and his compensation, though after his appointment the mortgaged property was sold under decree of foreclosure for an amount sufficient to pay the debt and costs.

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

A. C. Gormley and W. T. Pigott, for appellant.

M. S. Gunn, for appellees.

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

DE HAVEN, District Judge. This is an appeal from a final order and decree dismissing a petition pro interesse suo, and approving the report and account of the receiver appointed by the court to take charge of the property described in the bill of complaint and the rents, issues, and profits thereof. The facts disclosed by the record are:

Benjamin Graham and the American Freehold Land Mortgage Company of London, England, Limited, a corporation, filed in the Circuit Court of the United States, Ninth Circuit, District of Montana, a bill of complaint against the H. H. Nelson Sheep Company, a corporation, and H. H. Nelson and James T. Stanford, to foreclose a certain mortgage and trust deed of lands situate in the state of Montana, theretofore executed by the H. H. Nelson Sheep Company to Benjamin Graham, as trustee for the purpose of securing the payment of two promissory notes for $15,000 each and interest, made by the H. H. Nelson Sheep Company to the American Freehold Land Mortgage Company. It is alleged in the bill of complaint that the defendant H. H. Nelson guaranteed the payment of these notes and that defendant Stanford claims an interest in the land as a subsequent mortgagee. The bill further alleges:

"That the real estate and property described in said trust deed is insufficient as security for the payment of the said principal sum and interest and the performance of the covenants to be kept and performed by the said H. H. Nelson Sheep Company, as provided in said trust deed or mortgage, and that the said H. H. Nelson Sheep Company and the said H. H. Nelson are each and both insolvent."

The prayer of the bill is for a decree directing the sale of the mortgaged premises, and for the appointment of a receiver of all the property described in the mortgage or trust deed, and the income, rents, issues, and profits thereof, to hold and dispose of the same as the court may order, and that the said H. H. Nelson Sheep Company be directed to transfer and deliver possession of the property to the receiver so ap-

pointed, and that defendant H. H. Nelson Sheep Company be enjoined from disposing of any of the property subject to the mortgage, or the income, rents, issues, or profits thereof, etc.

The bill of complaint was filed on April 11, 1904, and on the same day a writ of subpœna was issued, and this was served upon the defendants H. H. Nelson Sheep Company and H. H. Nelson, on the 28th day of April, 1904. In the meantime, on April 14, 1904, the court made an order in the action enjoining the defendant H. H. Nelson Sheep Company "from selling, disposing of, or transferring the possession of any of the property described in the trust deed or mortgage made a part of the bill of complaint," and further ordered that the defendant show cause on May 17, 1904, or as soon thereafter as a hearing could be had, "why a receiver of the property described in said trust deed, and the rents, issues, and profits thereof, should not be appointed as prayed for in the bill of complaint in this suit." This order was served on the defendant H. H. Nelson Sheep Company April 16, 1904, and on H. H. Nelson May 3, 1904. On August 17, 1904, the said defendant H. H. Nelson Sheep Company, then being in possession of the real property described in the trust deed, sold and delivered to the complainant, in payment of an antecedent and existing indebtedness, the hay and oats grown upon said land during the year 1904. At the time of appellant's purchase a part of the crop had been cut, but not removed from the field, and a part was still standing, but how much had been severed from the land does not appear; but that which was standing was mature and ready for harvesting, and appellant harvested the same, paying therefor the sum of $157. The receiver was appointed September 3, 1904, and the next day took from appellant the possession of the hay and oats in controversy.

The reason for the delay in appointing the receiver was because of the fact that Hon. Hiram Knowles, United States district judge for the district of Montana, resigned and ceased to perform the duties of said office on April 13, 1904, and his successor did not qualify as such until September 1, 1904. Upon the hearing of appellant's petition pro interesse suo it was stipulated, in addition to the facts above stated, that appellant, Strain, before the purchase by him of the hay and oats in controversy, had actual notice of the commencement of the foreclosure suit above referred to, but had no notice or knowledge of the order of April 14, 1904, enjoining the defendant H. H. Nelson Sheep Company from selling or disposing of the rents, issues, and profits of the real estate described in the mortgage or trust deed, "unless it be held that he was charged with constructive notice of said order and the prayer of said bill by reason of the doctrine of lis pendens."

It is not alleged in the petition, nor was it claimed upon the hearing of the petition, that the property in the possession of the receiver is more than sufficient to pay the costs and expences of the receivership; and the prayer of the petition is:

"That the receiver be ordered and required to surrender and return the petitioner the said chattels, or, if the same shall have been sold or disposed of by him, that he pay to petitioner the value thereof, * * * and for such other and different relief as may be meet and equitable."

1. The appellant claims to be owner of the hay and oats purchased by him and taken from his possession by the receiver, and his petition pro interesse suo, asserting such claim, was therefore properly presented in the proceeding in which the receiver was appointed. Wiswall v. Sampson, 14 How. (U. S.) 53, 65, 14 L. Ed. 322; Krippendorf v. Hyde et al., 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Wheeler v. Walton & Wharm Co. (C. C.) 64 Fed. 664; Howell v. Ripley, 10 Paige, Ch. (N. Y.) 45. The only question presented for decision by this appeal is whether, in view of the facts above stated, the appellant acquired as against the receiver title to the hay and oats by reason of his purchase of the same from the defendant H. H. Nelson Sheep Company. In the decision of this question we start with the proposition that:

"A mortgage of land carries with it, in equity, a right to the accruing rents, when there has been a default and the security is inadequate and debtor insolvent. * * * The court will appoint a receiver in such a case to hold the rents till the event is ascertained. The mortgage is thus made to operate as an equitable assignment of the rents." Bank of Auburn v. Roberts, 44 N. Y. 198; Omaha Hotel Company v. Kountze, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609; Sea Insurance Co. v. Stebbins et al., 8 Paige, Ch. (N. Y.) 565; Astor v. Turner, 11 Paige, Ch. (N. Y.) 436, 43 Am. Dec. 766; Hollenbeck v. Donnell, 94 N. Y. 342.

In this last case the court said:

"The legal right to the rents, as well as the possession, continues in the mortgagor until foreclosure and sale, as it does in a vendor until conveyance; but, when default has been made in the conditions of the mortgage, the mortgagee at once becomes entitled to a foreclosure of the mortgage and a sale of the mortgaged premises. This process requires time, and on general principles of equity the court may make the decree, when obtained, relate back to the time of the commencement of the action, and, where necessary for the security of the mortgage debt, may appoint a receiver of the rents and profits accruing in the meantime, thus anticipating the decree and sale."

Now, as above stated, the bill of complaint in the foreclosure proceeding brought by Benjamin Graham and the American Freehold Land Mortgage Company against the H. H. Nelson Sheep Company et al. charged that the property described in the mortgage or trust deed was of insufficient value to secure the payment of the notes secured by such mortgage or trust deed and that the defendants liable for payment of such indebtedness were both insolvent. The foreclosure proceeding was thus brought within the rule stated in the cases just cited, and the court was authorized in the exercise of its jurisdiction to enjoin the defendants, as it did, "from selling, disposing of, or transferring the possession of any of the property described in the trust deed or mortgage," and also to make the order requiring the defendants in the action to show cause why a receiver of the property described in the mortgage, and the rents, issues, and profits thereof, should not be appointed, and, upon the hearing of the order to show cause, to appoint a receiver as prayed for. This being so, we think it clear that no person with actual notice of the pendency of that action could, by a purchase from the defendants, while the petition for the appointment of a receiver was pending, defeat the operation of the injunction and orders referred to, and thus

defeat the right of the plaintiffs to have the growing crops subjected to the lien of their mortgage, if the court should finally adjudge them entitled to such relief. As against a person having such notice the title of the receiver and his right to possession would relate back to the date of the application for his appointment.

The agreed statement of facts shows that the appellant, before the purchase by him of the property in controversy, had actual notice of the commencement of the foreclosure suit referred to, and, although it was further stipulated that he did not have actual knowledge of the prayer of the bill of complaint, or of the order to show cause why a receiver should not be appointed, still he knew that he was purchasing a crop grown upon the mortgaged premises, after the commencement of the suit to foreclose the mortgage thereon; and, this being so, we think his knowledge of the pendency of that suit sufficient to put him upon inquiry as to the nature of relief demanded therein and as to all proceedings which had been had in the action. He was required to make such inquiry, because he is charged with a knowledge of the law giving to the plaintiffs in that action the right, under the circumstances set forth in their complaint, to subject the growing crop to the lien of their mortgage, and if he failed to make the inquiry he is nevertheless deemed to have had notice of all that he would have learned if he had done so. He is therefore to be treated as having had, at the time of his purchase, notice of the pending application for the appointment of a receiver and of the prior order enjoining the defendant H. H. Nelson Company from making a sale of the property purchased by him. This conclusion is in accordance with the equitable rule that a person having knowledge of facts sufficient to put a prudent man upon inquiry as to the rights of third persons in property he is about to purchase is charged with knowledge of all he might have learned by inquiry in relation to the matter of which he had notice, or, as the rule is sometimes expressed:

"In equity, whatever put upon inquiry is notice of what inquiry would disclose." Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

2. The objections of appellant to the report and account of the receiver were properly overruled. In the report and account the receiver claimed credit for expenses incurred by him in the discharge of his duties as receiver. The objections of appellant to the allowance of this account were "based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate in pursuance of the decree of this court the complainant herein purchased all of said real estate for a sum sufficient to cover their mortgage indebtedness, interest, and costs, so that the said mortgage thereby became satisfied in full, without recourse to the said hay and oats, which had theretofore, to wit, on the 17th day of August, 1904," been purchased by the appellant. The court acted within its jurisdiction in appointing the receiver; and, this being so, he had the right to resort to the property in his possession as such receiver for the payment of his expenses in connection with such property and his compensation as receiver. "When it becomes the duty of a court of equity to take property under its charge through a receiver, the property becomes

chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services." Ferguson v. Dent (C. C.) 46 Fed. 88; Elk Fork Gas Co. v. Foster, 99 Fed. 495, 39 C. C. A. 615.

This rule is not changed by the fact, shown by the record in this case, that after the receiver was appointed the mortgaged premises were sold, under the decree of foreclosure in the action in which the receiver was appointed, for an amount sufficient to pay the indebtedness secured by the mortgage and the costs of the action.

Order and decree affirmed.

MANLEY et al. v. BOONE et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,343.

1. PARTITION—MINING PROPERTY—SUSCEPTIBILITY TO PARTITION.
   Though, since mining property, as a rule, is not susceptible to division, and partition thereof must generally result in its sale, such property may not only be divided among the owners in proportion to their respective interests, but, under the express terms of Alaska Codes, pt. 4, § 404, it must be so divided, unless it appears that a partition thereof cannot be made without great prejudice to the owners.

   [Ed. Note.—Partition of mineral rights or lands, see note to Dangerfield v. Caldwell, 81 C. C. A. 405.]

2. SAME—DIVISION—WHO TO MAKE.
   Under Alaska Codes, pt. 4, § 405, providing that where the court in a partition suit adjudges partition, instead of a sale, it shall designate three referees, who shall divide the property and allot the several portions thereof to the respective parties, the quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions, and under section 409, providing that, if the referees report that the property cannot be partitioned without great prejudice to the owners and the court approves the report, the court may direct a sale, the court cannot itself make a division of property, except in the indirect mode of confirming the report of the referees appointed to carry out the order of partition.

3. SAME—PERSONALTY.
   Personalty connected with mining property could not be the subject of partition in an action to partition such property, except so far as such personalty constituted a part of the realty, and as such constituent part it should have been dealt with by the three referees expressly authorized by Alaska Codes, pt. 4, § 404, to be appointed to make the division between the respective parties, subject to the approval of the court; and hence it was improper to appoint a receiver to take charge of the personalty and to divide it in kind if practicable, or if not practicable to sell it, and to decree that, if the cabins, dams, sluices, and ditches could not be divided, the receiver should allow to one or the other of the parties just compensation for the same.

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

This action was brought to obtain a decree of partition of certain placer mining ground situated in the Fairbanks mining district of the territory of Alaska known as "Creek Claims Nos. 4 and 5 Below Discovery on Cleary Creek," and "Bench Claims Nos. 4 and 5 Below on the First Bench, Right

Bank of the Creek"; the bench claims lying north of their companion creek claims, respectively, and the whole forming one contiguous body of mining ground. The appellees were plaintiffs in the court below, and were the owners of an undivided one-eighth each of the properties, and the appellants the owners of an undivided one-fourth each thereof. The complaint in the action alleged the tenancy in common of the properties, and their equipment and operation by the respective parties as mining partners; that the claims are valuable only for the gold contained therein, and that the appellants had assumed exclusive control and management of them, excluding appellees from any voice in the management; and that in the working of the ground the appellants had been guilty of waste, negligence, carelessness, and extravagance, the motive of which was to force the appellees to sell to the appellants their interest in the property for an inadequate price. The prayer of the complaint was for a partition of the property, a dissolution of the relationship between the parties, and for an accounting, for $50,000 damages growing out of the alleged wasteful and extravagant manner in which the property had been operated by the appellants, for costs, and for general relief.

In their answer the appellants admitted the tenancy in common and the joint operation of the properties by the respective parties, but denied that in their management of the property they had excluded the appellees, or that in their operation they had been either wasteful, careless, or negligent. As an affirmative answer they set up the character of the property, the adoption by common consent of all of the parties in interest of a joint plan of working the ground as a whole, and the installation of a plant for that purpose, and alleged that the ground could not be divided into parts without a loss; that the gold-bearing gravels contained in the claims are found in "pay streaks," which vary greatly in width, depth, and richness, do not run in uniform courses through the ground, and that it would be impossible to divide the claims into four or any other number of equal parts even approximately of equal value; that owing to the situation and character of the property, and the manner in which it should be worked, it is not susceptible of actual partition in parts without great prejudice to the owners; and that the only way in which the claims can be partitioned is by the sale of the property as a whole. The appellants at the same time filed a cross-bill setting up substantially the same matters stated in their answer.

While the record contains a large amount of testimony bearing upon the various issues made by the pleadings, the main contest between the parties is whether the property is susceptible of a fair partition in kind, or whether it should be sold as a whole and the proceeds divided in accordance with their respective interests. The court below found that the property can be fairly divided into parts without great prejudice to the owners, and that they would suffer far greater prejudice from a sale of it than by a division thereof into parts; and the court thereupon determined the manner in which the partition should be made, and the locality and boundaries of each allotment, in these findings:

"(5) That the property can be fairly, equally, and impartially divided into parts by giving to the plaintiffs a piece of ground of Creek Claim No. 4 which shall include 73 feet of the lower part of the ground, known as 'worked-out' ground at the upper end of said claim, and 162 feet of the unworked ground immediately adjoining thereto, all to extend the full width of said claim No. 4, as will more particularly appear from the plat on file in this case prepared by R. H. Jackson and C. W. Joint, dated September 5, 1905; the ground in these findings sought to be described being the ground indicated upon said plat by the red lines.

"(6) And by the giving to the plaintiffs that portion of side claim No. 4 which is indicated upon said map and plat by the red lines; all of the property to be awarded to the plaintiffs by this and preceding findings being marked upon said map and place as 'Boone Allotment.'

"(7) By giving to the plaintiffs herein the property at the lower end of Creek Claim No. 5 and of side claim No. 5 which is indicated upon said map and plat by red lines, and which is designated upon said map and plat as 'Boone Allotment.'

"(8) That said plat herein referred to is marked at the bottom thereof as follows: 'Map of Four Below Mining Company Property, on Cleary Creek, Fairbanks Mining District, Alaska. Surveyed by R. A. Jackson and C. W. Joint, September 5, 1905. Scale, 80 feet 1 inch'—and is hereby referred to and made a part of these findings.

"(9) That if the actual measurements upon the ground shall vary from the measurements set forth in said map that the rights of the parties hereto shall be protected by giving to them the same proportion of the ground as the amount allotted upon said map shall bear to the whole.

"(10) That the personal property can be divided, either by a division of kind, or, if that cannot be done, then by selling the same at public auction in the manner prescribed by law for the sale of personal property on execution.

"(11) That the defendants are to have all of the real property described in the complaint other than that which has been assigned and allotted to the plaintiffs herein."

The decree followed these findings and is as follows:

"Be it remembered that on the ——— day of September, 1905, the above-entitled cause coming on regularly for hearing, N. V. Harlan and McGinn & Sullivan appearing as attorneys for the plaintiffs, and Carr & Nye and W. H. Adams appearing as attorneys for the defendants, and the court heretofore and on the 16th day of September, A. D. 1905, rendered its decision in writing and filed the same with the clerk of the court, and therefore, in accordance with the findings of fact and conclusions of law therein contained, it is ordered, adjudged, and decreed by the court: That the property herein described be partitioned into parts. That the plaintiffs shall receive as their portion of said claims that part indicated upon the map and plat on file in this case, and which is known as 'Map of Four Below Mining Company Property, Made by Jackson & Joint,' and which is referred to in the findings of fact in this case, according to the allotments thereon made; the red lines upon said map being the property that is allotted to the plaintiffs in this action, and the defendants shall be allotted all of the balance of said claims not included within said red lines. That C. W. Joint and R. A. Jackson are hereby appointed referees for the purpose of allotting to the plaintiffs and defendants the respective parts of the property described in the complaint in this action, as the same has been determined by this court according to the map and plat on file herein, and shall designate such portions upon the ground by proper landmarks, and said referees may employ a surveyor, with necessary assistants, to aid them in establishing said landmarks, marking the boundaries of said allotments. That a receiver shall be appointed to take charge of the personal property, and to divide the same in kind if practicable, and, if the same cannot be done, then that the said property shall be sold by him in the manner prescribed by law for the sale of personal property on execution. That if the cabins, dams, sluices, and ditches cannot be divided, then that said receiver shall allow to one or the other of the parties hereto just compensation for the same. That if the measurements upon the ground shall vary from the measurements upon the plat on file herein, that the measurements on the ground shall control, and the parties thereto shall be allowed their respective portions of the same in the same proportion as the same is set forth on the map on file herein. That the court will reserve the matter of costs until the report of the referee and receivers shall be made herein. That the referee and receiver shall make a report to this court of their actions in this case.

"Dated at Fairbanks, Alaska, September 16, 1905.

"James Wickersham, Judge."

The appeal is from that decree.

Carr & Nye, W. H. Adams, and Curtis H. Lindley, for appellants.

E. M. Gibson and William R. Davis, for appellees.

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

ROSS, Circuit Judge (after stating the facts as above). Sections 397, 404, 405, and 409, of part 4, of the Statutes of Alaska, are as follows:

"Sec. 397. When several persons hold and are in possession of real property as tenants in common * * * any one or more of them may maintain an action of an equitable nature for the partition of such real property according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appears that a partition cannot be had without great prejudice to the others."

"Sec. 404. If it be alleged in the complaint, and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall adjudge a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained.

"Sec. 405. In making the partition, the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them therein. The referees shall make a report of their proceedings specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share."

"Sec. 409. If the referees report to the court that the property of which partition shall have been adjudged, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon, by an order, direct the referees to sell the property or separate portion thereof so situated."

It is contended on the part of the appellants that the court below erred: (1) In taking upon itself the function of making the partition, instead of appointing referees for that purpose as required by the statute; (2) In appointing two referees, instead of three, as required by the statute, and in limiting their powers to the mere establishment of landmarks and monuments designating on the ground the lands fixed by the court; (3) in appointing a receiver to take charge of the personal property of the parties, or to divide or sell the same as he might determine; (4) in decreeing that the receiver might, in case the cabins, dams, sluices, and ditches belonging to the parties could not be divided, allow to one or the other compensation; and (5) in adjudging that actual partition could be made, and in refusing to order a sale of the premises as a whole, and dividing the proceeds.

In respect to the last point, a careful consideration of the record satisfies us that we would not be justified in interfering with the finding of the court below to the effect that the property in question can be partitioned without great prejudice to the parties in interest. It is quite true that mining property, from its very nature, is not, as a rule, susceptible of division, and consequently that partition of such property must generally result in its sale. See Aspen M. & S. Co. v. Rucker (C. C.) 28 Fed. 223; Brown v. Challis, 23 Colo. 145, 46 Pac. 679; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Hall v.

Vernon, 47 W. Va. 295, 34 S. E. 765, 81 Am. St. Rep. 791; Freeman on Co-Tenancy and Partition (2d Ed.) 435, 537. Still, not only may such property be divided among the owners in proportion to their respective interests, but, according to the terms of the statute under which the present proceedings were taken, must be so divided unless it be made to appear that a partition thereof cannot be made without great prejudice to the owners. That is a question of fact upon which the evidence in the present case is very conflicting, and we think no good reason appears why the conclusion of the trial court upon it should be disturbed. See McKinley Creek Mining Co. v. Alaska Mining Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331; Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317; Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185; Mitchell v. Cline, 84 Cal. 418, 24 Pac. 164. Accepting this fact as found by the trial court, it results, necessarily, that there was no error in the conclusion of the court below to the effect that the partition of the property should be made.

We are of the opinion, however, that the court below erred in taking upon itself the function of dividing it among the various owners, and in designating two referees to mark upon the ground the lines so fixed in the first place by the court itself. The requirement of the statute, which was the basis of the court's action, is that in the event the court adjudges a partition according to the rights of the parties, instead of a sale of the property, it shall designate three referees, "who shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks." And when the three referees so appointed shall have divided the property, "quality and quantity relatively considered," among the respective parties, in accordance with their rights as fixed by the interlocutory decree of the court, they are, by section 409 of the Alaska Statutes above quoted, required to make a report to the court of their action, and "if the referees report to the court that the property of which partition shall have been adjudged, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon by an order direct the referees to sell the property, or separate portion thereof, so situated"; that is to say, vacate its interlocutory order directing a partition, and adjudge a sale instead. It is plain, therefore, from the statute itself, that the court cannot itself make the division of the property between the parties, except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. And to that effect are the authorities. Dondero v. Van Sickle, 11 Nev. 389; Freeman v. Preston (Tex. Civ. App.) 29 S. W. 495; Garth's Guardians v. Thompson (Ky.) 63 S. W. 41; Eakins v. Eakins, 112 Ky. 347, 65 S. W. 812; Lawson v. Bonner, 88 Miss. 235, 40 South. 488, 117 Am. St. Rep. 738; George v. Murphy, 1 Mo.

777; Brown v. Cooper, 98 Iowa, 444, 67 N. W. 378, 33 L. R. A. 61, 60 Am. St. Rep. 190; Freeman on Co-Tenancy and Partition (2d Ed. §§ 526, 543.

We think these provisions of the decree appealed from also erroneous: "That a receiver shall be appointed to take charge of the personal property, and to divide the same in kind if practicable, and, if the same cannot be done, then that the said property shall be sold by him in the manner prescribed by law for the sale of personal property on execution. That if the cabins, dams, sluices, and ditches cannot be divided, then that said receiver shall allow to one or the other of the parties hereto just compensation for the same." This portion of the decree treats the property therein referred to as personalty, entirely disconnected from the real property which was the subject of the action. Such property could not be the subject of partition in that action, except so far as it constituted a part of the realty, and in so far as it pertained to and constituted a part of that realty should be dealt with by the three referees authorized by the statute to be appointed by the court for the purpose of making the division between the respective parties to the suit, subject to the approval of the court.

The judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with the views above expressed.

G. & C. MERRIAM CO. v. OGILVIE.

(Circuit Court of Appeals, First Circuit. January 30, 1908.)

No. 730.

1. TRADE-NAMES—NAME OF COPYRIGHTED BOOK—EXPIRATION OF COPYRIGHT—EFFECT.

On the expiration of the copyright on the name "Webster," used in connection with dictionaries, the name became public property; though such name as applied to the dictionary published by the owner of the copyright had acquired a secondary meaning, indicating a particular book published and sold by such owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 16.]

2. SAME.

The right to use a copyrighted name upon the expiration of the copyright becomes public property, subject to the limitation that the right shall be so exercised as not to deceive members of the public and lead them to believe that they are buying the particular thing which was produced under the copyright.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 16.]

3. SAME—USE OF NAME—ADVERTISING—INJUNCTION.

A publisher, whose copyright on the name "Webster" as used in connection with dictionaries has expired, may be enjoined by a competing publisher of dictionaries from issuing circulars to the effect that it has the exclusive right to use the name in such connection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.]

4. SAME.

The copyright on "Webster's Unabridged Dictionary" having expired, a competing publisher of "Webster's Dictionary" or "Webster's Imperial

Dictionary" may be enjoined by the original publisher from issuing misleading and deceptive circulars and advertisements which show an intention to trespass upon the reputation of the original publishers, and deceive purchasers into buying the competing publisher's dictionary, on the supposition that it is one of the series published by the original publisher.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.]

5. SAME.

The M. Co.'s copyright on the name of "Webster," as used in the title of dictionaries, having expired, O. published dictionaries bearing that name, with the evident purpose of leading the public into supposing that they were buying Webster's Dictionary as improved by M. Important work of Noah Porter for M. is prominently referred to in its title pages. O.'s title page reads, "Being the authentic unabridged dictionary of Noah Webster, LL. D. * * * prepared under the direction of Noah Porter." On the backs of some of his publications O. printed "The latest complete authentic Webster's Dictionary," the word "authentic" being plainly borrowed from the backs of M.'s publications. *Held* that, though O. printed his name on the back or cover and on the title page of his dictionaries, and used "Imperial" and "Universal" in the title, and not "International," as used by M., he was guilty of unfair competition.

6. SAME—INTENT.

The presence of an inequitable purpose is an element of great weight in determining a question of fairness in trade.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 80.]

7. SAME.

Where one avails himself of the principle of public dedication of a name, he must in good faith fully identify his production, and clearly disassociate it from that of one who has given significance to the name, and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, it is something produced and put upon the market by himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.]

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

For opinion below, see 149 Fed. 858.

William B. Hale and Frank F. Reed (Charles N. Judson, E. S. Rogers, and Judson & Hale, on the brief), for appellant.

George F. Bean, for appellee.

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

ALDRICH, District Judge. This case involves a bill and a cross-bill, each party claiming injunction relief against the other. There was an injunction below against each party. The Merriam Company appeal upon the ground that it should not be restrained, and also upon the ground that the injunction against Ogilvie was not broad enough. Ogilvie did not appeal.

Whatever relief either party gets under these proceedings is afforded upon the ground of unfair competition rather than upon any theory of infringement of copyright or protected trade-name. This case does not, in any sense, stand like a case involving a trade-name established

in the course of business where, independent of statutory monopoly, the right to its exclusive and continuous use results from its adoption, adaptation, and use in trade and commerce.

The name "Webster" having been copyrighted by the Merriams, they were protected in its use under a statutory right during an expressed term of years. The protection, therefore, in that respect, came by virtue of the copyright rather than by virtue of its use in publication and trade.

The statutory monopoly having expired under statutory limitation, the word "Webster," used in connection with a dictionary, became public property, and any relief granted upon the idea of title or proprietorship in the trade-name of "Webster" would necessarily involve an unwarrantable continuance of the statutory monopoly secured by the copyright.

The authorities and the discussion of this phase of the case by the learned judge in the Circuit Court (Ogilvie v. Merriam Co. [C. C.] 149 Fed. 858, where the facts sufficiently appear) satisfy us in respect to the soundness of the proposition that upon the expiration of the copyright the name "Webster" passed into the field of public right.

We perceive no difference in principle between patent rights and copyrights in this respect, and, as observed by Mr. Justice White in Singer Manufacturing Company v. June Manufacturing Company, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, "where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created." The Singer Case declares a general and undoubted principle which is quite decisive of the case under consideration so far as the name "Webster" is concerned, and though the name "Webster" as applied to the Merriam Company's dictionary had acquired a secondary meaning, indicating a particular book published and sold by them, it became public property when the copyright expired.

The right to use a copyrighted name, however, upon the expiration of the copyright, goes out to the public subject to a certain and well-understood limitation or condition, namely, that the public right to use shall be so exercised as not to deceive members of the public and lead them into the belief that they are buying the particular or identical thing which was produced under the copyright. That the right of public user of the name "Webster" was subject to such a condition was fully recognized by the learned judge who decided this case in the Circuit Court, and, indeed, the principle was forcibly stated by Mr. Justice White in the Singer case.

We think the conclusion reached by the Circuit Court, that the Merriam Company should be enjoined from sending out circulars to the effect that it has the exclusive right to use the name "Webster" in connection with dictionaries, was justified by the evidence and the authorities, and we are content to leave that branch of the case upon the reasoning contained in the opinion of the learned judge of the Circuit Court.

That court also points out, and we think the situation justifies it, that the Ogilvie circulars and advertisements are misleading and deceptive, and show an intention on the part of Ogilvie to trespass upon the reputation of the Merriam Company and to deceive purchasers into buying his dictionary for one of the series of Webster's dictionaries published by the Merriam Company, and it was held that Ogilvie should be enjoined from sending out circulars and advertisements in their present form. We agree that this should be so upon equitable principles, because it presents a situation in which a member of the public seeks to appropriate more than fairly and equitably belongs to him.

It is also our conclusion that the same purpose and the same reasoning hold good with respect to the title page of the Ogilvie publication.

It seems pretty evident from consideration of all the circumstances surrounding these publications, including the correspondence, the circulars, the advertisements, and the character of the litigation, that the purpose of Ogilvie was to put out such a publication and such circulars and advertisements as would lead the public into the supposition that they were buying the Webster Dictionary as improved and added to by the Merriam Publishing Company, and we think that the reasoning of the Circuit Court with respect to the circulars and advertisements applies with equal force to the title page of the Ogilvie publication.

We also think, in view of the ingenious arrangement of the prominent features of the Ogilvie title page, that its weight in the public eye is not fully and unmistakably overcome by printing the name "George W. Ogilvie" upon the back of the cover, or by printing the words "George W. Ogilvie, Publisher," as a part of the title page.

The reasoning of the Singer Case, which we think applies here, is that the name must be accompanied by such indications as will unmistakably inform the public that the thing is something put out by the particular party who appropriates it and exercises the public right.

If the title page of the Ogilvie dictionaries had contained, for instance, the words "Webster's Dictionary, published by George W. Ogilvie," with other expressions correctly indicating the identity of the publication, the Merriam Company would have no just cause for complaint. But such is not this case.

Noah Porter did important work, under the auspices, and in connection with the enterprise of the Merriam Company, and his work is prominently referred to in their title pages, which, in an abridged form, call attention to the subject-matter of their improved publications. Beyond question the conspicuous feature of the Ogilvie title page, "Being the authentic unabridged dictionary by Noah Webster, LL. D., with an exhaustive appendix, including Scripture proper names and pronouncing vocabulary of Greek and Latin proper names prepared under the direction of Noah Porter, D. D., LL. D.," refers to the subject-matter of the Merriam title page, and to something which was substantial and supplemental to the Merriam Dictionary, and something done, not by Ogilvie, but by the Merriam Company in the development and improvement of their publication.

The manifest tendency of such a prominent feature of the Ogilvie title page would be to lead purchasers into the idea that they were buying Webster's Dictionary improved by the work of Noah Porter, which would, of course, mean the Merriam publication. Moreover, the word "authentic," used in the setting devised by the plaintiff, was strongly calculated to lead the public mind in the direction of the Merriam publication. This, we think, indicates that the design and purpose which prompted the Ogilvie circulars and advertisements were present in the formation of the conspicuous features of the title page of the Ogilvie dictionary. The same considerations apply to the words and phrases on the backs of some of the Ogilvie publications, as, for instance, "The latest complete authentic Webster's Dictionary." The word "authentic" was plainly borrowed from the backs of the Merriam publications, and, though the setting was somewhat different because they used "Imperial" and "Universal" rather than "International," the impression still remains that their purpose was a play upon the words and phrases of the Merriam publications.

It is quite true that Ogilvie proceeded with his purpose under a claim of right, but, notwithstanding this, his title page, and his imprints upon the backs of his dictionaries, as well as his circulars and advertisements, involve legal and equitable wrong, because, in spirit and in fact, they ignore the obligation of full compliance with the condition which law and equity impose upon the copyrighted name when set at large, and, although the name "George W. Ogilvie" was used, it was not in fact intended that it should in all cases overcome the prominent features of the title page and the imprints upon the backs, and unmistakably lead the ordinary purchaser to a correct conclusion as to the identity and true character of the publication.

Under the history and the circumstances of the Ogilvie publication, including the fact that a dictionary was at one time put out with the name of Ogilvie as agent for the publisher, we think it reasonable to conclude that the title page and the imprints upon the backs, although containing the name of Ogilvie, were ingeniously planned with the idea of not giving a clear and definite designation of identity, but of leading those who casually examine into the supposition that they are getting the Webster Dictionary of which they have heard and read in years gone by.

It seems to us that Ogilvie was not content with using the word "Webster," which was at large as a word entitled to be used in connection with a dictionary, but purposely used words of description calculated to lead the ordinary purchaser to suppose that he was getting the publication which had been built up by the Merriams. This, we think, was an appropriation of something which he was not entitled to appropriate, and under the circumstances amounts to unfair competition.

The presence of an inequitable purpose is necessarily an element of great weight in the determination of a question of fairness in trade. And where another avails himself of the principle of public dedication, he must in good faith fully identify his production and clearly disassociate his work from the work of the one who has given significance to

the name and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, that it is something produced and put upon the market by himself.

Use of a manufacturer's or producer's true name alone would not always suffice as an unmistakable designation, and especially where artifice and bad faith are present. Suppose, for instance, that another Gillette of precisely the same name as the one who has so extensively advertised his "Gillette Safety Razor" should, for the purpose of reaping the fruits of the original Gillette's advertising and reputation, put upon the market a different razor under descriptions and phrases calculated to lead the ordinary purchaser to suppose that he was buying the original Gillette razor, his competition would not be made fair by simply appending his own true name which is identical with the name of the Gillette who built up the reputation. This principle is recognized in International Silver Co. v. Rogers Co. (C. C.) 110 Fed. 955, and, though it only applies to an extreme situation, it illustrates the idea that the designation must be efficient and ample under the particular circumstances of a given situation.

While appending Ogilvie's name was doubtless intended as a technical compliance with the condition upon the public right to use the name "Webster," it was not intended that it should operate to wholly overcome the influence produced upon the public mind by the phrases descriptive of the Merriam publication. It is quite apparent that the intended effect of the whole was something contrary to that idea.

The decree of the Circuit Court with respect to the injunction against the Merriam Company is affirmed.

The decree of the Circuit Court for an injunction against Ogilvie in respect to circulars and advertisements is affirmed, and the case is remanded to that court with directions that the injunction against George W. Ogilvie, his agents, attorneys and servants, be so enlarged as to include the title pages and the backs of the dictionaries in the present form, or in any form calculated to deceive members of the public into purchasing his dictionary under the belief that it is a Merriam Webster's Dictionary, and for further proceedings not inconsistent with the opinion passed down this day. All questions of accounting, including the question whether or not the Merriam Company is entitled to an accounting, are open to the Circuit Court. Neither party recovers costs in this court.

POSTAL TELEGRAPH CABLE CO. v. NICHOLS et al.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,379.

1. TELEGRAPHS—MESSAGES—DELAY IN TRANSMISSION—CONTRACT.

Where plaintiffs wrote a message on a blank reciting that the message was received by the telegraph company subject to the terms and conditions on the back of the blank, which were agreed to, plaintiffs were charged with notice of such conditions, though they were not read and plaintiffs' attention was not called to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 45.]

*Rehearing denied June 10, 1908.

2. SAME—NEGLIGENCE.

Plaintiffs, before sending a telegram from Tacoma to Alaska with reference to a proposal for a government contract, explained the importance of the message to the manager of the sending office, and he, after satisfying himself of his ability to transmit it promptly, undertook to do so. Within 10 or 15 minutes after starting the message such agent knew that the transmission would be interrupted, and, though he knew that it was essential that it be delivered before noon of the succeeding day in order to be of avail, did not notify the senders of such interruption, and the message was not delivered until eight days thereafter. If notice of the interruption had been given, the senders might have protected themselves by communicating with the War Department at Washington, which was known to the agent at the sending office. *Held*, that the telegraph company was negligent in failing to notify the senders of the interruption, against which it could not contract for immunity from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 39.

Delay in transmission of message—failure to disclose that line was not in working order, see note to Pacific Postal Telegraph Cable Co. v. Fleischner, 14 C. C. A. 177.]

3. SAME—DAMAGES.

Where plaintiffs, discovering a mistake in certain proposals for government work, telegraphed the government officer in charge of the bids to add 5 per cent. to their proposal, but such message was not received in time because of the telegraph company's negligence, and plaintiffs were compelled to do the work at the original price, and the government officers would have added the 5 per cent. if the telegram had been received prior to the opening of the bids, the telegraph company was liable for such additional amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 64–68.]

4. SAME—NOTICE OF CLAIM.

Where a telegram was filed for transmission on June 12, 1903, but the senders had no knowledge, prior to July 11th following, of the telegraph company's negligent failure to deliver the same, and notice of claim for damages was filed on August 17, 1903, the claim was in time, under a rule requiring claims for damages to be presented within 60 days after the message is filed for transmission.

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

Robert H. Lindsay and W. S. Wood, for plaintiff in error.

A. R. Titlow, for defendants in error.

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

ROSS, Circuit Judge. On and prior to the 12th day of June, 1903, the defendants in error, who were the plaintiffs in the court below, were general contractors, having their offices in the same building in the city of Tacoma, state of Washington, in which the plaintiff in error had its telegraph office, and had, prior to the date mentioned, submitted a proposal in writing to do certain work for the government in Alaska, at a place called Haines, which proposal was made in response to an advertisement inviting bids, and wherein it was stated that all such bids would be opened by the constructing officer, Capt. W. P. Richardson, at Skagway, at noon of the 13th day of June, 1903. By their proposal, sent to Capt. Richard-

son in sufficient time, the defendants in error offered to complete the work for $48,870, and they gave security, as required by the War Department, that if such proposal was accepted they would enter into a contract to do the work accordingly. Subsequently finding that they had made some mistake, they undertook on the 12th day of June, 1903, to telegraph Capt. Richardson at Skagway to add 5 per cent. to their proposal, which addition amounted to $2,443.50. They were accustomed to the use of the telegraph in their business operations, and were regular customers of the plaintiff in error. They kept in their office a book of telegraph blanks so arranged that a carbon copy of any message written thereon could be preserved. Upon one of these blanks the defendants in error wrote, on the 12th day of June, 1903, a message in these words:

"Tacoma, Wash., June 12, 1903.

"Capt. W. P. Richardson, Skagway, Alaska.

"Proposal for Haines mailed last Monday. Add 5% to our entire proposal.

"W. R. Nichols & Co."

Nichols took this message to the office of the plaintiff in error, and, according to his testimony given on the trial, explained to its manager at Tacoma, Mr. Bell, the importance of the telegram, and stated to him that, if it could not be delivered to Capt. Richardson at Skagway before 11 o'clock of the next day, they could wire to the War Department at Washington such addition to their bid, and thus protect themselves from loss. The testimony of Nichols in respect to the manager's answer to this inquiry is that he first said:

"'Yes, sir,' and then he says, 'Wait.' He then went back to the operating table behind the counter. I was in front of the counter. He went back to the tables, and after awhile he came out, and he says: 'Yes; we can deliver it, and probably it will be delivered to-night. Yes; the wires are all right'—or: 'The wires are working. We can deliver it at that time, and probably it will be delivered to-night.'"

In regard to the same matter the agent of the telegraph company testified upon question and answer as follows:

"Q. Do you remember the incident on the 12th day of June, 1903, of Mr. Nichols having a conversation with you relative to the sending of a telegram to Skagway for the firm of Nichols & Co.? A. Yes. Q. Just state, if you please, what transpired between you and Mr. Nichols on that occasion. A. Well, I couldn't state just exactly what transpired, because I have those things every day; but I think Mr. Nichols came in and said he wanted to send an important telegram to Skagway, and asked me if I could get it through. I don't know what I remarked; but I went back and looked at the wire service—we get wire services which state whether or not the wires are down—and I saw nothing there to indicate that the wires were down, and I told him, I presume, that I could get it through. Q. Explain to the jury what those wire services are. A. They are notices of the condition—if at any time during the day a wire goes down on our system, for instance, the wire goes down between Seattle and Tacoma, we are notified, or any break of that kind, we receive a notification that the wires are down. Q. What do you do with that notification? A. That is placed on a spindle for the information of the employés, for reference. Q. Upon this inquiry made of you by Mr. Nichols, you consulted your wire services? A. Yes. Q. What was your wire service? A. I found I had no notice that the wire was down, and I came out and told him I thought I could get the message through."

The message was thereupon given to the telegraph company for delivery at Skagway, for which the defendants paid the usual charge, but not for the repetition of the message; the route being, as described by one of the employés of the plaintiff in error, from "Tacoma to Seattle over our own line; from Seattle to international boundary between the United States and Canada over our own line, where the metallic connection is made with the Canadian Pacific wire to their Vancouver office; there it comes actually into the hands of the Canadian Pacific government and department; from Vancouver to Ashcroft over the Canadian Pacific lines, and from Ashcroft to White Horse, Yukon Territory, through British Columbia and a part of the Yukon Territory, over lines owned and operated by the Dominion government of Canada; from White Horse, Yukon, to Skagway, over the lines of the White Horse & Yukon Railway Company."

The case further shows that the message was immediately started from Tacoma, and reached Seattle 18 minutes after 4 o'clock of the afternoon of June 12th. It did not reach Capt. Richardson until June 20th, "owing to the Dominion telegraph line being down," according to a statement made in a letter from that officer, of date July 9, 1903, to the defendants in error. There was evidence going to show that, if the telegram had been delivered before noon of June 13th, the additional 5 per cent. would have been added to the bid of the defendants in error, and that because of such nondelivery they were obliged to take the contract and do the work for the amount of their original proposal, resulting in a loss to them of $2,443.50. The case further shows that on June 12th there were two lines of telegraph open between Tacoma and the city of Washington, by means of which the defendants in error could have communicated with the War Department; and it also shows that they were not notified by the plaintiff in error of its inability to get the telegram through to its destination, although it knew, according to the testimony of Bell, within 10 or 15 minutes after the message was started, that the connecting wires were down and its transmission interrupted.

These further facts appear in the case: On the plaintiff in error's blank, on which the message in question was written, and above the space designed for its insertion, were printed the words:

"Send the following message, without repeating, subject to the terms and conditions on the back hereof, which are hereby agreed to."

And on its back were printed these, among other, "terms and conditions":

"It is agreed between the sender of the message written on the face hereof and the Postal Telegraph Cable Company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for the nondelivery of any unrepeated message, beyond the amount received for sending the same. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. This company will not be liable for damages or statutory penalties in any case where the claim is not presented in

writing within 60 days after the message is filed with the company for transmission. No employé of this company is authorized to vary the foregoing."

The message was not repeated, the delay occurred upon a connecting line, and no claim for damages was presented in writing within 60 days after the message was filed with the company for transmission. We attach no consequence to the testimony of Nichols to the effect that he did not read the printed matter on the front or back of the blank upon which he wrote the message and that his attention was not called to such matter. In the case of Primrose v. Western Union Telegraph Company, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, the Supreme Court held that the measure of damages for mistakes made in the transmission of an unrepeated telegram in cipher, written upon one of the company's blanks upon which were printed terms and conditions similar to those appearing in the present case, was the sum paid for sending it, where the telegraph company was not informed of the nature or importance of the message.

But this case presents two very important distinctions: Here the telegraph company was distinctly informed of the importance of the message and that it was essential that it be delivered at Skagway before noon of June 13th, and with that knowledge accepted and undertook so to transmit and deliver the message, after satisfying itself of its ability to do so. Here, too, the telegraph company became aware, within 10 or 15 minutes after starting the message, of a break in the line over which it knew, or should have known, it must go, and that its transmission had been interrupted. With that knowledge on its part, and knowing the importance of the message, and that it was essential that it be delivered before noon of the next day in order to be of any avail to the senders, we have no hesitation in holding it to have been gross neglect on its part, against which it could not contract, not to notify the senders of the break in the line and the consequent interruption in the transmission of the message, that they might have protected themselves by communicating directly with the War Department at Washington. See Fleischner v. Pacific Postal Telegraph Company (C. C.) 55 Fed. 738; Swan v. Western Union Telegraph Company, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Western Union Telegraph Company v. Cook, 61 Fed. 624, 9 C. C. A. 680.

We are also of opinion that the damages sued for, and which the defendants in error recovered in the court below, were not speculative or remote, as they covered only the 5 per cent. desired by the defendants in error to be added to their bid, and which the officers of the government having in charge the work in question testified would have been added, had the telegram been delivered prior to the opening of the bids, at noon of the 13th of June, 1903.

The contention on the part of the plaintiff in error that the action cannot be maintained because of the failure of the defendants in error to present their claim for damages within the 60 days required by the rules of the plaintiff in error cannot be sustained upon the record. It appears that the claim for damages was presented to the plaintiff

in error on the 17th day of August, 1903. There was testimony on the part of the defendants in error to the effect that they did not know of the nondelivery of the telegram to Capt. Richardson prior to July 11, 1903, which was much within the 60-day period. Counsel for the plaintiff in error are mistaken in saying, as they do in their brief, that the record shows that the defendants in error knew of such nondelivery on the 17th of June of that year. Neither the testimony of the witness Titlow, nor the letter of Capt. Richardson to the defendants in error of date July 9, 1903, gave any such information.

The judgment is affirmed.

CHRISTIE & LOWE et al. v. FANE S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1908.)

No. 1,710.

1. COLLISION—VESSEL AT FAULT.

A tug and tow passing down the Mississippi river, near the New Orleans side, because of certain "boils" and cross-currents in the river, came into collision with a vessel safely moored at a wharf, one of the barges in the tow striking the vessel at almost right angles. The captain of the tug was an experienced navigator, and the tug itself was powerful and amply able to handle her tow. The fact that powerful eddies and cross-currents and "boils" were likely to occur at the point in question was well known to every navigator in the port, and in order to avoid them experienced pilots were in the habit of beginning to make a turn much farther up the river than the captain of the tug did on the morning in question, he, being desirous to take advantage of the down current in midstream as long as possible, waited until it was too late to make a turn with certainty of safety, notwithstanding the "boils," cross-currents, etc. *Held*, that the collision was not the result of inevitable accident from unforeseen conditions of navigation, but of the negligent navigation of the tug.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 19.]

2. SAME—DAMAGES—DOUBLE CHARGE.

Where, in a libel for collision, the injured vessel was under charter at a fixed rate, requiring her to pay and subsist the officers and crew a decree allowing damages for loss of charter money pending repairs, and in addition an amount for wages of officers and crew, and for cost of subsistence of the crew during the same time, was objectionable as a double charge for the same items of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 286.]

3. COSTS—ERRORS IN DECREE—CORRECTION.

Where a mistake in a decree was not called to the attention of the trial court nor assigned as error on appeal, its correction would not affect either the costs at the trial or on appeal.

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

Chas. S. Rice and R. B. Montgomery, for appellants.

J. D. Rouse, Wm. Grant, and W. B. Grant, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit in admiralty to recover damages growing out of a collision. As we find the evidence, the case was

correctly ruled and decided in the District Court. It appears, however, that in framing the decree an error was made resulting in a double charge for certain items of damage. While the injured vessel Bratten was under charter at a fixed rate, she was, under the contract, required to pay and subsist the officers and crew. The decree allows $991.46 damages for loss of charter money pending repairs, and also (item No. 11) $269.46 wages of officers and crew, and (item No. 12) $84 cost of subsistence of crew during the same time. These two last-mentioned items it is agreed should not have been included in the decree. The mistake was not called to the attention of the lower court nor is it particularly assigned as error on this appeal, therefore it ought not to affect the costs either here or in the District Court.

The decree of the District Court is amended by striking out items of damages Nos. 11 and 12 and reducing the total amount of recovery from $14,336.86 to $13,983.40, and, as thus amended, the same is in all respects affirmed.

NOTE.—The following is the opinion of Saunders, District Judge, in the court below:

SAUNDERS, District Judge. The libelant in this case claims that its ship, the Bratten, was moored safely and properly at the wharf in New Orleans, on the morning of May 12, 1904, and that while so moored the said steamship was run into by a tow of barges which was being brought down the river by the steam tug R. C. Viet. The result of the collision was that a large hole was made in the side of the steamship Bratten, and she was broken from her moorings and set adrift in the river in a helpless condition. She was rescued by some steam tugs, who came to her assistance. These tugs demanded and sued for salvage, and recovered a judgment for $6,000 and costs. Expenses were incurred in repairing the Bratten, and she was put to considerable expense for the time she was delayed and for loss under her charter party. The answer admits the collision, but claims that it was due to inevitable accident. It is alleged that the steam tug Viet was properly equipped, had sufficient power to handle the tow; that its machinery was in good order, and that she was in charge of a competent and experienced master; that she was "tight, staunch, and strong, fully equipped with proper machinery, and apparatus, all in good order, for the work in which she was engaged; that she was one of the most powerful tugs used in and about the harbor of New Orleans." But, the answer avers, she was prevented from keeping her course as intended, "by the sudden, unexpected and unforeseeable currents, eddies, and boils in the river added to the then powerful current, adjacent to the point and extending and sweeping the said steam tug and her tow into the bend near the foot of which the steamship Bratten was lying, and in spite of the efforts of those on board the Viet, and not through any fault, omission, or neglect or inattention, or want of proper care or skill on the part of said tug, her master or crew; but that every care, skill, and duty devolving upon them, in the premises, was exercised to the fullest extent, and that no liability was, in the belief of respondents, incurred or devolves upon them" (the claimants).

The evidence proves the allegation of the answer as to the equipment, machinery, master, and crew of the Viet. It is shown that the master enjoys a high reputation for skill and care in his profession. It is further shown that he has had more experience, probably, than any pilot in the port of New Orleans, in handling tows up and down the river, and at the particular point where this accident occurred. The tug Viet is the second most powerful tug in the city of New Orleans. It is not proved that the barges which were in tow of the Viet that morning were too heavy for the tug ordinarily to handle. Indeed, the tow was of much less weight than tows which the same tug had handled successfully a few days before.

The evidence shows that it is a well-known fact that the point at which the collision occurred is more dangerous to navigate than most of the other points in the port of New Orleans. There is an eddy running up stream on the Algiers side of the river. There is a bend in the river which necessitates a sharp turn at that point. It is also proven, beyond any controversy, that at this point of the river particularly there frequently occur what the river men call "boils"; that is, eruptions of large volumes of water which are projected apparently from the depths of the river. No one seems to know what causes these boils. They probably result from the meeting of conflicting and opposite currents. When a boil occurs, if it emerges near the side of the bow of a vessel, it is apt to throw the vessel entirely out of its course. All these facts have been abundantly proven.

Capt. Strand claims that on the morning when the collision occurred this boat was pursuing a proper course, and that a boil suddenly occurred near the bow of his tug which threw it and the barges towards the New Orleans side. Before he could recover his course, another boil emerged, throwing the tug and barges again towards the New Orleans shore. The captain pursued his course, doing his best to throw the tug and barges from the New Orleans shore, so as to avoid collision with the vessels moored at the wharf on the New Orleans side. When he found that a collision was inevitable, he then reversed his engines and backed with all his power so as to lessen the force of the collision. But he testifies that his helm was hard aport and that it continued hard aport when he attempted to back the tug. The result necessarily was that the course of the tow was turned in, instead of parallel to the vessels at the wharf, and that when the collision occurred it was very much as if the barge which struck the Bratten was driven against that vessel for the purpose of ramming it. If the helm had been reversed, the direction of the tug and barges might then have been parallel to the Bratten, and not at right angles to it. This seems to me to have been a mistake on the part of the captain of the Viet, which resulted disastrously to the Bratten. Apart from this, however, I think that the evidence shows that the Viet was in fault in not attempting to make the turn sooner than she did. The evidence shows that the captain of the Viet did not turn in towards the Algiers side of the river until he had reached Conti street, three squares below Canal street, and the preponderance of the evidence convinces me that the turn should have been begun several blocks higher at least. One of the witnesses, a very experienced river pilot, says that in high water he always began to make the turn three or four blocks above Canal street. Others say they began to make the turn at Canal street. On this occasion the Viet did not begin the turn until she was opposite Conti street, and was going then at full speed. The reason why the Viet did not begin to make the turn sooner is very obvious. The river was high, and the eddy on the Algiers side going up the river was strong. If the tug and barges had gotten into this eddy on the Algiers side, while that course would have been far safer for the shipping on the New Orleans side of the river, it would have been more difficult for the tug and barges. The captain of the Viet naturally wished to take advantage of the down current in midstream as long as possible, and he accordingly kept in midstream until it was too late to make the turn with a certainty of safety. While it is true that he could not have foreseen the particular boils, eddies, and currents which he met after he began to make the turn, yet the testimony of all the witnesses show that boils and eddies occur at that point with great violence, and that every navigator in this port expects to meet them there. It was incumbent, therefore, on the captain of the Viet, in view of the known possibility of meeting boils, eddies, and currents which would deflect him from his intended course, to make the turn in time to have his tow so far on the west side of the river, that even if he should meet such boils and eddies and be deflected from his course, he could still regain it before being driven into the wharves on the New Orleans side.

It is clear to me that the captain of the Viet, in order to take advantage of the midstream current, and in order to keep out of the eddy or current on the Algiers side, which would have imposed additional labor upon his

own operations, took a risk for the vessels on the New Orleans side of the river that he should not have taken. The fact that no well-authenticated accident has ever occurred at this point convinces me that if the captain had gone sooner and further to the west, and had made proper allowance for deflecting boils and currents, this accident would not have happened. The evidence tending to show that he took a proper course has little or no weight with me, as one of the witnesses was not in a position to see accurately the course which was actually taken, and the other witness so manifestly exaggerates that I can attach little importance to his evidence. The occurrence of this accident, whereby a vessel safely and properly moored in a harbor was rammed by a tow in motion, is prima facie evidence of some negligence on the part of the tow. The evidence is far from convincing me that if proper care had been taken by the master of the Viet the accident would not have occurred; still less does the evidence show that the accident was the result of any inevitable accident. It was produced by currents, eddies, and boils, the possible and probable occurrence of which the master of the Viet was as well aware of as any navigator in the port of New Orleans, and for the occurrence of which he should have made a safe allowance in taking his course.

There will accordingly be judgment for the libelant, as prayed for.

BEAN et al. v. MORRIS et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,423.

1. WATERS AND WATER COURSES—APPROPRIATION—STATUTES.

Act Wyo. Ter. March 11, 1886 (Laws 1886, p. 294, c. 61), provide that one claiming a water right shall file in the office of the clerk of the proper county and in the office of the clerk of the district a notice of such claim, and that in any controversy concerning water rights no evidence shall be received in behalf of any claimant until such statement or claim is filed by him. *Held*, that such act was not intended to provide an exclusive method of appropriation; its only effect being to take from an appropriator who failed to file such notice the right to claim an appropriation prior to the time when the water was actually supplied and used.

2. SAME—SOURCE OF WATER—INDIAN LANDS.

Where complainants appropriated in Wyoming waters from a creek rising in the Crow Reservation in Montana, complainants' appropriation attached eo instante on the reservation being thrown open to settlement, and became prior to the rights of subsequent appropriators settling on such reservation lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 11.]

3. SAME—INTERSTATE STREAMS.

Complainants, by a prior appropriation or diversion in Wyoming of the waters of a nonnavigable stream rising in Montana, acquired the right to continue the diversion of such waters as against a junior appropriator of the waters in Montana; the rights of appropriation not being affected by the interstate character of the stream.

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

For opinion below, see 146 Fed. 423.

George W. Pierson, Walsh & Nolan, and T. J. Walsh, for appellants.

McConnell & McConnell and J. R. Goss, for appellees.

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

DE HAVEN, District Judge. This is an appeal by certain defendants from a final decree in equity entered in the Circuit Court of the United States for the District of Montana. The bill of complaint alleges that the complainant is a citizen of Wyoming, and that in the year 1887 he acquired a water right of 250 inches, statutory measurement, by diverting the waters of Sage creek onto lands then occupied and now owned by him in that state; that such diversion was made in the state of Wyoming; that the defendants are citizens of the state of Montana, and that they had for three years prior to the commencement of this suit, during irrigation seasons, diverted the waters of said Sage creek and its tributaries at points on the stream above complainant's point of diversion; that said diversion was made by the defendants in the state of Montana; and that such acts of diversion resulted in damage to him in the sum of $2,500. The bill prayed for an injunction and for damages.

The defendants, who are the appellants here, filed an answer in which they denied that complainant ever made any appropriation of the waters of Sage creek, or that he ever diverted the waters of said stream to or upon the lands described in the bill of complaint, prior to the month of November, 1895. They admitted the diversion by them of the waters of Sage creek and its tributaries, as alleged in the complaint, but denied that complainant suffered any damage thereby. They further set forth that the alleged diversion by them was in Montana, and for the purpose of irrigating lands owned or occupied by them in that state. They alleged these lands to be unsurveyed lands, which would be subject to entry under the homestead laws when surveyed; that each of defendants is a qualified homesteader; and that he intends to enter the lands occupied by him as soon as the same shall be surveyed. The defendants further averred that each, relying upon his appropriation, cultivated his lands and improved them by the erection of houses, barns, etc.; that the lands are unproductive and valueless, unless they can be irrigated. As a further defense, they alleged an adverse use of the waters by them during the irrigation season for a period of more than ten years, and, further, that by reason of the peculiar condition of the bed of Sage creek and its tributaries the water sinks in places and rises in others, and that in consequence of this the complainant has had as much water during the period of which he complains as he ever used.

One T. N. Howell, who in his petition alleged himself to be a citizen of the state of Wyoming, was permitted to intervene; all of the parties consenting thereto. The cause of action set forth in his petition was of the same general character as that alleged in the bill of complainant—the intervener alleging that on August 1, 1890, he appropriated from the waters of Sage creek in the state of Wyoming 6¼ cubic feet per second; that his appropriation was prior to that of the defendants, but subject to the right of the complainant. He further alleged that he had enjoyed the use of the waters so appropriated by him without disturbance until about two years before the filing of his petition in intervention, when the defendants began to use the water of said stream in Montana to such an extent as to deprive him of the use of the waters so appropriated.

Answers were made to this petition identical in general character with the answers to the bill, and specifically putting in issue intervener's allegation of his Wyoming citizenship and averring, on information and belief, that he is a citizen of Montana.

The court, upon consideration of the evidence, filed its findings of fact, and made and entered its decree establishing the right of the complainant to 100 inches, miners' measurement, of the waters of Sage creek and its tributaries, of date April, 1887, and further adjudging that the intervener, Howell, is entitled to 110 inches of the waters of Sage creek and its tributaries, miners' measurement, of date August 1, 1890; that as between the complainant and intervener, the complainant is prior in time and prior in right; and that both complainant and intervener are prior in time to the defendants and prior in right. The decree further enjoined the defendants from in any manner interfering with the rights of the complainant and intervener as determined in the decree, and they were further commanded to allow, at all times when needed by the complainant and intervener, a sufficient amount of water to flow down to them to satisfy their rights.

The defendants, Bean, Bainbridge, Bennett, and S. W. and Wallace Bent, appeal.

1. At the date of the complainant's diversion of the waters of Sage creek in April, 1887, the statute of the then territory of Wyoming, approved March 11, 1886 (Laws 1886, p. 294, c. 61), provided that one claiming a water right should file in the office of the county clerk of the proper county and in the office of the clerk of the district court a notice of such claim, and it was further provided that in any controversy concerning water rights no evidence should be received in behalf of any claimant until such statement or claim was filed by him. This latter provision in relation to the rejection of evidence offered by a claimant, who had not filed in the proper office the statement required by the statute, was subsequently repealed and is no longer in force. It is conceded that the complainant never filed any notice of his claim to the waters diverted by him, as required by the territorial statute of March 11, 1886, and the appellants insist that, such being the fact, he never made any valid appropriation of such water under the laws of Wyoming.

The Circuit Court held, and we think rightly, that it was not the purpose of the statute referred to to provide an exclusive method of appropriation, and that its only effect was to take from an appropriator who failed to file such notice the right to claim an appropriation as of the date of the beginning of the work of diversion; "the penalty for such failure being to limit the right to the time when the water is actually supplied and used." This is the construction placed upon similar statutes in other states requiring the filing and recordation of claims to water. Murray v. Tingley, 20 Mont. 260, 50 Pac. 723; Wells v. Mantes et al., 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432.

2. It is also urged that complainant's appropriation was invalid, because at the date of the initiation of his claim the head waters of Sage creek were within the limits of the Crow Reservation in the state of Montana; that the complainant's appropriation conferred no right

upon him as against the Indians of that reservation; and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians. We think a complete answer to this contention is found in the opinion of the learned judge presiding in the Circuit Court, in which he said:

"When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, assenting for the sake of argument to the theory of the defendants, all that was in the way of the validity of the prior appropriations had been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibly make, because their appropriations attached eo instante. * * * The rights of the defendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlement made by them. At that time prior appropriations had been made by the complainant and intervener, and defendants took their riparian rights subject to and charged with those appropriations."

3. Sage creek is a nonnavigable stream, the waters of which rise in the state of Montana and then flow into the state of Wyoming. The main contention of appellants, and one that has been most strongly urged in the argument and brief of their attorneys, is that the appellees could not, by prior appropriation or diversion of the waters of Sage creek at a point within the state of Wyoming, acquire the right to continue the diversion of such waters as against a junior appropriator of the waters of the same stream in the state of Montana. The argument in support of this contention is based upon the proposition that the water flowing in Sage creek within the state of Montana belongs to its citizens, and their right to divert the same at points within and upon lands of that state cannot be taken from them by a prior appropriation or diversion of the waters of the same stream in the state of Wyoming.

The proposition thus stated is not a new one, and has been decided adversely to the contention of appellants in Howell v. Johnson (C. C.) 89 Fed. 556; Morris v. Bean (C. C.) 123 Fed. 618. This court, also, in Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, 81 C. C. A. 207 in discussing the question of the jurisdiction of the Circuit Court of Nevada to quiet title to a water right, where the complainant claimed title by prior appropriation of a certain part of the flow of a river to irrigate its lands in Nevada, and alleged that such rights were being interfered with by defendant, a junior appropriator of the waters of the same stream in California, said:

"The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows no imaginary state or county lines, and is a thing in which no man has a property until captured, to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at any time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon that right. In other words, the appropriation may still be acquired, although the stream is interstate, and not local to one state; nor will the mere fact that the stream has its source in one state authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another state. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the

laws of the state where made, is protected in such right as against subsequent appropriators, though the latter withdraw the water within the limits of a different state."

It is not deemed necessary to add anything to this statement of the law. The right to divert or appropriate for a useful purpose the waters of a nonnavigable stream is recognized by the laws of Montana and Wyoming, and by sections 2339 and 2340 of the Revised Statutes [U. S. Comp. St. 1901, p. 1437]; and the broad principle which underlies the relative rights of appropriators from the same stream is, that whoever is first in time is first in right, and the fact that the stream, the waters of which are appropriated, is interstate and nonnavigable, does not affect the rule.

4. Other questions argued by appellants, such as the alleged laches of the complainant, abandonment, adverse user by defendants, and insufficiency of the evidence to justify the decree as to the number of inches of water actually appropriated by the complainant and intervener, do not require discussion.

It is sufficient to say we find no error in the record, and the decree is therefore affirmed.

VARLEY DUPLEX MAGNET CO. v. OSTHEIMER et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 104.

1. FRAUD—DECEIT—ALLEGATIONS AND PROOF.

In an action for fraud inducing the execution of a contract, it is not sufficient for plaintiffs to show that they did not get what they paid for, but fraud involving deception must be alleged and proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 55–59.]

2. SAME—MISREPRESENTATIONS.

In an action for fraud inducing plaintiffs to purchase an option to buy certain patents, a statement in the option that defendant would sell 49 patents "issued" in foreign countries, when, in fact, none of the patents had been issued, was calculated to deceive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 3–5.]

3. TENANCY IN COMMON—KNOWLEDGE AND ACTS OF CO-TENANTS.

Defendant gave D. a written option for the sale of 49 patents represented to have been issued in certain foreign countries for $600,000 to expire March 1, 1900, with the privilege of a further extention of four months on payment of $20,000. D. negotiated with plaintiff for a sale of the option and patents, and, the original option being about to expire, plaintiff paid defendant two-thirds of the $20,000 for the extension; the remaining one-third being paid by D. *Held*, that D. was not plaintiff's agent in any sense, but that plaintiff and D. acquired the option in common, and that plaintiff was not therefore charged with D.'s knowledge prior to such payment that the patents had not been issued, nor was plaintiff bound by an agreement executed by D. the year after the execution of the option reciting that the money paid for the extension had been forfeited.

4. EVIDENCE—PRESUMPTIONS.

Where plaintiff and D. owned an option to purchase certain patents in common, there was no legal presumption arising from the fact that D. showed the option to plaintiff, that he also showed plaintiff subsequent letters indicating that the patents had not in fact been issued.

5. FRAUD—CONTRACT—MISREPRESENTATIONS—WAIVER.
Where plaintiff was induced to purchase in common with D. an option for the sale of certain patents, falsely reciting that the patents had been issued in certain foreign countries, the contract was executed on plaintiff's part when it bought the option and paid for it before plaintiff was informed that it contained any misstatements, and hence plaintiff did not waive the fraud under the rule that, when a person after learning that he has been induced to enter into a contract by fraud executes it notwithstanding the deceit, he waives the fraud.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 30.]

6. EVIDENCE—LETTERS—SELF-SERVING DECLARATIONS.
A party cannot introduce in his own behalf letters written subsequent to one offered by his opponent, under the rule that, where part of a letter or document or conversation is received, the whole may come in for purpose of explanation which rule has been extended to admit prior letters referred to in the letter admitted.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1096–1099.]

7. SAME—CORRESPONDENCE BETWEEN STRANGERS.
A letter written by one stranger to another is not rendered admissible against a party by sending it to him.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1051–1060.]

8. SAME—BEST EVIDENCE—FOUNDATION.
Copies of letters should not be received in the absence of proof that the originals had been lost, or that search has been made therefor.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 561–569.]

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

Writ of error to review a judgment of the Circuit Court, entered upon the verdict of a jury in favor of the defendants in error, who were the plaintiffs below. In this opinion the parties are designated as in the court below.

Treadwell Cleveland, for plaintiff in error.

Coudert Bros. and Frederic R. Coudert (Paul Fuller, Jr., of counsel), for defendants in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is an action to recover damages for fraud. The complaint alleges, in substance, that in December, 1899, the defendant gave a written option to one Drake for the sale of 49 patents issued in certain foreign countries for $600,000 to expire March 1, 1900, but with the privilege of a further extension for four months upon the payment of $20,000; that Drake entered into negotiations with the plaintiffs for the sale of said option and patents; that the original option being about to expire, the plaintiffs, induced by and relying upon the statements therein, paid to the defendant two-thirds of said $20,000 for the extension thereof, the remaining one-third being paid by said Drake; that at the time of the execution of said option and of said payment the defendant did not own said patents and the same had not been issued or applied for; that the representations contained in said option were false and fraudulent; and that the plain-

tiffs have been damaged. The answer admits the making of the option and the payment for the extension thereof. It also admits that the patents mentioned in the option had not been actually issued at the time it was extended, but alleges that Drake was aware of this fact and informed the plaintiffs, who at all times knew and approved the situation regarding the patents. It denies any statement which ever deceived or misled the plaintiffs. The plaintiffs having obtained a verdict, the defendant brings this writ. We may conveniently consider the claims of error relied upon as embodied in the points of the defendant's brief.

The defendant claims in its first point that there was no deception of the plaintiffs by the defendant, and consequently that the complaint should have been dismissed. This is not an action of assumpsit. It is not enough to show that the plaintiffs did not get what they paid for—that the consideration failed. Fraud is alleged and must be proved. Fraud involves deception. If the plaintiffs were not deceived, they cannot recover. The statement in the option that the defendant would sell 49 patents "issued" in foreign countries, when in fact no patents had then been issued, was calculated to deceive. Still, if the plaintiffs knew when they paid their money that it was not true, they were not deceived or defrauded; but there is no evidence to show that they had any actual knowledge that it was not true. All that the defendant claims is that Drake's knowledge should be imputed to them.

Now, it does not appear that, when the option was given, Drake knew that the patents had not been issued. But the letters from the defendant between that time and the time the money was paid—in which the filing of applications for patents is mentioned—must fairly have apprised him of the situation. We may therefore adopt the defendant's contention that at the time of the payment of the money, Drake knew that the statement in the option was untrue. But it is not claimed that Drake was ever expressly created the agent of the plaintiffs, so that they are bound by his knowledge or that there was any partnership agreement. It is claimed that the law implies such agency from the relationship of the parties. The plaintiffs, with Drake, paid the money for the extension of the option. They took the option and the rights thereunder in common. No partnership was created, and one co-owner was not in law the agent of the others. They merely owned together the option rights as they would any other property. Drake may not have been deceived. He may have no cause of action. But we cannot impute his knowledge to the plaintiffs.

In its second point the defendant claims that the court erred in refusing to submit to the jury the question of Drake's authority to execute an agreement a year after the execution of the option, in which he stated that the money paid for the extension of the option had been forfeited. If this statement was merely the expression of Drake's opinion as to the then existing situation, it was immaterial. If offered to show a release of the plaintiffs' claim for fraud, there was no evidence to warrant the jury in finding that Drake had, in fact, authority to make it. And, for reasons already stated, no such authority can be implied as a matter of law from the relations of the parties. Consequently there was no question to be submitted to the jury.

The defendant's third point is that the court erred in failing to charge that the defendant had the right to presume that, if Drake showed the option to the plaintiffs, he also showed the subsequent letters indicating that the patents had not in fact been issued. The probability that Drake would show his associates all the correspondence was proper for the jury to consider. But there is no legal presumption in the matter.

The defendant's fourth point is that, if any fraud were committed by the defendant upon the plaintiffs, they waived it by their subsequent conduct. Under this point the defendant claims that, soon after the money was paid, the plaintiffs learned of the alleged fraud, but they did not disaffirm the contract and continued on under it. And the defendant cites authorities which hold that when a person, after learning of the fraud which has induced him to enter into a contract, goes forward and executes it notwithstanding the deceit, he waives the fraud and cannot recover damages therefor. But these principles are inapplicable here. The plaintiffs did not go forward and execute the contract after discovering the alleged fraud. They executed the contract on their part when they bought the option and paid for it, which, as alleged and shown, was before they knew that the option contained misstatements.

In its fifth point the defendant claims that the court erred in admitting in evidence certain letters and copies of letters offered by the plaintiffs. Among these letters were several from the plaintiff Ostheimer to Drake dated many months after the payment of the money and the expiration of the option. These letters are claimed to have been admissible as supplementing another letter of an earlier date from the said plaintiff to Drake which had been offered in evidence by the defendant. In support of this claim, the plaintiffs call attention to the rule that, where part of a letter, document, or conversation is received, the whole may come in for purposes of explanation. This rule has also been extended so as to admit prior letters referred to in the letter which has been admitted. But no rule permits a party to put in his own letters written subsequently to the one offered by the other side. A party must testify under oath, and cannot make evidence by writing letters. He cannot relieve himself of statements made one day by showing that the next day he said something different. The letters were clearly inadmissible. Two letters from Bolton to Berg, total strangers to the controversy, were also admitted in evidence, and were obviously inadmissible. It is not entirely clear whether both of these letters came into Drake's possession, and were forwarded to Varley; but whether they did or not is immaterial. The letter of a stranger to a stranger is not rendered admissible against a party by sending it to him. That there was prejudicial error in admitting these letters appears from the fact that in one of them Bolton wrote that he did not "think Mr. Varley in America was straight with you." The letters from Bolton to Drake and from Berg to Drake which were received in evidence were also inadmissible for the reasons stated.

There was also error in receiving copies of several letters in the absence of proof that the originals had been lost, or that search had been made therefor. In explanation of these rulings, it is proper to

point out that the evidence was taken in France and presented in court in the form of depositions, so that the party offering it had no opportunity to correct mistakes. This circumstance undoubtedly led the trial court into the errors stated.

As a new trial must be had, we think it unnecessary to consider the remaining points in the defendant's brief. Upon another trial, it is possible that other evidence may be offered, and it would serve no useful purpose to discuss the weight of the evidence received upon the last one.

A new trial is ordered.

NEW YORK TRANSP. CO. v. O'DONNELL.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 145.

1. TRIAL—INSTRUCTIONS—EXCLUDING ISSUES.

In an action for the death of a pedestrian struck by an automobile, an instruction that if, when he first saw the automobile he was in a position of imminent danger from it, the doctrine of contributory negligence did not apply to the case, was erroneous, as withdrawing from the jury the question whether the pedestrian was negligent in getting into the place of danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613–623.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

One may be excused for making a mistake when suddenly confronted with imminent danger only when he is without fault in getting into the dangerous situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Contributory Negligence, §§ 99, 100.]

3. TRIAL—CURE OF ERROR—INSTRUCTIONS.

In an action for the death of a pedestrian struck by an automobile, an instruction that if, when he first saw the automobile, he was in a position of imminent danger from it, the doctrine of contributory negligence did not apply, being erroneous as withdrawing from the jury the question whether the pedestrian was negligent in getting into the place of danger, the error was not cured by instructions in other parts of the charge dealing at length with the question of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–718.]

Coxe, Circuit Judge, dissenting.

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

Writ of error to review a judgment of the Circuit Court, Eastern District of New York, entered upon a verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the following opinion the parties are designated as in the court below.

Arthur K. Wing, for plaintiff in error.

R. J. Donovan (Herbert D. Cohne, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. In this action the plaintiff seeks to recover damages for the death of William O'Donnell, resulting from injuries received in a collision with an automobile owned and operated by the defendant upon or near the Plaza, New York, in January, 1905. The basis of the action stated in the complaint was the negligence of the defendant's chauffeur. The answer denied the allegations of negligence, and charged contributory negligence.

Upon the trial the court charged the jury with respect to the questions of negligence and contributory negligence, and then went on to say:

"If an accident occurs under such circumstances that the person injured, through sudden fright or fear or confusion, does not have opportunity to do more than make a momentary judgment, and he makes the wrong judgment under the stress of the situation, so that he does not have time to exercise reasonable care, then the doctrine of contributory negligence does not come in. As I understand it, that means this: If this deceased should have, without any warning which reached his intelligence, his senses, if he should have found himself in a position where he had no chance to exercise his judgment, but had to act so quickly that a reasonable man could not have told what he would do, then you must go back to the act that happened, and see whether the defendant had used reasonable care up to the time where this confusion occurred. If this deceased, O'Donnell, without any notice which he had heard, suddenly found himself immediately under the dashboard of the automobile, and if he had stepped back might have avoided, but if he stepped forward could not step quick enough to escape, you should be satisfied as to whether the reason that he was run over was because he did not have time to estimate which way he should go."

Subsequently when the defendant excepted to this portion of the charge, the court said:

"I did not charge that a person would not be guilty of contributory negligence if suffering from fright. I charged that, if a person were in such a situation that a reasonable man would not have a chance to form a judgment, there would be no contributory negligence. It would then be entirely a question of negligence of the defendant."

Thus, in substance, the court told the jury that if, when O'Donnell first saw the automobile he was in a position of imminent danger from it, the doctrine of contributory negligence did not come into the case—that the only antecedent negligence then to be considered was that of the defendant. The charge was erroneous. It withdrew from the jury the question whether O'Donnell was negligent in getting into the place of danger. A person may be excused for making a mistake when suddenly confronted with imminent danger, provided—and only provided—he was without fault in getting into the dangerous situation. Under the very circumstances described by the court the question of the decedent's prior negligence, instead of being out of the case, was of primary importance. It is true that in other parts of the charge the court considered at length the question of contributory negligence. But this did not cure the error. However well the jury were instructed with respect to that doctrine, they were told not to apply their knowledge at the point where it was most important.

As a new trial must be had for this misdirection, it is unnecessary to consider the other questions raised upon the record.

There is error, and the cause is remanded for a new trial.

COXE, Circuit Judge (dissenting). An examination of the record has convinced me that after a fair trial a just result has been reached. In such circumstances it is the duty of the court to sustain the judgment. To justify a decision which casts upon the parties the expense and delay of a new trial and a new appeal, prejudicial error must be shown. The mere existence of error is not enough, it must appear that the defeated party has been injured thereby. Prejudice should not be presumed. It seems to me that reversal in the case at bar is reached by wresting from its context a single sentence of the charge and placing upon it a construction which was not intended by the judge and which the jury could not have understood him to intend. It is conceded in the opinion of the court that the trial judge in other portions of the charge, considered at length the question of contributory negligence. The portion immediately following the first quotation in the opinion of the court is as follows, the italics being my own:

"Then you should consider what happened *before that*, to see whether the man driving the cab, the car, had used reasonable precaution, had used reasonable care in warning him and in running so close to him. But if you should be satisfied that both the driver and O'Donnell saw the nearness with which the automobile was approaching him, if they both used care up to a certain point, if O'Donnell stopped, or if the chauffeur slowed down, and then if they both made a mistake—the chauffeur in letting the machine go ahead, O'Donnell in thinking that the chauffeur was going to wait and attempting to cross—if you think that was the situation, *then you must take the whole transaction into account in deciding whether O'Donnell was guilty of contributory negligence in attempting to cross ahead of the machine*, or in attempting to dodge out of the way, when he should have either stood still or gone straight ahead."

Again the court said:

"You must consider whether this cab came on him so suddenly that he could not think what to do, and a reasonable man in his position would not have been able to see what to do—or whether he saw the cab coming, and was in doubt whether it was coming around the corner or whether it was coming straight, and did not use reasonable precaution in giving the driver room to come; if you *find that he did not use such reasonable precaution, then the plaintiff cannot recover, because the deceased was guilty of contributory negligence.* * * * You must consider whether O'Donnell was also negligent, and whether his negligence contributed proximately to his being struck, *by increasing the rate at which he was walking and attempting to cross ahead.* * * * But if O'Donnell *made a mistake of judgment with the automobile at that distance*, and attempted to go ahead of it, when the chauffeur, as a reasonable man, had a right to suppose that O'Donnell, as a reasonable man, would keep out of the way of the automobile, *then you should find for the defendant.*"

Other portions of the charge to the same effect might be quoted but I think enough has been shown to demonstrate beyond a doubt that the jury were told over and over again that if O'Donnell was guilty of negligence in attempting to cross in front of the automobile the plaintiff could not recover. And yet the judge is, in effect, made to charge the jury that if O'Donnell was guilty of negligence sufficiently gross to get himself into a position from which escape was impossible, his representative can recover.

I cannot believe that the jury understood that they were to follow such an amazing rule of law.

It may be conceded that the language quoted in the opinion of the court would have been more perspicuous if the judge had prefixed his remarks by saying that they applied to a person who without previous fault on his part found himself suddenly in a position of extreme peril. But he did say this in substance several times in his charge and was justified in assuming that the jury would so understand.

Considered in the light of the testimony and the other portions of the charge it seems to me that there is no room for serious criticism of the language used by the judge. His attention was fixed on the one point which he was attempting to elucidate, namely an accident happening in extremis. In order to make his meaning plain he assumed the parties to be in that position and excluded, for the moment, their previous conduct, having fully explained in other parts of the charge that O'Donnell was guilty of contributory negligence if he attempted to cross ahead of the automobile without exercising proper care.

In my judgment the charge fairly construed meant simply this—that the plaintiff was entitled to recover if the jury found the defendant at fault, and that O'Donnell's only negligence was that he did not exercise good judgment when he found himself in the jaws of the collision. This was good law. Coulter v. Merchants' Ex. Co., 56 N. Y. 585.

In my opinion the judgment should be affirmed.

CHESAPEAKE & DELAWARE CANAL CO. v. GRING.

(Circuit Court of Appeals, Fourth Circuit. February 15, 1908.)

No. 746.

1. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT OR VALUE IN DISPUTE.
A bill by the owner of a number of tugs and barges employed in navigation which required them to pass through defendant's canal to enjoin defendant from enforcing certain alleged illegal regulations and charges states a cause of action in the nature of a continuing trespass, and, where it shows that complainant is subjected to charges owing to such exactions amounting to some $1,600 per year, it discloses a sufficient amount in dispute to give a federal court jurisdiction.

[Jurisdiction of Circuit Courts as dependent on the 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. CANALS—REGULATIONS OF CANAL COMPANY—VALIDITY.
A regulation of a canal company requiring all barges to be passed through its locks by mules or horses *held* reasonable and valid as applied to barges which were but a very few inches less in width than the locks, necessitating careful handling to prevent injury to the vessels or locks.

3. SAME—CHARTER POWERS OF COMPANY—TOLLS.
Under the charter of a canal company authorizing it to charge toll for every boat or vessel passing through its canal, it had power to charge toll for tugs when towing other vessels through.

4. SAME.
Under the charter of a canal company which makes its canal a public highway, it has no power to adopt a regulation prohibiting barges not the property of the owner of the tug having them in charge from being towed

through the canal by such tug, and requiring them to be turned over to a particular towing company to be taken through.

Cross-Appeals from the Circuit Court of the United States for the District of Maryland.

See 129 Fed. 996.

Andrew G. Gray (Bond, Robinson & Duffy, George L. Crawford, and Ward & Gray, on briefs), for Chesapeake & Delaware Canal Co.

Robert H. Smith, J. C. McLanahan, and Jacob France, for Charles Gring.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

BRAWLEY, District Judge. Charles Gring, a citizen of New Jersey, and the owner of certain tugboats and barges, engaged in the business of the transportation of lumber and other articles of merchandise between ports in the states of North Carolina, Virginia, Maryland, and Pennsylvania, filed a bill of complaint against the Chesapeake & Delaware Canal Company, a corporation chartered under the laws of the states of Maryland, Pennsylvania, and Delaware, and the owner of a canal or waterway connecting the Chesapeake Bay and the Delaware Bay, praying, among other things, for an injunction restraining the canal company from enforcing its regulation requiring that a barge when coming to the canal in tow of a tug owned by a person other than the owner of the barge be delivered to a tug of the Canal & Back Creek Towing Company, to be towed through the canal, also from collecting charges for towing barges through the locks of the canal, and from charging toll upon the tugboats going through the canal whether with or without barges in tow, and for an accounting for moneys paid by him on account of such alleged illegal exactions. The decree of the court below granted some of the relief prayed, and refused others. The assignments of error in the appeal and cross-appeal bring before us the questions to be determined, each of which will be considered in order.

The first error assigned is in overruling the demurrer of the respondent to the bill of complaint, which raises the question of jurisdiction; the contention being that the amount involved is less than $2,000. The averment of the bill is that the losses and damage from the alleged unlawful acts of the defendant respondent far exceed the sum or value of $2,000, exclusive of interest and costs. The evidence shows that Gring is the owner of 11 barges and 2 tugboats, of the value of about $118,000, all of which were built by him especially for trading through the Chesapeake and Delaware Canal, and so constructed that, if they are not permitted the use of the canal, their value will be greatly lessened; that he does not intend to diminish his outfit, but intends to continue in the business if he is not driven out of the canal; that for three years, from June 16, 1902, to September 3, 1905, the towing charges paid by Gring or deducted from his towing bills for barges taken from him because said barges were not owned by him, and sent through the canal in tow of a tug of the Canal & Back Creek Towing Company, amounted to $3,814; that

the amount of tolls paid by him on his tugs amounted on an average to something over $200 a year each during the three years, and that the amount paid by him for lock towage amounted to something over $200 per year. It is clear from the evidence that if the complainant had succeeded in obtaining the injunction prayed for, covering the three points enumerated, he would save about $1,600 a year, and that, if his prayer for an accounting for the moneys paid out had been granted in full, the amount paid out was something over $7,500. "By matter in dispute," says the Supreme Court in Smith v. Adams, 130 U. S. 175, 9 Sup. Ct. 569, 32 L. Ed. 895, "is meant the subject of litigation, the matter upon which the action is brought and issue is joined, in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the moneyed judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary results to one of the parties immediately from the judgment." In Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601, objection was taken to the appellate jurisdiction of the Supreme Court on the ground that the subject-matter of the suit was incapable of pecuniary estimation. That was a case where the amount of the salary of an office, the right to which was impeached, was considered as determining the value of the matter in dispute, and as the prosecution might end in a sentence of dismissal the amount of the salary during the residue of his term, which it was stated would exceed the sum of $5,000, was held to give the court jurisdiction. Mississippi & Missouri Railroad Company v. Ward, 2 Black, 492, 17 L. Ed. 311, was a bill filed by Ward against the railroad company to abate a nuisance caused by the erection of a bridge, and the court held that:

"Where a private party sues in such a case, he cannot be heard unless he shows that he has sustained and is still sustaining individual damage; but, when seeking redress of a continuing trespass and wrong against himself and others, want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy and the value of the object must govern."

Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648, was a case where the state constables, acting under the dispensary law of South Carolina, seized certain liquors imported by plaintiff for his own use, and injunction was sought to restrain them. It was contended that the value in controversy did not exceed the sum of $2,000, but it being alleged in the bill that the complainant intended to import from time to time, as he might need the same for his own use, wines and liquors which it was admitted would exceed the value of $2,000, the court says:

"Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of $2,000, nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court as a court of equity until his property to an amount exceeding in value $2,000 has been actually seized and confiscated, and when the preventive remedy of injunction would be of no avail."

In Texas & Pacific Railroad Company v. Cuteman, 54 Fed. 547, 4 C. C. A. 503, the railroad company sought by injunction to restrain a shipper from prosecuting in a state court a multiplicity of suits for overcharge in freight, and the Circuit Court of Appeals of the Fifth Circuit held that the maintenance of the scheduled rate under which the charges were made was the real subject of dispute, and the value of such maintenance determined the jurisdictional amount of the controversy.

In Lee v. Watson, 1 Wall. 339, 17 L. Ed. 557, the court says:

"By matter in dispute is meant the subject of litigation, the matter for which the suit is brought."

We are of opinion that the demurrer to the jurisdiction was properly overruled, as the subject-matter in dispute was above the jurisdictional amount, and, although it might be that in no one year would the amount claimed to be illegally exacted amount to more than $2,000, the injury to complainant was of the nature of a continuous trespass, the proper remedy for which would be by an injunction, which would avoid the necessity of bringing an indefinite number of suits in the future. The prevention of vexatious litigation and of a multiplicity of suits is a favorite ground for the exercise of the jurisdiction of equity.

The other assignments of error will now be considered. The regulations complained of are claimed by the canal company to have been made in accordance with the following provision of its charter:

"The president and directors of the said company shall have power to enact rules and regulations for the good government of the canal, its harbors, and basins and other appurtenances, and for the general convenience of vessels navigating the same."

The charter of this company has been interpreted and construed in the case of Perrine v. Chesapeake & Delaware Canal Company, 9 How. 176, 13 L. Ed. 90, where Chief Justice Taney says:

"Upon a fair construction of the language of this section, we think this canal was intended to be a public highway, and that every boat or vessel suited to its navigation was to be at liberty to pass through it upon payment of the tolls therein specified."

The first regulation complained of is that which provides that all barges shall be passed through the locks of the canal by mules or horses, and a charge is made of $2 for every barge passing through the three locks. The complainant urges that this regulation is unreasonable, and that the barges can be carried through these locks by the tugs having them in tow, and that the charge is unreasonable. The canal locks, three in number, are 24 feet wide and 220 feet in length, and the testimony shows that the barges belonging to the complainant vary in length from 125 feet to 189 feet, and in width from 23½ feet to 23 feet 10 inches. It thus appears that the complainant's barges, when placed in the exact center of the locks, are distant from the walls from three inches to one inch on either side, and the manager of the canal testifies that it is necessary to have mules to draw these barges into the lock and out of it, because it is impossible for a tug, without damage to the locks or the vessel, to move a barge through these locks.

The court below has found that this is a reasonable regulation, and we concur in this opinion.

The second ground of complaint is that the canal company has no right to charge a toll upon the tugs of the complainant for towing vessels through the canal. It appears from the charter of the company that it is entitled to demand and receive the following tolls:

"Every boat or vessel which has not commodities on board to pay the sum of $4.00; every empty boat or vessel, $4.00, except an empty boat or vessel returning, whose load has already paid the tolls affixed, in which case she shall re-pass toll free, provided such boat or vessel shall return within 14 days after paying said toll."

As it cannot be questioned that a tug is a vessel, the toll charged is within the charter rights of the company.

The third ground of complaint is that the complainant was not allowed to tow other barges than his own through the canal, but was compelled to deliver up all barges other than his own to the Canal & Back Creek Towing Company, with which the canal company had a contract by which all such barges were turned over to its charge for towage thereof. We concur in the opinion of the court below that this regulation is not reasonable or necessary, and therefore beyond the powers of the canal company. In justification of this regulation the canal company claims that, in order to accommodate the absolute necessities of three-fourths of the commerce passing through the canal, it was necessary to have a towing company whose charges shall be low, and which will be ready at all times to take barges through without delay, and that it found that, in order to get such service, it was necessary to secure to such towing service a sufficient amount of business at the low prices charged to pay the expenses of the necessary equipment. We find nothing in the charter of the company which justifies it in preventing a tug of proper dimensions from towing through the canal any barge of suitable dimensions and equipment upon the payment of the lawful toll. The canal is a public highway, and the public has the right to the free use of it provided the legal tolls are paid. As said by the Chief Justice in the Perrine Case:

"It is clear that every vessel suited to the navigation of the canal is authorized to pass through upon payment of the toll imposed by law."

The fact, if it be a fact, that the canal cannot be kept up or operated profitably unless provision is made for furnishing motive power for the transportation through the canal of barges unprovided with motive power of their own, may furnish a reason for asking such amendment to its charter as would justify the regulation in question; but, so long as it retains its franchise, it cannot refuse the performance of the duties imposed by its charter, on the ground that the limitations therein would render the operation of the canal unprofitable. It may surrender its charter if the traffic on the canal becomes unremunerative, but restrictions not authorized by the charter cannot be imposed upon those persons desiring to use the canal, able and willing to pay the tolls prescribed, and to comply with the lawful regulations. The rule forbidding any tug carrying more than four barges in tow was held by the court below to be a reasonable regulation, because the character of the

canal is such, we assume, that a longer tow could not be allowed without impairment to the canal itself or to the convenience of the traffic on it. There is no appeal from this decision, and the regulation seems reasonable, but we can conceive of no reason or justification in the regulation forbidding the carrying of any barges not exceeding four in number not belonging to the owner of the tug, and we concur in the view of the court below that this regulation is not reasonable or necessary, and is beyond the powers of the canal company. The other assignments of error were not pressed in the argument before us, and the same are without merit.

The decree of the court below is in all respects affirmed.

HAMBURG-AMERICAN PACKET CO. v. RICH.

(Circuit Court of Appeals, Third Circuit. February 13, 1908.)

No. 44.

1. COLLISION—STEAMER AND ANCHORED BARGE—NEGLIGENT NAVIGATION.
   A finding of the trial court that a collision between a steamship starting down the Delaware river and a barge anchored within the anchorage grounds at Philadelphia was due to the fault of the steamship, and that the barge was not in fault, affirmed.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 104.]

2. SAME—SUIT FOR COLLISION—DEFENSE—PLEADING.
   In a suit in personam against the owners of a vessel for collision, the defense that the vessel was being navigated by a licensed pilot, whose taking was compulsory under the law, cannot be availed of, unless pleaded in the answer with due certainty and precision.

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

For opinion below, see 154 Fed. 1006.

N. Dubois Miller and J. Wilson Leakin, for appellant.

John F. Lewis, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the District Court for the Eastern District of Pennsylvania. The case was a libel in personam, by the master of the barge "Iron State," on behalf of its owners and the owners of the cargo, against the Hamburg-American Packet Company, owners of the steamship "Bengalia," to recover for the loss of the barge and her cargo, caused by a collision with the said steamship while the barge was lying at anchor on the eastern side of the Delaware river, above Gloucester, in or near the port of Philadelphia, and as alleged within the limits of an anchorage ground for that port. The steamship was of steel, 500 feet in length, 62 feet beam, had on board 5,000 tons of cargo, and was bound down the river to sea, drawing 23 feet of water. The barge "Iron State" was a wooden vessel 214 feet long, of 1,700 tons capacity, engaged in the coal carrying trade. At the time of the collision, she had a full cargo of coal on board, and was anchored on the western side of the said anchorage

ground, where she had been two or three days, waiting for a tug to tow her on her voyage to some eastern port.

The steamship left her pier about half past 5 o'clock in the morning, and proceeded down the river, with her master and pilot and a third officer and quartermaster on the bridge, and other officers and members of the crew on the deck. The tide was ebb, running about 3½ or 4 miles an hour, and the barge was tailing to her anchor, with her head upstream. The collision occurred about 6 o'clock in the morning, and those on board the ship testified that, though it was daylight and clear enough when the steamship left its pier, shortly after the atmosphere became hazy, and just before the collision thickened into a fog, which came down around those on the bridge of the steamship, so as to prevent their seeing the barge they were approaching. The usual mast light on the barge was still burning, though it was daylight, but there was no watch on deck. As the barge was at anchor and the steamship was the moving cause of the collision, the court below correctly held that she was presumptively at fault, and that the burden was upon the respondents to rebut that presumption. This, they have attempted to do by the testimony of her officers and crew above referred to, to the effect that a thick fog settled down on the steamship just before the collision, that their fog signals were thereupon at once sounded and the ship slowed down, that there were no signals from the barge, and that at just about that time, a ferryboat met them, in order to pass which the helm was starboarded, which gave the vessel a sheer to port and towards the anchorage ground, and that directly after the barge was sighted, 200 or 300 feet ahead, and that orders were given to port the helm and reverse the engine, but that, owing to the short distance between the steamship and the barge, when the latter was discovered, the port sheer was not overcome by the porting of the helm, or her headway sufficiently slackened by the reversing of the engine to prevent the collision, and that there was no negligence on the part of those in charge of the steamship. The steamship, therefore, struck the barge upon its port side, about 40 feet from the bow and at an angle of about 45 degrees, causing it to drag its anchor and move down with the steamship against another barge anchored below it, the collision with which caused the almost instant sinking of the former. The respondents also aver that the collision was due to the negligence of those on board the barge, in maintaining no anchor watch and sounding no signals; that if there had been a proper anchor watch, the cable of the barge could have been paid out as the steamer approached, which would either have avoided the collision altogether, or diminished its violence, and moreover, that the barge was on the extreme western side of the anchorage ground, or outside of it in the channel way of the river.

The court below, however, found that the barge was well within the limits of the anchorage ground, and that the custom of vessels lying within said ground was not to maintain an anchor watch. The testimony as to atmospheric conditions, and as to the sounding of the fog signal, was more than usually conflicting. The court below, however, has found that, by the preponderance of testimony, it was established to its satisfaction that there was no such fog as that testified to by those

on board the steamship, and that the tesimony, presumably unbiased, of those on other vessels on the anchorage ground, and on the passing ferryboat, negatived the existence of such a fog, and established the fact that, at the time of and just before the collision, objects could have been seen at a sufficient distance by those on board the steamship for its safe navigation. "It is probable," says the learned judge of the court below, "that the morning was misty, but if any reliance is to be placed upon disinterested testimony, the mist did not offer any serious obstacle to vision." As corroborative of this testimony, it is observed by the learned judge, that though there were from 20 to 40 vessels on this same anchorage ground, and a passing ferryboat, no fog signals were heard from any of them. Having found, therefore, that the barge was on the anchorage ground, where she had a right to be, and that the steamship was out of her proper course at the time of the collision, a fact not excused or accounted for by any atmospheric conditions found to exist at the time, and that fog signals on the barge were not required by those conditions, and that neither such signals nor an anchor watch could have been effective to prevent the collision or mitigate its effects, the learned judge is at a loss to account for the same, except by the fault of the steamship. These findings of fact by the court below have not only the weight with us that such findings are always entitled to have, but we think they are justified by the evidence as disclosed in the record. An independent discussion of this evidence would answer no good purpose, and it suffices to refer to and approve that contained in the opinion of the court below.

The fourth assignment of error is as follows:

"The learned court erred in finding in this action, which is in personam, that the respondent was liable for the action of the pilot, who was compulsorily taken on board the ship."

The point suggested by this assignment was made in argument in the court below, as also in this court. Counsel for complainant contend that it was made compulsory, under the Pennsylvania act of 1803, to take a licensed pilot on board, and that such a pilot having been so taken by the respondent's steamship in obedience to law, he was in no sense the servant of the owners, and they therefore would not be subject in an action in personam for his default. The point is interesting and important, and if taken in the proper manner and at the proper time, would have required careful consideration at our hands. It is a distinct and substantive defense, and as such should have been properly set forth in the answer or other plea by the respondent. Such a pleading should have stated, with due certainty and precision, the special facts constituting the defense, such as the compulsory employment of the pilot, and not only the extent of his authority on the ship at the time of the collision, but the particular default or misconduct alleged to be the cause thereof. Proof corresponding with such allegations would present a very serious question as to the liability of respondent in an action in personam, such as the one before us. In the absence of such pleading, we are not at liberty to consider the defense as suggested in argument. It is not sufficient to rely upon facts proved having a material bearing on such a defense, "unless there

are allegations suited to bring them before the court as matters of plea and controversy." The importance attached in admiralty practice to the pleadings of libel and answer, is evidenced by the fact that they are required to be sworn to, and courts are careful to enter no decree not founded upon an issue or controversy thus raised. In the present case, the only issues here raised are as to the position of the barge and the nature of the weather. The statement by way of narrative in the answer, that the steamship left her pier at a certain hour "with the assistance of two tugs, a river and sea pilot, Daniel Stevens, who was in command," and the further averment that, at the time of the collision, "Daniel Stevens, a regularly licensed pilot in charge of the ship, the master and third officer were on the bridge," are far short of the requirements in this respect. There is no affirmative allegation that the collision was caused by the fault of the pilot, and that that fault would be set up as a defense to libelant's claim, on the ground that he was compulsorily employed under the provisions of the Pennsylvania act. On the contrary, the averment is, that those on board the Bengalia were entirely free from fault, and the pilot was called as a witness to so testify. We think, therefore, the court below was entirely right in refusing to consider favorably the point made in the fourth assignment of error.

The appellant also assigns as error, that the court found that the value of the barge "Iron State," at the time of the collision, was $17,000, but failed to find that the said value was, at the time of the collision, only $9,000. After it had been ordered and adjudged by the court below, that the collision mentioned in the libel was due to fault on the part of the steamship, the case was referred to a commissioner, to ascertain the damages sustained by the libelant, and to report thereon to the court. Under this order, much testimony was taken, and much time consumed, principally by the libelant. The commissioner, in an elaborate supplemental report, after exceptions had been made and considered to his first report, fixed the value of the barge at the time of the collision, at $13,000. This being excepted to by both sides, the learned judge of the court below, after examination of the voluminous testimony presented before the commissioner, was of opinion that the valuation of the barge should be raised from $13,000 to $17,000, "and even this larger sum," he said, "seems to be a conservative estimate." After examining this testimony, we do not feel that this finding of the learned judge should be disturbed.

It is also objected, that the court below erred in allowing interest upon the award from the date of the collision, October 12, 1900, to the date of the decree, July 21, 1907. It would seem that an unusually long time was consumed after the delivery of the court's opinion as to liability, in taking the testimony of the ten witnesses examined by libelant as to the value of the barge at the time of the collision. Three years and four months are alleged to have been so occupied by the libelant, while the respondent occupied only from February 7th to May 29th, a period of 3 months and 22 days, in examining the same number of witnesses. It is, however, well settled, that the allowance of interest is a matter entirely within the discretion of the court making the decree. In this case, the court below has said:

"No circumstances were shown to render inequitable the allowance of interest on the various items of damage, and the award of the commissioner in this respect is approved. The respondent should also pay the costs of suit, including the costs of inquiry before the commissioner."

As a general rule, such an exercise of discretion is not properly the subject of review, and the decree of the court below is therefore affirmed.

FARRELLY v. UNITED STATES.

O'BRIEN v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

Nos. 92, 93.

1. CONTRACTS—CONSTRUCTION—DAMAGE FOR BREACH.

A contract between the United States and defendants for dredging work to be completed by a time stated provided that if defendants should fail to prosecute the work faithfully and diligently the engineer officer in charge should have power, with the sanction of the Chief of Engineers, to annul the contract by written notice, and that "upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be authorized, if an immediate performance of the work * * * be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract as prescribed in section 3709 of the Revised Statutes of the United States." Such section [U. S. Comp. St. 1901, p. 2484] requires contracts to be let after advertisement, except that, when public exigency requires, open contracts may be made without advertisement. By a subsequent clause it was provided that, in case of a failure "to complete the contract as specified and agreed upon," all sums due and percentages retained should be forfeited, and the United States should be entitled to recover all damages in excess of such forfeiture due to such failure, including the excess cost of completion. *Held*, that the provision of the latter clause for a recovery of the excess cost of completion did not apply in case of an annulment of the contract under the prior provision before the time fixed for completion had expired, but that in such case no damages were recoverable in excess of the amount due and unpaid and the reserved percentage, expressly provided for.

2. SAME—WAIVER OF BREACH.

The fact that prior to the time of the annulment of such contract the United States had failed to make monthly payments on the work as required by the contract could not be availed of by defendants as a defense against the consequences of such annulment, where they did not elect to treat such defaults as a breach, but continued the work.

3. SAME—RIGHT OF CANCELLATION—SUFFICIENCY OF NOTICE.

Notice having been given to defendants by the engineer officer in charge on the 4th of a month that unless an increased plant was put on the work by the 1st of the succeeding month the contract would be annulled, a notice of annulment, mailed on the 31st and received by defendants on the date specified, was not premature, where no increased plant was then put, or sought to be put, on the work; nor was it necessary that the approval of the annulment by the Chief of Engineers should be in writing, there being no such requirement in the contract.

Ward, Circuit Judge, dissenting in part.

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

This action was brought by the United States against O'Brien, successor of Perkins & O'Brien, contractors, and the City Trust Company, surety under a contract for dredging Narragansett Bay and Providence river. Recovery was had for amounts earned, but not paid, and for what the work actually cost the government after O'Brien was put off it, as against O'Brien $73,578.76 and as against the company $27,242.45. Each defendant sued out a writ of error.

F. J. Swift and George A. King, for plaintiff in error Farrelly.
J. W. Browne, for plaintiff in error O'Brien.
Henry L. Stimson, U. S. Atty., and Winifred T. Denison, Felix Frankfurter, and Francis W. Bird, Asst. U. S. Attys.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The contract was entered into November 16, 1899. By it the parties of the second part agreed to furnish the necessary equipment and do all the work of dredging required in a certain part of Narragansett Bay, in accordance with specifications attached. In consideration of the parties of the second part performing the required work (removing about 2,056,491 cubic yards of material) the party of the first part agreed to pay at the rate of 10.8 cents per cubic yard. All materials and work, before acceptance, were to be subject to a rigid inspection, and the decision of the engineer officer in charge as to quality and quantity was to be final. It was provided that payments should be made monthly when funds are available, 10 per cent. being reserved; also that "the said Perkins & O'Brien shall commence work on or before the 1st day of March, 1899, and shall complete the work on or before the 1st day of July, 1902."

Work was begun on March 1, 1899, and, although at the outset it was apparently pushed sufficiently to satisfy the engineer officer in charge, after several months the rate of progress was such that he repeatedly called upon the contractors to increase their monthly output, and finally, on December 31, 1900, sent a letter to each of the principals, and to the surety, formally notifying them that the work under the contract had not, in his judgment, been prosecuted faithfully and diligently, and that the contract "is hereby annulled." At that time there had been 526,708 cubic yards in all removed, 13,406 in the current month. The engineer supposed there was about 1,500,000 yet to be taken out; but in reality there was only 1,300,000. It was, as the engineer testified, "a very possible thing, easily accomplished, for any one to have completed that contract within 18 months if they had the plant. * * * My judgment was that these men could not control sufficient plant to complete what remained to be done * * * in the remaining time." Since the most important question in the case deals with the results of such annulment, it will be first considered.

The contract contains the following clause, which is found near the close of the document:

"It is further understood and agreed that, in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to re-

cover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

Earlier in the contract, and immediately after the clause providing for the beginning and completion of the work, is found the following clause:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed (i. e., the engineer officer in charge), shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States."

The section of the Revised Statutes referred to [U. S. Comp. St. 1901, p. 2484] provides that all purchases and contracts for supplies or services shall be made by advertising a sufficient time for proposals when the public exigencies do not require immediate delivery or performance, and that when the public exigency requires the same may be obtained by open purchase or contract without advertisement. The notice of annulment of this contract was given under the clause last above quoted.

It will be seen that, in the event of a "failure to complete the contract as specified and agreed upon," all sums due and percentage retained are forfeited, and the United States is also entitled to recover all damages in excess of such forfeiture due to such failure, including the excess cost of completion. Inasmuch as a stated time is given for completion, it would not ordinarily be possible to declare that there had been a failure to complete, until the time given for such completion had elapsed. It might frequently cause great embarrassment to the government if it should be required to wait till the day when the breach was complete, especially when the conduct of the contractor and the manner in which he was prosecuting the work indicated that he would not complete it on the day named. In order, therefore, to provide for such a contingency, the annulment clause was inserted, giving to the engineer officer the right to terminate the contract in advance of the time allowed for its fulfillment, whenever in his judgment the contractor may fail to prosecute the work faithfully and diligently. This clause, while no doubt necessary, is a drastic one. It allows the government to terminate the contract although—as was the case here—the contractor could easily have fully completed the work in the time yet left, had he mended his ways and been allowed to continue. Moreover, while in one sense it may be said that a contractor who fails to prose-

cute the work faithfully and diligently for part of the time allowed him is not doing what the contract impliedly requires him to do, nevertheless, where there is no clause in the contract directing that he shall perform some specified part of the work within some specified time, or even that he shall do some work each month, it can hardly be said that he has broken the contract just because he has been so slothful during the first half of the period allowed him that he will have to be very much more diligent during the remainder of the period, in order to fully complete the work on time. Since this clause is thus drastic, and permits the government to terminate the contract while the contractor is still able to complete, and by such completion avoid a breach of its provisions, it might be expected that the damages to be assessed against him would not be so heavy as those provided for when he has actually failed to complete the contract as specified within the time allowed. Reference to the clause shows that it contains no words calling for damages arising from excess cost of completion. It reads merely:

> Upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

It is assigned as error that the judgment entered against plaintiffs in error included damages arising from excess cost of completion, and in the opinion of a majority of the court the point is well taken. The general provision in the later clause for forfeiture and damages "in case of failure to complete as specified and agreed upon" does not apply because on January, 1901—a year and a half before the expiration of the time limited—there had not been a "failure to complete," and because the annulment clause does not refer to the later provision, but provides its own punishment for the negligent contractor, viz., exclusion from the work and forfeiture of all sums due him. If the rule for assessing damages were to be found in the general clause, it is difficult to understand why the draftsman dealt with that subject in the annulment clause. Being a form prepared by the party of the first part, and in the preparation of which the contractor took no part, any ambiguities in its language are to be construed against the party preparing it. But we find no ambiguity. The expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled.

It will not be necessary to review in detail the many authorities cited in support of the judgment. Those in which there was a completed breach of the contract, and those where the contract did not in terms provide for just what should be the consequences in the event of annulment in advance of the time allowed, are not persuasive here. In one of them, U. S. v. Maloney, 4 App. Cas. D. C. 505, the contract was identical with the one at bar. The point here raised is not discussed at any length; the court holding that:

> "The annulling of the contract under this power reserved to the government certainly does not exonerate either the principal or his sureties from liability for all prior breaches of the contract. Such annulment in no manner affects the obligation under the contract that had accrued prior to that time."

In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to "commence work on or before the

16th day of June, 1891," which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause.

It is further contended that the reference in the annulment clause to section 3709 of the Revised Statutes "inevitably implies" a right to general damages beyond those stipulated for in such clause. We are unable to concur in this proposition. The reference to section 3709 may be sufficiently accounted for on the theory that the contractor is thus forewarned that in case of annulment he must leave the work at once, because his successor may be selected and sent there without the delay resulting from readvertisement. Moreover, where the context specifically describes the consequences to the contractor, implication must be of the clearest to warrant any addition to the enumeration.

In the views above expressed as to the construction of the contract only a majority of the court concur. It is not disputed that at the time of annulment the government had not paid the monthly estimates for work done in September and October (no work was done in November). Without discussing the question whether or not these failures of the government to carry out the terms of the contract were justified by prior default of the contractors, the point here raised may be disposed of by the statement that the contractors at no time elected to treat any such failure as a breach. They did not even notify the engineer officer that without payment they would be unable to proceed with the work. They chose, as they had a right to do, to continue work after the non-payments directly up to January 1, 1901, thus continuing the burden as well as the benefit of such further performance, and disregarding the breach so far as it might excuse them from such further performance.

Objection was raised on motion to dismiss, and reserved by exception, that there was no proof of any written sanction of the Chief of Engineers; but the contract nowhere requires that such sanction shall be expressed in writing. Nor do we find that the annulment was premature. Contractors were notified on December 4, 1900, that unless they have on the work by January 1, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month, the contract would be annulled. The final notice of annulment was mailed to them on December 31st, and not received until January 1st. The case is distinguishable from King v. U. S., 37 Ct. Cl. 428, in which on the named day the contractor appeared with a suitable force. Here no plant sufficient to dredge at least 100,000 cubic yards a month was put, or sought to be put, on the work on January 1st. There was no evidence introduced or offered tending to show that in exercising his judgment as he did the engineer officer did not act with fairness and good faith.

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

WARD, Circuit Judge. I do not concur in the opinion of the court so far as the annulment clause of the contract is concerned. It necessarily implied a covenant on the part of the contractors to prosecute the work "faithfully and diligently," and made the Chief of Engineers tne absolute judge of performance. He decided that they had broken

the contract in this respect and therefore annulled it. The United States is accordingly entitled to compensation, which is in this case the excess over the contract price paid to new contractors to whom the work was relet, unless its right to compensation has been contracted away.

The opinion of the court treats the provision that upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be or become forfeited to the United States," as if it were a provision for liquidated damages. I think it a penalty and that the measure of damages is the usual one, viz., compensation which may be more or less than the forfeiture. As a measure, forfeiture would be most unsatisfactory—inadequate if the annulment were declared early in the work and perhaps excessive if declared later. The reference to section 3709, Rev. St. U. S., authorizing the United States to relet the work without advertisement if the public exigencies demand it, strongly confirms this opinion. It is not satisfactorily explained as a warning to the contractors that they may have to leave the work at once if the United States relet without advertisement, because upon the annulment of the contract they would have to leave whatever course the United States pursued in respect to reletting. Unless the contractors were to be liable for the loss, if any, of reletting, I do not see why the statute was referred to. The judgment should be affirmed, with, however, a deduction of the amount of the reserved percentages, $5,409.99, in favor of the principal, John J. O'Brien.

SEA INS. CO. OF LIVERPOOL, ENGLAND, et al. v. VICKSBURG, S. & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1908. On Rehearing, April 3, 1908.)

No. 1,705.

1. INSURANCE—PAYMENT OF LOSS—SUBROGATION.
   Where policies insuring certain cotton provided that the insurance company on payment of loss should be subrogated to that extent to assured's right to recover for any act of negligence claimed to have caused the loss, the insurance company, on paying for the cotton destroyed by fire from sparks thrown out by defendant railroad company's locomotive, was subrogated to the rights of the owners of the cotton against the railroad company.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1506.]

2. BAILMENT—OBLIGATION OF PARTIES.
   Where cotton was delivered to a compress company for compression for hire, the transaction constituted a bailment, in which the compress company was to do work for the owners of the cotton; the obligations of both bailor and bailee being mutual, but several.

3. SAME—LOSS OF GOODS—LIABILITY OF BAILEE.
   A bailee is liable to the bailor for injury to or the destruction of the property caused by the bailee's negligence, both under the common and civil law.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 33-46.]

4. NEGLIGENCE—DESTRUCTION OF PROPERTY—CONCURRENT NEGLIGENCE.
Where property held by a bailee is destroyed by the concurrent negligence of the bailee and a third person, the bailor may sue either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 74, 75.]

5. SAME—IMPUTED NEGLIGENCE.
Where cotton was delivered by the owner to a compress company for compression for hire, neither the relation of master and servant nor that of principal and agent existed between the owner and the compress company, or its servants; and hence the negligence of the latter, contributing to the destruction of the cotton by fire alleged to have been set out by a railroad company, could not be imputed to the owner.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 74, 75.]

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

A. A. Armistead and J. D. Wilkinson, for plaintiffs in error.

Harry H. Hall, E. H. Randolph, Frank P. Stubbs, and Frank P. Stubbs, Jr., for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The plaintiffs, four insurance companies, sue the defendant railroad company for $59,871.92, alleging that they had insured certain cotton at Arcadia, La., and that the insured property had been destroyed by fire resulting from sparks thrown out by defendant's locomotive; that this occurred through the negligence of the defendant; that the plaintiffs had paid the owners of the cotton $55,501.92, and by the terms of the several policies were subrogated to the rights of such owners and entitled to sue the defendant for reimbursement. Each of the policies contained a provision that, if the insurance company should claim that a fire was caused by the act or negligence of any person or corporation, the insurance company shall, on payment of the loss, be subrogated to the extent of such payment to the right to recover by the assured for the loss resulting therefrom, and such right shall be assigned to the insurance company on receiving such payment. The plaintiffs became subrogated by such payment to the rights of the owners of the cotton, and, in fact, the right of action was assigned in writing by the assured to the plaintiffs, the insurance companies, pursuant to this provision. The defendant railroad company answered the petition, denying the charge of negligence, and further pleaded the contributory negligence of the compress company, alleging that it permitted large quantities of loose cotton to be exposed on the platform where the fire occurred, and that it was guilty of the careless and reckless handling of the cotton.

The assured, to whom the policies issued on the cotton were payable, had placed the cotton in the possession of the compress company to be compressed. It is conceded in the printed arguments of both parties that the compress company held the cotton as bailee for the owners, the assured. Evidence was offered tending to show that the compress company was negligent in leaving quantities of loose or uncovered cot-

ton on the platform, and in failing to put out the fire when it was discovered; and, on the other hand, there was evidence tending to show that the compress company exercised due care and was not negligent.

One of the questions that arose on the trial was whether or not the alleged negligence of the bailee, the compress company, could be imputed to the bailors, the assured, so as to defeat the right of the plaintiffs to recover. On this subject the learned trial judge charged the jury as follows:

"As between the parties to this suit, the contributory negligence of a bailee of cotton, whereby it was consumed by fire proceeding from a railway engine, is imputed to the owners of the cotton.

"If you find that the plaintiff companies, through the fault of the compress company, for which it is chargeable, was guilty of contributory negligence in not with reasonable care looking after and protecting the cotton from such dangers as were known by or to the compress company's servants to be inherent in the physical conditions of the time and place, and you believe such contributory negligence was the proximate cause of the fire loss, you should find for the defendant."

An exception to this charge was duly reserved, and it is assigned as error.

The contention of the learned counsel for the defendant in error is that the compress company was the agent or bailee of the owners of the cotton, having full control of it, and "that the negligence of the compress company, as the agent or bailee, was necessarily to be imputed to the principals, the owners of the cotton." The contention is that the servants of the compress company, who received and handled the cotton, were the servants of the owners of the cotton, or, at least, that such relation exists between a bailee and bailor as to make the negligence of the former imputable to the latter when the latter sues a third party to recover damages for the destruction of the subject of bailment by the negligence of such third party. This view was sustained by the Circuit Court, as shown by the charge quoted and several other parts of the judge's charge.

The record shows that the owners of the cotton delivered it to the compress company to have it compressed. The receipts given by the compress company to the owners when it was delivered are omitted from the printed record by agreement; but the record sufficiently shows that the compress company was to be, or was entitled to be, compensated for the work of compressing the cotton. The transaction clearly constituted a bailment, in which the bailee, the compress company, was to do work for the bailors, the owners of the cotton. In such case the obligations and duties of the bailor and bailee are mutual, but several; the obligations of the one being entirely different from those of the other. The obligations of the bailor are to pay the price or the compensation for the work to be done; to pay for new materials, if any are necessarily furnished; to do everything which he has agreed to do on his part to enable the bailee to execute his engagement; and, finally, to accept the thing when the work is finished. The obligations on the part of the bailee are to do the work; to do it in the time agreed on; to do it well; and to exercise a proper degree of care and diligence about the work and for the safety of the property. Story on Bailments (8th Ed.) §§ 425, 428. The bailee would unquestionably be liable to the

bailor for injury to, or the destruction of, the property caused by the bailee's negligence. This is true, both under the common law and under the civil law. Id. § 414. Nor can there be any doubt that, in a case where the property held by the bailee was destroyed by the concurrent negligence and wrong of the bailee and a third person, the bailor could sue either or both of the wrongdoers; for it is settled, seemingly without dispute, that, if the concurrent or successive negligence of two persons results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. 1 Thompson on Negligence, § 75, and cases cited. The case at bar can be taken out of the control of this principle only by sustaining the contention that the bailors, the owners of the cotton, stand in the relation of principal or master to the bailee, the compress company. That such relation does not exist is indicated by the fact that the duties and obligations of the bailor and bailee are totally different, and that the former has no control over the servants of the latter. In this case the bailee, being a corporation, can act only by and through its servants and agents. Clearly the bailor has no control over such servants and agents, and can neither select, employ, nor discharge them. The right of selection and control of the servant is the foundation of the general rule that makes the master liable for the acts of the servant while acting within the scope of his employment.

A plaintiff cannot recover damages for an injury to which he has directly contributed by his own negligence. If the plaintiff's own fault, whether of commission or omission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. The converse of this doctrine ought to follow as a necessary corrollary: That when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of some one towards whom he stands in the relation of principal or master has materially contributed to the injury. The bailor, we hold, is not the principal or master of the bailee. In N. Y., etc., Co. v. N. J., etc., Co., 60 N. J. Law, 338, 38 Atl. 828, and 61 N. J. Law, 287, 41 Atl. 1116, it was held that in an action by the bailor, who is the owner, against a negligent third party for injury to the property bailed, the negligence of the bailee or his servants or agents is not imputable to such bailor and will not prevent a recovery. This view seems to be sustained by reason and authority. 1 Thompson on Negligence, §§ 499, 512; Van Zile on Bailments and Carriers, § 130; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; The Bernina, 12 L. R. Pro. Div. 58, s. c. 13 App. Cas. 1.

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

On Rehearing.

PER CURIAM. A re-examination of the questions decided in this case, in the light of the exhaustive briefs filed by the defendant in error, satisfies us that our decision is correct.

The petition for rehearing is denied.

H. D. WILLIAMS COOPERAGE CO. v. HEADRICK.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1908.)

No. 2,676.

1. MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROMISE TO PROVIDE SAFEGUARDS AGAINST RISKS.

A servant had been at work tending an equalizer in a temporary stave mill, standing about 3 feet in front of it, for about a month. Beneath the two saws were holes in the ground, which held about two bushels each, made to receive the sawdust and blocks which fell from the saws. This was the usual way in which such mills and equalizers were constructed. It was the duty of another servant to clean these holes out when they became filled; but he neglected his duty, and they were frequently so full that the exact location of their edges was concealed by the sawdust and blocks, and this was their condition at the time of the accident. The day before the accident the servant complained of the danger from this condition and from the exposed saws, and the master promised to keep the holes cleaned out and to make the saws safe. On the next day, upon a signal to go to the barrel saw, the servant undertook to pass between a bench, which was 18 inches from the edge of one of the holes and 30 inches from one of the equalizer saws, and that saw, stepped into one of the holes and the saw cut his foot. He might have gone around the bench away from the holes with comparative safety by traveling about 8 feet farther.

Held, the servant was guilty of contributory negligence that was fatal to his suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709.]

2. SAME—DUTY OF MASTER DOES NOT REQUIRE HIM TO FURNISH NEWEST AND SAFEST APPLIANCES—LIMIT OF DUTY.

The master is not required to supply or use the best, newest, or safest places, appliances, or methods of operation to secure the safety of his servants.

The limit of his duty is to exercise ordinary care to supply reasonably safe places, appliances, and methods.

The test of the full discharge of this duty is ordinary care to supply such places, appliances, and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172–174, 180–192.]

3. SAME—PROMISE OF MASTER UPON COMPLAINT DOES NOT RELIEVE SERVANT FROM DUTY TO EXERCISE ORDINARY CARE.

The promise of a master, upon complaint by the servant of defects or risks in places, appliances, or methods, to remove them, or to provide safeguards against them, does not relieve the servant of his duty to exercise ordinary care to protect himself against them meanwhile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 685.]

(Syllabus by the Court.)

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

Ben F. Williamson, Thomas J. Gaughan, and John T. Sifford, for plaintiff in error.

W. A. Oldfield and Charles F. Cole, for defendant in error.

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

SANBORN, Circuit Judge. This was an action for damages for a personal injury. The negligence charged was the failure to box equalizer saws in a stave mill and to keep the holes beneath them free from sawdust and blocks. The defenses were a denial of the defendant's negligence, and an assumption of the risks and contributory negligence by the plaintiff. The plaintiff, a man about 35 years of age, was tending equalizer saws for the defendant in a temporary stave mill which had been set up in the country in the state of Arkansas, to operate from 40 to 60 days. One of these saws was fastened upon each end of a driven shaft, which was supported by timber about 10 inches above the ground. The saws were about 28 inches in diameter, and a hole had been dug under each, about 2 feet in depth and capable of holding about two bushels, for the purpose of receiving the sawdust and the ends of the blocks which fell from the saws. It was the duty of one Arnold, a servant of the defendant, to clean these holes out as often as they filled; but at the time of the injury they had become full, and the sawdust was scattered over them and over the adjoining ground, so that the exact location of their edges was not visible. It was the duty of the plaintiff to stand about 3 feet in front of these saws, take the bolts of timber as they came from the saws, place them on a bench or table at his side, which was about 12 feet long and 6 inches higher at the end near to the equalizer than it was at the far end, so that by giving the bolts a push he could send them along upon the bench to a point where the side sawyer could take them and put them upon the carriage of the barrel or drum saw. The foot of the bench near the equalizer was about 18 inches from the nearer edge of the hole beneath the nearer one of the equalizer saws and about 30 inches from that saw. The barrel saw was on the side of the bench. One of the duties of the plaintiff had been to leave his station at irregular intervals on a signal from the foreman, to go to the barrel saw and by pressing a timber against it to steady it. There were two ways for him to reach the place where he discharged the latter duty. One was to go around the bench, and the other was to go between the bench and the hole beneath the equalizer. The distance by the former route was about 14 feet and by the latter route about 6 feet. By the former route he went away from the equalizer saws and the holes beneath them, but passed between the far end of the bench and the barrel saw, which was about 18 inches distant from it; but there was no evidence that there was any danger and there was positive evidence that there was no danger in pursuing this way. By the latter route he passed between the end of the bench and the hole beneath the equalizer saw, the edge of which was invisible. The plaintiff thought he received a signal from the foreman to steady the barrel saw. He grasped the near end of the bench and started between it and the equalizer, along the 18 inches of ground between the bench and the hole, when he stepped into the hole under the nearer saw, and it cut his foot. He knew the holes were there, their size and their location, and he had been at work at the equalizer within 4 feet of them from some time in July until the 23d day of August, when he was injured; but at the time of the accident the sawdust and blocks rendered the edges of the holes invisible. On the day before the accident the plain-

tiff had told the defendant's foreman that he was going to quit. The latter had asked him to stay. The plaintiff had told him that if he would fix the saws safe for him to work, and see that the holes were kept cleaned out, he would continue to work. The foreman said, "All right," and the plaintiff "relied on his promise to fix it" and went to work the next day. The evidence was conclusive that temporary stave mills and the equalizers therein were commonly conducted and operated by ordinarily prudent mill owners in the vicinity of this mill in the same way that this mill and equalizer were constructed and operated, with open holes beneath the saws, and without any covering over them. Upon this state of facts the court, at the conclusion of the trial, denied a request to instruct the jury to return a verdict in favor of the defendant, and this ruling is assigned as error.

The master is not required to furnish the best, the safest, or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances, and methods. The test of his discharge of this duty is the exercise of ordinary care to supply such places, appliances, and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances. Washington, etc., R. R. Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; Southern Pacific Company v. Seley, 152 U. S. 145, 153, 14 Sup. Ct. 530, 38 L. Ed. 391; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 391, 74 Fed. 195, 196. Tried by this test, there was no negligence in the construction or operation of the stave mill, or of the equalizer saws, for the proof was plenary that they were constructed and operated in the way commonly adopted by ordinarily prudent owners of mills under similar circumstances.

But counsel rely on the promise of the defendant to keep the holes clear of sawdust and blocks and to make the saws safe. Whether or not such a promise to protect against the ordinary risks incident to the business, which are not the effects of any negligence of the master, relieves the servant from his assumption of those risks, it is unnecessary to consider in this case, because in any event it does not relieve him from his duty to exercise ordinary care to protect himself from them. A promise by a master to remove defects, or to protect against risks or dangers, of which a servant has complained, does not relieve the latter of his duty to exercise ordinary care to protect himself against them. District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 483, 126 Fed. 495, 501, 63 L. R. A. 551; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 372, 149 Fed. 680, 684. The defendant knew the existence, the size, and the location of the holes. He knew that if he permitted his foot to fall into one of them there was imminent danger that it would come in contact with the revolving saw and be seriously injured. He knew that the sawdust and the blocks so filled the hole that its edges were not perceptible to the eye, and this knowledge that his eyes were useless for the purpose of protecting him from this danger imposed upon him the duty to use his other senses more actively and persistently to protect himself against

the hole and the revolving saw therein. He appreciated the risk and the danger of this situation; for he had complained of it the day before, and had obtained the promise of protection, which he knew had not been fulfilled. In this state of facts he owed to his master, as well as to himself, the duty to exercise ordinary care to use that degree of watchfulness which an ordinarily prudent person of his capacity and experience would exercise under like circumstances to protect himself against the obvious risks and dangers of which he complained. That duty required him to use the faculties which would protect him; to use his judgment and his reason, since his sight and his hearing were useless here, and by their use to exercise ordinary care to keep himself away from the hole and to avoid contact with the saw. When he received the signal there were two ways in which he could have answered it—one, around the bench away from the holes and the equalizer; the other, between the bench and the equalizer, along the narrow strip of earth, 18 inches in width, covered with sawdust, which concealed the edge of the hole. The former route was comparatively safe; the latter, comparatively dangerous. 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. Gilbert v. Burlington, C. R. & N. R. R. Co., 128 Fed. 529, 534, 63 C. C. A. 27, 32; Morris v. Duluth, S. S. & A. Ry. Co., 108 Fed. 747, 749, 47 C. C. A. 661, 664; Gowen v. Harley, 56 Fed. 973, 983, 6 C. C. A. 190, 200; Coal Co. v. Reid, 85 Fed. 914, 29 C. C. A. 475; McCain v. Railroad Co., 76 Fed. 125, 126, 22 C. C. A. 99, 101; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Gleason v. Railway Co., 73 Fed. 647, 19 C. C. A. 636; Cunningham v. Railway Co. (C. C.) 17 Fed. 882; English v. Railway Co. (C. C.) 24 Fed. 906. He pursued the more dangerous way and thoughtlessly stepped into the hole, brought his foot in contact with the saw, and thereby caused an injury which would not otherwise have happened. His knowledge of the place and its risks, and his appreciation of the risk and danger to which he exposed himself unnecessarily were as great as, probably they were greater than, those of his master, and they imposed upon him the duty to exercise as high, if not a higher, degree of care than that which was required of his master to protect himself therefrom, and there is no escape from the conclusion that, if the master was negligent, the servant was as much so. If he had not thoughtlessly walked into the hole, he would not have sustained the injury; and the court below should have instructed the jury to return a verdict in favor of the defendant. Where the evidence at the close of a trial so clearly discloses the fact that the plaintiff was guilty of negligence, which directly contributed to his injury, that a finding to the contrary cannot be sustained, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. Gilbert v. Burlington, C. R. & N. R. R. Co., 128 Fed. 529, 532, 63 C. C. A. 27, 30, and cases there cited.

The judgment below must be reversed, and the case must be remanded to the court below, with instructions to grant a new trial; and it is so ordered.

MEAD et al. v. DARLING et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 153.

1. TRIAL—DIRECTION OF VERDICT—REQUEST BY BOTH PARTIES.
Where each party requests the trial judge to direct a verdict, such procedure is tantamount to a request that the trial judge find the facts, which finding will be upheld, if there is any evidence to support it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 400; vol. 3, Appeal and Error, § 4024.
Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to Love v. Scatcherd, 77 C. C. A. 8.]

2. FRAUD—PRESUMPTIONS.
Where fraud is charged to have occurred in transactions occurring 45 years before, and must be established from a few acts of commission and omission, the principal participants being dead, the jury must rely largely on presumptions drawn from the established facts.

3. COURTS—FEDERAL COURTS—TRIAL—INSTRUCTIONS—OPINION ON FACTS.
A trial judge in a federal court is not prohibited from expressing his opinion on the facts.

4. SAME—PRESUMPTION OF INNOCENCE.
Where a fact was proved from which two inferences could be drawn, one tending to establish fraud and the other innocence, it was within the province of the trial judge in a federal court to call the jury's attention to the latter probability or possibility.

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

See 151 Fed. 1006.

On writ of error to review a judgment entered by the Circuit Court upon the verdict of a jury in favor of the defendants. The action is in ejectment, and relates to the legal title to premises known as No. 208 Fifth avenue and No. 1128 Broadway, in the city of New York. The action was first tried in March, 1906, upon substantially the same evidence as in the present record. At the close of that trial both parties moved for a direction, and the court directed a verdict in favor of the defendants. On writ of error to this court, the judgment of the Circuit Court was affirmed. The opinions of this court in the case in hand, in the action against Chesebrough Building Company and in the action against Gallatin, involving similar questions, will be found reported, respectively, in 151 Fed. 1006, 81 C. C. A. 192; 151 Fed. 998, 81 C. C. A. 184. The present trial is had pursuant to section 1525 of the New York Code, granting a defeated plaintiff in ejectment a new trial as matter of right, upon payment by him of the costs of the first trial.

Decker, Allen & Storm (James J. Allen, of counsel), for plaintiffs in error.

Arthur M. Johnson, for defendant in error Darling.

Bowers & Sands (James M. Bowers and Charles P. Northrop, of counsel, and Gerald S. O'Loughlin, with them on the brief), for other defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. In view of the thorough examination which the questions involved in this controversy received when they were before this court a year ago, but little need now be added. In the Chesebrough Case the court said:

"We are of the opinion that a jury would have been justified in finding that the mortgaged premises were not of sufficient value to have enabled the trustees to replace the existing mortgages with new mortgages for the same amount, notwithstanding the presumptions to the contrary arising from all the surrounding facts. * * * As regards No. 32, there was a fair question for a jury upon the issue of fraud, and, as the defendant was doubtless chargeable with constructive notice of all the matters of record affecting the title to any part of the premises, there was a question for the jury upon the whole case. But, as we have indicated, the case was not one in which there was no evidence to support the finding of the trial judge." 151 Fed. 1004, 81 C. C. A. 184; 151 Fed. 1006, 81 C. C. A. 192.

Each party had requested the trial judge to direct a verdict, which was tantamount to a request that he find the facts, and therefore his finding was upheld; there being evidence to support it. In the case at bar the same request to direct a verdict had been made by each party, and this court said:

"If there was a question of fact for a jury, the ruling of the trial judge was correct. We think there was such a question, and that in view of our decision in the Chesebrough Company Case any detailed statement of the facts or further discussion of the legal question involved would serve no useful purpose."

Although this language is not entirely clear, yet, when considered in connection with the opinion in the Chesebrough Case, there can be little doubt as to its meaning. We think the court intended to say that, although there was a question for the jury, both sides requested the trial judge to decide it, and he had decided it correctly. On the trial which is now under review no such request was made by the plaintiffs, and the question was submitted to the jury. We have read with care the clear and painstaking charge of the trial judge, and find no error which warrants the reversal of the judgment.

In a transaction occurring 45 years ago, where all the principal participants are dead, and where a charge of actual fraud is made against parties whose motives can only be ascertained from the few acts of commission and omission which are proved, the jury must rely largely upon the presumptions which may be drawn from the established facts. In calling the attention of the jury to these presumptions pro and con, in tracing them to their logical conclusions, in directing the attention of the jury to the relations between the parties and the improbability that fraud would be attempted in such circumstances, in all this we think the trial judge did not trespass upon the province of the jury, especially so in a tribunal where the judge is not prohibited from expressing his opinion upon the facts. Where a fact was proved from which two inferences could be drawn, one tending to establish fraud and the other innocence, it was quite within the province of the court to call the attention of the jury to the latter probability or possibility.

It is argued by the defendants in error that the evidence produced by the plaintiffs in error failed to prove actual fraud, and that a ver-

dict should have been directed for the defendants; but in view of the conclusion reached we deem it unnecessary to decide the question thus presented.

The judgment is affirmed.

In re NORTHRUP et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 83.

1. BANKS AND BANKING—COLLECTIONS—SUBSTITUTION OF FUNDS—DECLARATION OF TRUSTS.

Bankrupts operated the C. bank, and for several years prior to bankruptcy the C. and S. banks had collected paper for each other without credit or charge, no account of their mutual dealings being kept and no balances struck. The C. bank prior to its insolvency had collected a draft on P. for $1,170.29 for the S. bank, but had failed to remit the proceeds or notify the S. bank of the collection until after its assignment, prior to which the S. bank had in its hands $796.23, the proceeds of drafts collected for the C. bank, and on the day of the assignment, but before the C. bank's assignment had been actually executed, the S. bank mailed its draft to the C. bank to cover such collections. After the assignment one of the bankrupts said to the other that the amount in the hands of the S. bank would offset its claim against the bankrupts. *Held* that, the S. bank not having been informed of such declaration until long after the assignment, it was insufficient either to vest it with any title to the collection for which it remitted to the bankrupts or to constitute a declaration of trust.

2. SAME—PAYMENT—MISTAKE OF FACT.

The S. bank having no right to offset the money in its hands belonging to the bankrupts against its claim against them, the payment of the proceeds of the collection by the S. bank to the bankrupts did not constitute a payment through mistake of fact.

Petition for Revision of Proceedings of the District Court of the United States for Northern District of New York, in Bankruptcy.

For opinion below, see 152 Fed. 763.

E. L. Hunt and James Moore, for petitioner.

W. A. Mackenzie, Jr., and B. B. Aylesworth, for respondents.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. In 1905 Walter E. Northrup and Robert A. Hill, who had carried on a banking business in Oneida, N. Y., under the name of the Central Bank of Oneida, became bankrupts. The National Bank of Syracuse applied to the District Court for an order directing the trustees to pay over to it the proceeds of two drafts amounting to $796.23 drawn by said Syracuse Bank in favor of said Central Bank, which proceeds had come into the hands of the trustee. The trustee answered, and the matter was referred to a special master to take evidence and report his findings of fact and conclusions of law. The master took testimony and reported his findings and conclusions to the District Court which disallowed them. The court then, upon the evidence so taken, made its own findings of fact and conclusions of law and granted the application of the Syracuse Bank.

There is no dispute as to the following facts: The Syracuse Bank and the Central Bank had had business relations for several years prior to the bankruptcy of the latter. They received negotiable paper, the one from the other, for collection in their respective territories. But they held such paper for collection only, and no credit was given therefor, and no charge, with an immaterial exception, was made. No accounts of their mutual dealings were kept, and no balances struck. On June 16, 1905, the Syracuse Bank sent to the Central Bank for collection a draft for $1,170.29 upon one Paul, a resident of Oneida. The Central Bank collected this draft the following day, but failed to remit the proceeds or to notify the Syracuse Bank of the collection. Some 10 days later the Central Bank made an assignment in insolvency under the state law. On the day of the assignment the Syracuse Bank had in its hands $796.23, the proceeds of drafts which it had previously collected for the Central Bank. On said day, but before the assignment had actually been executed, the Syracuse Bank mailed its drafts for $796.23 to the Central Bank to cover said collections. The assignee in insolvency collected these drafts, and their proceeds were subsequently turned over to the trustee in bankruptcy. The Syracuse Bank claimed, and the District Court ruled, that at the time the drafts for $796.23 were sent to the Central Bank, the Syracuse Bank had the equitable title to the funds represented thereby—that it had paid over money which it was entitled to retain. The only evidence offered to justify any such conclusion was a conversation between the bankrupts which took place at the Central Bank after the close of business on the day of the assignment. It was testified to by the bankrupt Hill:

"Mr. Northrup asked me how we stood with Syracuse; he said this draft had not been remitted for, and I told him that they owed us practically the same amount; Northrup says that is an offset, so there is nothing to that."

The witness also stated that Northrup said that there was a "stand off" in the accounts with the Syracuse Bank. What Northrup said was undoubtedly true. The Central Bank had not remitted the proceeds of the Paul draft. The Syracuse Bank had not then remitted the proceeds of the drafts which it had collected. The accounts nearly balanced. But this conversation was wholly insufficient to justify a finding that the bankrupts had elected to retain the identical proceeds of the Paul draft and appropriate the moneys collected by the Syracuse Bank in substitution therefor. No entry of any kind was made upon the books of the Central Bank. The conversation was not in pursuance of any suggestion of the Syracuse Bank. The Syracuse Bank was not informed of it until long after the assignment. There was no agreement in the matter of any kind with the Syracuse Bank. The conversation was wholly inadequate to vest in the Syracuse Bank any title—equitable or other—in the collections which it subsequently remitted for, or to operate as a substitution of funds. It did not constitute a declaration of trust. It was merely the talk of the partners in their crisis about their affairs. It was wholly between themselves, and neither affected their rights nor those of other persons.

The District Court also reached the conclusion that the Syracuse Bank remitted the proceeds of its collections to the Central Bank

through a mistake of fact. This conclusion is apparently based upon the assumption that, had the Syracuse Bank been advised of the collection of the Paul draft, it would have set off the accounts. But it does not appear that the Syracuse Bank had any right to make such offset. On the contrary, it seems clear that it had no such right. The bankrupts undoubtedly acted wrongfully in failing to give notice of the collection of the Paul draft. But this was a matter outside the obligation of the Syracuse Bank to remit for what it had collected. A payment made in ignorance of an extrinsic fact not affecting the obligation to make it is not a payment through mistake of fact. And even if the Syracuse Bank would have had a right to offset the accounts had it been notified of the collection of the Paul draft, it does not follow that its ignorance of the existence of such right when it forwarded the checks constituted mistake of fact. Franklin Bank v. Raymond, 3 Wend. (N. Y.) 69.

The decision of the District Court is reversed, with costs.

In re NEW YORK TUNNEL CO.

(Circuit Court of Appeals, Second Circuit. February 17, 1908.)

No. 214.

1. BANKRUPTCY—SUITS AGAINST BANKRUPTS—INJUNCTION.

Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], provides that a suit founded on claims on which a discharge will be a release, and which is pending against a person at the time of filing a petition against him shall be stayed until after an adjudication or the dismissal of the petition, and, if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined. *Held*, that such act only authorizes the restraining of suits founded on claims from which a discharge will be a release, so that the bankruptcy court has no control over a suit on a nonprovable claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 649, 651.]

2. SAME—PROVABLE CLAIMS—UNLIQUIDATED DEMANDS—TORTS.

Bankr. Act July 1, 1898, c. 541, § 63, par. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], enumerates the debts which may be proved against the bankrupt's estate, including debts founded on judgments and written instruments, taxation of costs, open accounts, or express or implied contracts, and certain judgments rendered subsequent to bankruptcy. Paragraph "b" declares that unliquidated claims against the bankrupt may be liquidated pursuant to an application to the court in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate. *Held*, that paragraph "b" relates to the procedure, and provides for the liquidation of such claims enumerated in the preceding paragraph as might require such process, and that neither authorized proof of unliquidated demands against the bankrupt for wrongful death, and this notwithstanding section 17, Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026], providing that a discharge shall release the bankrupt from his provable debts except liabilities for frauds, for false pretenses or false representations, and for willful and malicious injuries to the person or property of another, as such

negative provision was not effective to make all other nonenumerated tort liabilities provable debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 480.]

8. SAME—PETITION FOR REVIEW—SCOPE OF REVIEW.

Where petitioners in bankruptcy on a petition to the court of appeals to review restraining and reference orders enjoining prosecution of suits against a bankrupt in a state court for wrongful death, and referring such claims to a special master for liquidation, petitioner could not obtain a review of the district court's jurisdiction of the entire bankruptcy proceeding.

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

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

Petition to review two bankruptcy orders of the District Court, Southern District of New York. The first order, dated October 15, 1907, enjoins Mary Hatch Riggs, administratrix, from prosecuting an action pending in a state court against the alleged bankrupt to recover damages for negligence causing the death of her intestate, and referring her claim to a special master for liquidation and determination. The second order, dated November 1, 1907, contains a similar restraining and reference order with respect to a similar claim of Genaro Tamburi, administrator. The administratrix and administrator are the present petitioners.

Don R. Almy, for Riggs' estate.

Gilbert Ray Howes, for Tamburi's estate.

B. S. Catchings, for petitioner.

Philbin, Beekman & Menken (S. S. Menken and Richard Steel, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The question in this case is whether unliquidated claims, like the petitioners' demands, founded upon torts are provable against a bankrupt estate.

Section 11a of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), provides:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

Thus the act only authorizes the restraining of suits founded upon claims "from which a discharge would be a release." But unless a claim is provable against a bankrupt estate, it is not discharged, and, consequently, is not subject to the control of the bankruptcy court.

Paragraph "a" of section 63 enumerates the debts of the bankrupt which may be proved against his estate. It includes debts founded upon (1) judgments and written instruments; (2 and 3) taxation of costs; (4) open accounts or express or implied contracts; (5) certain judg-

ments rendered subsequently to bankruptcy. This paragraph manifestly does not include liabilities for torts.

Paragraph "b" provides:

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

This paragraph evidently relates to procedure. It provides for the liquidation of such of the claims enumerated in the preceding paragraph, e. g., for breach of contract, as might require such process. The one paragraph particularly enumerating the debts which are provable, we see no ground for holding that the other opens the door to unliquidated demands of every nature. Moreover, any question about it seems to be settled by the decision in Dunbar v. Dunbar, 190 U. S. 350, 23 Sup. Ct. 757, 47 L. Ed. 1084:

"In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct."

While the Supreme Court in the later case of Crawford v. Burke, 195 U. S. 187, 25 Sup. Ct. 9, 49 L. Ed. 147, stated that another construction of the paragraph was possible, we do not understand that they adopted it. It is urged, however, that a different construction should be adopted in view of an amendment to section 17—relating to discharges—adopted in 1903. Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026]. This section as originally adopted provided as follows:

"A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the property or person of another. * * *"

Judgments rendered before bankruptcy whether based upon liability for tort or contract are expressly provable under section 63a. The exception in section 17 was to prevent judgments for certain torts being discharged.

In 1903 section 17 was amended in various ways. One change was the substitution of the word "liabilities" in place of the word "judgments." And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for tort implies that such liabilities in general are not discharged. But this implication does not carry far. The amendment was to an exception in the discharge statute which states what debts shall not be discharged rather than what shall be. A negative provision that liabilities for certain torts shall not be discharged does not, of itself, make all other tort liabilities provable debts. It is apparent that Congress by the amendment intended to preclude the possibility of claims for certain torts being discharged, whether reduced to judgment or not. Having that object in view, it used language not wholly in

harmony with the other sections of the act. But we see nothing to indicate an intention to enlarge the classes of provable debts. Certainly no intention is evidenced to bring in claims for torts which were never provable under the earlier bankruptcy acts. We therefore follow the very careful opinion of the Circuit Court of Appeals for the Third Circuit in Brown v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, in holding that a claim for unliquidated damages founded upon tort is not provable in bankruptcy. The claims of the petitioners were of this nature, unaccompanied with contractual liability, and the District Court was without power to make the orders complained of. They should be set aside.

The petitioners also ask the court to declare that the District Court had no jurisdiction of the whole bankruptcy proceedings because the corporation was not of the classes subject to be adjudicated bankrupts. But the petitioners have only petitioned this court to review the two restraining and reference orders. All they urged in the District Court upon the jurisdictional question was by way of objection to the granting of these orders. They sought to escape from the bankruptcy proceedings. Upon the record as it stands, we can do no more than let them go.

The orders of the District Court are reversed, with costs.

CRAGIN v. DE PAPE.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1908.)

No. 1,670.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTION FOR COURT OR JURY.
Where the facts in an action for malicious prosecution are undisputed, the question of probable cause is for the court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 161.]

2. SAME—DEFENSES—ADVICE OF COUNSEL.
The advice of reputable counsel, honestly sought and acted on in good faith, is alone a complete defense to an action for malicious prosecution.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 41.]

3. SAME—PROBABLE CAUSE—EVIDENCE.
Plaintiff, who was employed by defendant as a cook, on being locked out by another servant and getting no response to her rap at the door, pounded and kicked it until she split the panels. Defendant instituted an inquiry the succeeding day, and told plaintiff she would be required to pay for the door, which she refused to do, whereupon defendant and a servant who was present when the door was broken consulted a lawyer, who, after hearing the account of both defendant and the servant, advised obtaining a warrant under a statute making the willful and malicious destruction or injury of personal property of another ground for imprisonment and fine. A warrant was procured, and plaintiff was arrested and confined for a few hours, and the succeeding day was tried and discharged by a justice of the peace. *Held* to establish probable cause for plaintiff's arrest as a matter of law.

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

Geo. M. Robbins, for plaintiff in error.

A. W. Cockrell, Jr., and Alston Cockrell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. There is a preliminary question raised by the record in this case as to the sufficiency of the service, and whether in the Circuit Court the motion should have been granted to set aside the service and quash the sheriff's return, and the plea to the jurisdiction raising the same question, sustained. This question becomes unimportant, in the view we have taken of the case. The sole question in the case which we deem it necessary to notice, and which is controlling, is whether on the trial before a jury in the Circuit Court a verdict should have been directed for the defendant on all the evidence submitted.

The suit is one for malicious prosecution. Elise de Pape, the plaintiff, was engaged by Charles I. Cragin, the defendant, as cook for his family, at his winter residence at Palm Beach, Fla. Servants had been installed in the Cragin residence, and Cragin and his family were at a hotel, waiting for the house to be put in order for them to occupy it. The plaintiff, on Saturday evening, January 9, 1904, after supper, had stepped out of the kitchen into the yard or garden of Cragin's residence to "cool off," as she says. While she was out, one of the servants locked the door of the kitchen, in accordance with Cragin's orders that the house should be locked up at 6 o'clock in the evening. The plaintiff came back to the door and found it locked. There was another door, apparently entering at the side, and into the part of the house where the other servants were sitting at the time. This door appears from the testimony to have been unlocked, and some of the witnesses say open. The plaintiff knocked on the kitchen door, and, there being no response, she began to kick it. She had a kettle in her hand, which some of the witnesses say she used to strike the door with. This she denies; but there was some evidence going to show that the kettle was badly dented and unfit for use afterwards. Receiving no response to her knocks and kicks, except that the other servants called out for her to go around to the other door, the plaintiff continued her attack on the door, making a split in one of the panels, as she says herself, about two inches long. The servant charged by the defendant with the duty of seeing that the house was locked finally went to the door, opened it, and let the plaintiff in. The next day (Sunday) one of the servants, at church, reported the matter to Mr. Cragin, and he came over on Monday to inquire into it. He had an interview with the plaintiff and the other servants, and after ascertaining the facts he told the plaintiff she must pay for the door. This she refused to do. On Tuesday Mr. Cragin went to West Palm Beach, taking with him one of the servants who had been present when the door was broken. This servant was also his boatman. At West Palm Beach he went to the office of a lawyer, with whom he consulted as to what it was proper for him to do under the circumstances, and what proceedings could be instituted against the plaintiff. The attorney, after hearing Mr. Cragin's account of the matter, told him he would prefer to hear the facts

from some one who had been a witness to the transaction, whereupon Mr. Cragin brought up the boatman and had him state to the attorney what had occurred. After hearing this the attorney advised Mr. Cragin to have a warrant sworn out against Elise de Pape under the following statute of Florida:

"Whoever willfully and maliciously destroys or injures the personal property of another in any manner, or by any means not particularly described in these Revised Statutes, shall be punished by imprisonment not exceeding twelve months or by fine not exceeding one thousand dollars; but when the value of the property so destroyed or injured is not alleged to exceed the sum of $15, the punishment shall be by imprisonment not exceeding thirty days or by fine not exceeding fifteen dollars."

The warrant was sworn out; the boatman making the affidavit on which it was issued. After the warrant issued, the defendant was arrested, carried to Palm Beach, and confined in the local prison for a few hours. She was released in the evening and was tried the next day. Under the law of Florida a justice of the peace has jurisdiction to try and determine criminal cases where the penalty is no greater than provided in the section under which this warrant issued. At the trial the justice of the peace found Elise de Pape not guilty and discharged her. Thereupon she brought this suit in the Circuit Court of the United States, claiming damages in the sum of $5,000, in that the defendant in the proceeding just stated had maliciously and without probable cause instituted a criminal proceeding against her and caused her arrest. There was a trial before a jury in the Circuit Court, and the evidence, while somewhat lengthy, was in substance what has been stated above. After all the evidence had been submitted by the respective parties, the defendant requested the court to instruct the jury to find a verdict for the defendant, which was denied, and the jury found a verdict in favor of the plaintiff. This verdict, although required to be reduced by the court, was allowed to stand.

The question, therefore, is whether under all the evidence in the case the defendant was entitled to a verdict, and this question depends upon the further question: Did the defendant have probable cause for taking the action he did in having the warrant sworn out and Elise de Pape arrested? Where the facts are undisputed, the question of probable cause is one for the court. 19 Am. & Eng. Ency. Law, 673; Stewart v. Sonneborn, 98 U. S. 187, 194, 25 L. Ed. 116; Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141–149, 7 Sup. Ct. 472, 30 L. Ed. 614. We think the material facts—that is, the controlling facts in this case—are practically undisputed. The plaintiff had broken the defendant's door without any reasonable cause for doing so. She acted clearly from anger at finding herself locked out, even according to her own evidence. Mr. Cragin, wishing the direction of counsel, went to an attorney and laid the matter before him, and, acting on his advice, had a warrant taken out for this slight misdemeanor. While there was some conflict between the witnesses as to the details of the transaction, there was none as to the prominent facts which should govern in the disposition of this case.

The advice of reputable counsel alone, honestly sought and acted upon in good faith, it has been held, will itself furnish a complete de-

fense on an action for malicious prosecution. In Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75, decided by the Circuit Court of Appeals for the Fourth Circuit, this is said in the opinion of the court:

"That the advice of reputable counsel, bona fide sought, and given upon full and fair statement of all the facts and circumstances, and as a consequence of which a prosecution was instituted, will serve as a defense in a suit for malicious prosecution, seems to be too well settled to admit of serious contention"—citing Stewart v. Sonneborn, supra, Saunders v. Palmer, 14 U. S. App. 297, 55 Fed. 217, 5 C. C. A. 77, and Forbes v. Hagman, 75 Va. 168.

But it was unnecessary for the defendant to rely solely upon the advice of counsel as a defense in this case. Taking the occurrence at Cragin's house and the facts connected with it, as they have been stated, the careful inquiry made by Cragin as to what really happened and how it happened, and his seeking the advice of counsel before taking any action, we think clearly shows a case of probable cause, and on undisputed evidence. In this situation it was the right of the defendant to have had a verdict directed in his favor by the court, as matter of law, on the ground that probable cause had been shown for the prosecution and arrest.

The judgment of the Circuit Court is reversed, with direction to award a new trial.

BOLLES v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 177.

1. CARRIERS—BILL OF LADING—STIPULATIONS—APPLICATION.
   A bill of lading provided that property not removed within 24 hours after arrival at destination may be kept in the car, depot, or place of delivery of the carrier at the owner's risk, or may at the carrier's option be stored at the owner's risk and cost, subject to the carrier's freight lien. *Held*, that such clause was only applicable to property after it had reached its destination, and did not apply to hay transported under a contract requiring delivery at ship's side within lighterage limits of the port of New York, which had only reached the rail terminal at the time it was stored and destroyed.

2. SAME—FIRE EXEMPTION.
   A clause in a bill of lading, providing that no carrier or party in possession of all or any of the property shall be liable for any loss thereof or damage thereto by fire, was applicable only in case the carrier at the time of the fire which destroyed the goods was "in possession" thereof.

3. SAME—STATE STATUTE—APPLICATION.
   3 Starr & C. Ann. St. Ill. 1896, p. 3285, c. 114, par. 102, providing that, whenever any property is received by any railroad corporation to be transported, it shall not be lawful for the corporation to limit its common-law liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitation expressed in the receipt given for the safe delivery of such property, as construed by the courts of that state, does not apply to restrictions contained in that part of the bill of lading which constitutes a contract.

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

This cause comes here upon appeal from a judgment in favor of the defendant in error, who was defendant below. At the close of the plaintiff's case the trial judge dismissed the complaint.

Simpson, Thacher & Bartlett (J. P. Workum and Arthur S. Hamlin, of counsel), for plaintiff in error.

Alexander & Green (Allan McCulloh, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This action was brought to recover the value of a large amount of hay belonging to plaintiff's assignor, which had been shipped from certain points in Illinois by the Lake Shore-Lehigh Valley route to New York for export. The shippers and defendant's representative had agreed that the former would give a portion of their business to this line, of which the defendant was the final carrier, on the same terms and conditions as the route over which the said shippers had theretofore been sending their hay. These conditions were that the traffic was for export; that the rate was named by the initial carrier; that defendant was to participate in that rate, or whatever agreed division they had, with the initial line; that the shipments were to be delivered at the ship's side within lighterage limits of New York Harbor; and that the remuneration for performing the service was to cover the transportation and care of the property for a period of 60 days from the date of the bills of lading, in which time the consignor was to designate the vessel or point in New York Harbor to which the hay was to be delivered. Bills of lading containing the conditions of the uniform bill of lading were issued.

The hay, which is the subject of this controversy, came safely over defendant's line to its rail terminal in Jersey City, arriving some time before the expiration of the 60 days. Plaintiff was promptly notified of arrival. The hay, not being removed within 24 hours thereafter, was unloaded from the cars and stored in a warehouse owned by the National Storage Company, where thereafter, and within the 60 days, it was destroyed by fire. No vessel had been designated to which this hay was to be delivered. There was no evidence in the case tending to show any negligence. The trial judge dismissed the complaint solely on the ground that the fifth clause of the bill of lading was controlling of the case. It reads as follows:

"(5) Property not removed by the person or party entitled to receive it within 24 hours after its arrival at destination may be kept in the car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges."

This clause, however, by its very terms, applies only when the property has reached its destination. The hay in question had not reached such destination when it arrived at the rail terminal of the defendant in Jersey City. The contract between the parties expressly provided that the carrier should transport it to ship's side within lighterage limits of the port of New York, and should hold it during the 60

days awaiting designation of the ship. There is nothing in this oral contract inconsistent with the terms of the subsequent bill of lading, which provides for transportation to "New York, N. Y., for export." The decision of the trial judge should therefore be reversed, unless there is some other ground on which a dismissal should be sustained. Defendant relies upon clause 1 of the bill of lading which reads:

"(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto * * * by fire," etc.

Manifestly this clause applies only if the carrier at the time of the fire is "in possession" of the property. Whether the Lehigh Valley Railroad Company was in possession of the property after it had been placed in the storage warehouse of the National Storage Company depends on the facts and circumstances under which it was placed there. Upon a new trial these facts and circumstances will probably be more fully disclosed than they are in this record, and for that reason it seems better not to discuss that branch of the case further than to observe that the power of a common carrier to make contracts of this sort restricting his common-law liability is recognized in the federal courts when no negligence is shown, and that the provisions of the statute of Illinois which have been referred to (3 Starr & C. Ann. St. Ill. 1896, p. 3285, tit. "Railroads," par. 102) have been construed by the courts of that state as not applying to restrictions contained in that part of a bill of lading which may constitute a contract.

Judgment reversed, and cause remanded for new trial.

UTZ et al. v. WOLF et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908.)

No. 1,402.

1. EQUITY—REMEDY AT LAW.

Each of defendant merchants agreed to buy "purchase stamps" from complainants to give to his customers according to the amount of their purchases. Complainants agreed to print the merchant's name and business in an "automobile stamp directory," and to authorize the merchant to exchange for each directory containing 100 stamps a ticket entitling the holder, upon the merchant's performance of the contract, to one fractional interest in an automobile, the denominator of the fraction to be the number of tickets that should be so issued. Each contract provided that complainants could make similar contracts with other merchants in the same city, and that persons receiving tickets from merchants complying with their contracts should have equal interests in the automobile. Before any stamps on tickets were issued, the merchants repudiated their contracts. *Held*, that complainants could not maintain a bill against all the merchants on the theory that the one automobile was to satisfy complainants' obligations under all the contracts, and that, as there were no ticket holders to take the automobile, the merchants were jointly entitled to it; and, since it could not be given or its value credited to each merchant in separate actions at law, all the merchants became subject to one equitable suit, in which the automobile could be tendered to them jointly.

2. SAME—ADEQUACY OF LEGAL REMEDY—BREACH OF CONTRACT.
That the damages from the breaches are too uncertain to be assessed, and liquidated damages were not stipulated, does not give rise to an equitable cause of action on one nor on a multiplicity of the contracts.

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

Leslie A. Needham, for appellants.
Merrill Moores, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appellants based their bill upon breaches of eight written contracts separately executed by eight distinct groups of appellees, who by their several demurrers insisted that there was no joint cause of action against them, that appellants' remedy, if any, was at law and not in equity, and that the contracts were illegal. The court sustained only the first two grounds. Upon appellants declining to amend, a dismissal was decreed "without prejudice to any action or actions at law by complainants."

The contracts were with eight retail establishments of Ft. Wayne, Ind. Each merchant agreed to take "purchase stamps" from appellants, to give to his customers during a period of six months one stamp with each 10 cents' worth of goods sold, and to pay appellants 10 cents for every hundred stamps so given. In return appellants covenanted to ship one special automobile to Ft. Wayne, to print the merchant's name and business in an "automobile stamp directory," and to authorize the merchant to exchange for each directory containing 100 stamps a ticket which should entitle the holder, upon the merchant's full performance of the contract, to one fractional interest in the automobile, the denominator of the fraction to be the number of tickets that should be so issued. Each contract provided that appellants should have the right to make similar contracts with other merchants in Ft. Wayne and that all persons who should receive tickets from merchants who should comply with their contracts should have equal interests in the automobile. Before any stamps or tickets were given out, appellees repudiated their contracts.

Appellants, of course, do not question the rule (Gaines v. Chew, 2 How. 619, 641, 11 L. Ed. 402; Dial v. Reynolds, 96 U. S. 340, 341, 24 L. Ed. 644) that a bill cannot be maintained against various defendants upon demands that are unconnected. The claim is that this case is not within the rule by reason of the fact that the one automobile was to satisfy appellants' obligation under all the contracts. As there were no ticket holders to take the automobile, appellants say that appellees were jointly entitled to it; and since it could not be given, or its value credited, to each merchant in separate actions at law, all the merchants became subject to one equitable suit in which the automobile could be accounted for or tendered to them jointly.

The contract with one merchant was not conditioned upon other merchants' entering into like contracts. If appellants had been content to furnish an automobile and a supply of purchase tickets for the stipulated percentage of the first merchant's sales, he could not have

avoided payment on the ground that appellants had failed to get contracts from other merchants. His contract obligations and rights were neither diminished nor increased by appellants' success or failure with others. If he performed his part of the contract, he was to receive, not an automobile nor an undivided interest in one, but the increase of business which might come from the advertisement that with purchases he would give stamps and tickets which appellants would honor by giving the holders undivided interests in an automobile. If he failed to perform, the automobile, so far as he was concerned, continued to be the property of appellants, for he had no right under the contract to inquire whether appellants retained it or gave it to holders of tickets issued by other merchants. If he accepted appellants' advertising services, he was to pay a stipulated price. If he refused to accept, he became liable for the contract price less what it would have cost appellants to have furnished him with the agreed advertising. That this cost might be greater or less, depending on the number of businesses that were to be advertised in the same "automobile stamp directory," does not affect the status of the parties to the contract, nor involve any greater difficulty in measuring the damages than might arise in case of breach of other advertising contracts. And if in any case damages are too uncertain to be assessed, the failure to provide for liquidated damages does not give rise to an equitable cause of action on one or on a multiplicity of such contracts.

The decree is affirmed.

THE GLADYS.

(Circuit Court of Appeals, Second Circuit. January 22, 1908.)

No. 102.

1. SHIPPING—DUMPING OF CARGO BY LIGHTER—DANGEROUS SWELL CAUSED BY PASSING STEAMER.

   The careening of a lighter proceeding up the Hudson river in tow, by which she dumped overboard her cargo of wine in barrels, *held*, on the evidence, not due to her unseaworthiness, but to a swell caused by a meeting steamer, for which her owners were liable because of her negligent navigation.

   [Ed. Note.—Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

2. ADMIRALTY—PLEADING—ISSUES AND PROOF.

   In a suit against a tug to recover for an injury to her tow and the loss of her cargo, where the respondent brought in the owner of a steamer, alleging that the injury was caused by the swell made by such steamer, the petitioner is not limited to proof that the swell was caused by the particular vessel named; but it is sufficient to charge the owner with liability if it is shown that it was caused by one of its vessels, although the particular boat is not identified.

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

De Forest Bros. and George Holmes, for appellant.

A. G. Thacher and Butler, Notman & Mynderse, for respondent Italian Swiss Colony.

Charles S. Haight and Wheeler, Cortis & Haight, for respondent Lee.

A. F. Cushman, for respondent Johnson.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The decree is affirmed, with costs, upon the opinion of the district judge and the report of the commissioner confirmed by him.

NOTE.—The following is the opinion of Holt, District Judge, in the District Court:

HOLT, District Judge. It seems to me that the evidence is uncontradicted that the tow was loaded in the usual manner; and, if it was loaded in the usual manner, that is the proper manner. I think that the evidence shows, also, that the Dillon was seaworthy. I do not see any satisfactory evidence that she was not. The captain says that after the accident she was not leaking. Her story that she was listing to starboard must, if true, have been due either to her leaking, or to some of the barrels getting loose, and some of the weight being swerved over on that side. There is no evidence that she was leaking. Men on the boat swear that they tested her before she started, and on the trip up, and that she was not leaking. The people who repaired her found nothing the matter with her hull, and if any of the chocks had given way, so that any of the barrels had become loose and the load got over on one side, it seems to me that the men on the lighter must have seen it, and that they must have made an outcry about it, or taken some action right away to restore the load to its proper symmetry. I think, therefore, that any claim that the boat was not seaworthy is not sustained by the evidence.

The question is, therefore, what caused this accident? If there was nothing in the boat to make her list over to one side, how did it happen that the barrels rolled over? It seems to me it must have been some sudden external force of a violent kind, because, as she rolled, she broke her mast out, and the barrels, in going overboard, took away the rail. They could only have been thrown out with great violence. The evidence of the two men on the float is that a Sandy Hook boat came down between the boat and the shore, and that there was a swell caused by it, which came up and over the bow and wet the feet of the men forward, and at the same time the impulse of the wave threw the boat violently to port, and then back, with the result that the boat partly careened, and a large portion of her cargo in the barrels went overboard. I think the evidence preponderates that that was the cause of the accident. The only question is whether it was a Sandy Hook boat. The allegation in the petition is that the Asbury Park was the boat; but I do not think that that is such an allegation that the party must prove that it was the Asbury Park. The respondent brought in the Central Railroad of New Jersey, and if it was any one of the Sandy Hook boats that is enough under the pleadings. These two men on the Dillon testify that, while they do not know which boat it was, they do know that it was one of those boats. The boats are well known about the harbor, and they are not yet contradicted in any respect as I can see, except by the man on the tug. For various reasons apparent in this testimony, I must say I cannot put much reliance on his evidence. According to his evidence there was not any Sandy Hook boat there, or any swell that caused the trouble, and yet we find that within a day or two after the accident happened notice was sent to the Central Railroad of New Jersey that the injuries were caused by one of their boats, and therefore they must send a man over to take part in a survey. The idea that there was nothing of a swell there seems to me not to be supported by a preponderance of evidence.

There should be a decree for the libelant against the Central Railroad of New Jersey, and not against Lee, and there should be an order of reference to compute the damages.

Mr. Benedict: Is the libel dismissed as to all the other boats?

The Court: Yes.

The following is the material part of the report of Commissioner James Ridgway:

"I have carefully considered all of the proofs in the case, as well those taken upon the trial of the cause, as those taken on the reference before me, and I do find that on the 25th day of July, 1905, the libelant, the New York branch of the Italian Swiss Colony, an incorporated company engaged in the business of wholesale dealer and producer in wines and brandies, was the owner and consignee of a shipment of 1,498 barrels of wine, sent by the California office of the colony by the ship Shenandoah to New York, and discharging at Bush's Stores, Forty-Second street, South Brooklyn, for the purpose of lightering the cargo from that point to New York, and that the manager of the New York branch engaged the services of the respondent H. M. Lee, a lighterman, and the respondent Lee engaged the services of Johnson, a part owner of the lighter Frank Dillon, and that the Dillon took on board at Forty-Second street on that day 350 barrels of such wine, and proceeded in tow of the tug Gladys bound for Canal street, New York, on the Hudson river, where said 350 barrels of wine were to be delivered to the Italian Swiss Colony; that while proceeding up the Hudson river, and when about abreast of Pier 25, the lighter careened and dumped her cargo overboard. The careening of the lighter and the loss of her cargo were due to the heavy swells created by the passing of one of the Sandy Hook boats, owned by the Central Railroad of New Jersey. 'She made such an awful swell' that the lighter took a severe roll to port and then came back to starboard. 'She filled herself full of water forward and aft,' and the barrels commenced to get loose and slide down, the shrouds were carried away forward, the bulwarks were swept away, and the Dillon was rendered substantially a wreck. The swells from the Sandy Hook boat came on board, wetting the cargo and the crew."

LANDRY v. SAN ANTONIO BREWING ASS'N.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1907. On Rehearing, February 25, 1908.)

No. 1,741.

BANKRUPTCY—PETITION TO REVISE—SUFFICIENCY OF RECORD.

A Circuit Court of Appeals cannot act on a petition to superintend and revise the proceedings of a District Court in bankruptcy, where the record does not contain a statement or finding of facts, nor show whether the court determined the question sought to be reviewed as one of fact or law.

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

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Texas.

A. L. Davis, for petitioner.

C. A. Teagle, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The proceeding sought to be superintended and revised is the allowance of a secured claim. The district judge considered and allowed the claim on evidence which we have not before us. We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence.

Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied.

On Rehearing.

In Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, which was a case on a petition to revise and superintend in a matter of bankruptcy, the referee found the facts and the district judge affirmed the referee in all respects, and there was no dispute or suggestion even as to the correctness of the findings of fact of the referee, and the question before us was one of pure law.

In Clayton et al. v. Exchange Bank of Macon, 121 Fed. 630, 57 C. C. A. 656, in which the rank and validity of a mortgage, withheld from the record until bankruptcy was impending, was involved, the matter was brought before the court by appeal, which, of course, brought before us the evidence in the case. In the present case the referee found and formulated the facts on the evidence submitted to him, also his conclusions of law, and the whole, accompanied with the evidence, was transmitted to the district judge for review. The record shows that the judge on the hearing considered the certificate of the referee as to the questions presented, and the summary of the evidence, and thereupon reversed the referee and entered judgment accordingly, so that we cannot from the record say whether the judge decided the case upon the facts reported by the referee or upon facts found by himself on the evidence. To determine whether the judge a quo correctly ruled the law, we must necessarily have before us the facts upon which he acted.

The petition for rehearing is denied.

MOORE ex ux. v. UNITED STATES et al.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908. Rehearing Denied April 29, 1908.)

No. 1,765.

HABEAS CORPUS—ARMY—ENLISTMENT—MINORS.

Where the record in a habeas corpus proceeding to procure the discharge from the army of an enlisted soldier does not show, except by ex parte affidavit attached to the petition, that he was a minor when he enlisted or that his enlistment was without his parents' consent, and where the return of the military commandant, alleging due enlistment for an unexpired term, desertion, surrender, commitment to the commandant, and confinement under pending charges for the desertion, was not traversed, the writ was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 70.]

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

Charles P. Cocke, for appellants.

Rufus E. Foster, U. S. Atty., for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The case does not show, except by ex parte affidavit of Mrs. Moore attached to the petition for habeas corpus, that Au-

burn Moore was a minor when he enlisted in the United States military service, or that his enlistment was without the consent of his parents. The case was submitted in the lower court on the return of the military commandant, as follows:

"That the said Auburn Moore was duly enlisted as a soldier in the service of the United States at Columbus, Ohio, on February 6, 1907, for a term of three years. That the said Auburn Moore deserted said service at Ft. William Henry Harrison, Mont., on December 19, 1907, and remained absent in desertion until he surrendered himself at Jackson Barracks, New Orleans, La., January 3, 1908, and was thereupon committed to the custody of the respondent as the commanding officer of the post of Jackson Barracks. That the said Auburn Moore has been placed in confinement charged with said offense, and formal charges against him therefor are being prepared, and that he will be brought to trial thereon as soon as practicable before a court-martial to be convened by the commanding general of the Department of the Gulf."

This return was not traversed, and we are not authorized to go outside thereof for the facts in the case. By the return the case is to be controlled by our decisions in Miller v. United States, 114 Fed. 838, 52 C. C. A. 472, and United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675.

The judgment of the District Court must be affirmed.

When the charge of desertion against Auburn Moore has been disposed of, or if the military authorities do not proceed thereon within a reasonable delay, the appellants can renew their application for a writ of habeas corpus.

LA CRANDALL et al. v. LEDBETTER et al.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908.)

No. 1,759.

SUNDAY—CONTRACTS—VALIDITY—PUBLIC AMUSEMENT.

Under Pen. Code Tex. art. 199, forbidding the keeping open of places of public amusement on Sunday, and defining such places to mean theaters, etc., and such other amusements as are exhibited and for which an admission fee is charged, a contract providing for the appearance and exhibition of persons as performers in places of public amusement on Sunday in theaters, for admission to which a fee is charged, cannot be enforced in the courts of that state, in so far as it includes Sunday exhibitions.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5389–5390.]

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

W. H. Atwell, for appellants.

P. Barry Miller, John C. Robertson, and James J. Collins, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The contract between the appellants and the Interstate Amusement Company, which is the basis of this suit, was not attached to the bill, nor offered in evidence; but, by fair implication

from the averments of the bill, it is a contract providing for the appearance and exhibition of appellants as performers in places of public amusement on Sunday in theaters for admission to which a fee is charged. Such a contract, in so far as it includes Sunday exhibitions, is in derogation of article 199 of the Penal Code of the state of Texas, and therefore cannot be enforced in the courts of the state of Texas.

For this and other reasons apparent on the record, the decree of the District Court, dismissing the bill, is correct; and it is affirmed.

BANK OF CLINTON v. KONDERT.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908. Rehearing Denied April 29, 1908.)

No. 1,767.

BANKRUPTCY—APPEAL—DECISIONS APPEALABLE.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], restricting appeals in bankruptcy proceedings to judgments adjudging or refusing to adjudge bankruptcy, granting or denying a discharge, and allowing or rejecting a debt or claim of $500 or over, an appeal will not lie to the Circuit Court of Appeals from a decree of the District Court reversing a referee's judgment requiring a trustee to account to the creditors in specified sums as the rental value of property, of which he permitted the bankrupt to retain use and possession.

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

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

Wm. Winans Wall, for appellant.

John Clegg, Lamar C. Quintero, and T. Jones Cross, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the bankruptcy of James W. Strong, pending in the District Court for the Eastern District of Louisiana, Oscar Kondert, trustee, filed a provisional account. To this account the Bank of Clinton, claiming to be a creditor, filed an opposition, claiming that the trustee, for permitting the bankrupt to remain in use and possession of a certain sawmill, teams, and wagons without adequate rent, should be charged a rental for the mill of at least $200 per month and for the horses, mules, and wagons $100 per month. The opposition came on to be heard before the referee, who took evidence, and thereupon rendered the following judgment:

"It is therefore ordered that opposition filed herein by the Bank of Clinton shall be maintained, in so far as to require that Oscar Klondert, the trustee of this estate, shall account to the creditors in the sum of $1,400 as rental value of the Clinton Sawmill for a period of seven months from June, 1906, to January, 1907, and in the sum of $700 for the rental value of two teams for the same period of time mentioned, making a sum total to be accounted for by Oscar Kondert to this estate of $2,100, with costs of these hearings.

"Judgment rendered this 25th day of April, 1907, at New Orleans, La. Judgment signed this 7th day of May, 1907.

"[Signed] Wm. A. Bell, Referee."

The trustee, not satisfied with this judgment, on petition for review brought the matter before the district judge, who, after hearing, rendered the following decree:

"In the Matter of J. W. Strong, Bankrupt. No. 903. In Bankruptcy.

"This cause came on at this term to be heard upon the petition of Oscar Kondert, trustee, for a review of the ruling of the referee herein, and was argued and submitted, when the court took time to consider. Upon due consideration whereof, and for the reasons orally assigned, it is ordered, adjudged, and decreed that the said ruling of the referee be, and the same is hereby, reversed.

"Decree entered and signed this 28th day of December, 1907.

"[Signed] Aleck Boarman, Judge."

From this decree the Bank of Clinton sued out this appeal.

Paragraph "a," § 25, of the bankrupt law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), restricts appeals in bankruptcy proceedings in the courts of bankruptcy to the following cases: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. From the above statement of the case, it is apparent that, while the matter involved in this appeal is a proceeding in bankruptcy, it is not by any intendment within any one of the classes in which an appeal is allowed.

Therefore, pretermitting the question as to whether any final decree could have been rendered upon the account filed by the trustee, and also the question as to whether in the case the court has rendered any final decree, the appeal is dismissed.

J. J. McCASKILL CO. v. DICKSON.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1908.)

No. 1,690.

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

A pleading averring that plaintiff's assignor was a corporation, with its principal office in Florida, and that defendant resided in Alabama, insufficiently shows the citizenship of the assignor and of defendant, and hence is insufficient to show jurisdiction in the federal Circuit Court on the ground of diverse citizenship.

[Ed. Note.—For cases in point, see Cent. Dig. vol 13, Courts, §§ 876–881.

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

2. WRIT OF ERROR—DISPOSITION OF CAUSE.

In a suit on an assigned contract, no objection was made in the federal Circuit Court, nor on writ of error in the Circuit Court of Appeals, to the fact that defendant's citizenship was not shown, but objection was made to the fact that it did not appear that the suit might have been prosecuted in the Circuit Court on the contract, if no assignment had been made; and, a general demurrer being sustained, plaintiff refused to further amend. *Held*, that the Circuit Court of Appeals is bound to affirm the judgment of dismissal for want of jurisdiction in the Circuit Court.

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

Wm. W. Flournoy, for plaintiff in error.
E. C. Maxwell and L. J. Reeves, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The plaintiff in error (plaintiff below) brought this suit by attachment and as assignee of a contract for the delivery of logs. The jurisdictional averments are that the plaintiff and assignee, the J. J. McCaskill Company, is a corporation duly incorporated under the laws of the state of Florida; that its assignor, the W. S. Keyser Company, is a corporation with its principal office in the city of Pensacola, Fla.; and that the defendant, Dickson, resides beyond the limits of the state of Florida, within the state of Alabama. In Thomas v. Board of Trustees, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160, it is said:

"It is equally well established that, when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Martin v. Baltimore & Ohio R. Co., 151 U. S. 673, 689, 14 Sup. Ct. 533, 38 L. Ed. 311; Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 98, 18 Sup. Ct. 264, 42 L. Ed. 673. As late as in Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 63, 24 Sup. Ct. 598, 601, 48 L. Ed. 870, we said, both parties insisting upon the jurisdiction of the Circuit Court: 'Consent of the parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute.' "

The same case and others there cited show, as given in the textbooks (see Moon on Removal of Causes; Carter on Jurisdiction Fed. Courts), and as expressly held by this court in Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404, 69 C. C. A. 248, that for jurisdictional purposes in the United States courts the proper way to show the citizenship of a corporation is to aver it to have been duly created under the laws of the state of its origin. If any jurisdictional question is well settled, it is that the citizenship of a party for jurisdictional purposes is not sufficiently shown by averring his residence merely. Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057. Cases to this effect in the Supreme Court, the Circuit Courts of Appeals, and the Circuit Courts are multitudinous.

From this it clearly appears that the jurisdiction of the Circuit Court in this case is not shown by the record, either as to the citizenship of the defendant or sufficiently that the assignor of the contract through diverse citizenship or otherwise could have maintained an action in the United States Circuit Court to enforce the contract if no assignment had been made. That the latter was necessary, see New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764.

No objection was made in the Circuit Court (or here, either, for that matter) that the citizenship of Dickson was not shown by the record; but objection was urged that it did not appear that the suit might have been prosecuted in the Circuit Court to recover on the contract if no assignment had been made, and when a general demurrer was sustained the plaintiff refused to further amend.

This leaves this court with no alternative, and we must affirm the judgment of dismissal for want of jurisdiction in the Circuit Court; and it is so ordered.

CONSTANTINE & PICKERING S. S. CO. v. TWEEDIE TRADING CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 137.

SHIPPING—CONSTRUCTION OF CHARTER PARTY—PAY OF WINCHMEN.

A provision of a charter party requiring the vessel to furnish steam winches for loading and discharging, and to provide men for working the same as required, is fulfilled by the vessel by tendering competent seamen to work the winches, and, if their services are refused because the stevedores employed by the charterer refuse to work with them, or for other reason, the cost of employing other winchmen cannot be charged to the vessel or owners.

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

Convers & Kirlin (J. P. Kirlin and John M. Woolsey, of counsel), for appellant.

R. J. M. Bullowa and Wheeler, Cortis & Haight, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The owners of the steamer Brookwood filed this libel against the charterer for balance of charter hire, against which the charterer sought to set off money paid by it for men to work the steamer's winches. Clause 24 of the charter party regulates the subject in these words:

"Steamer to work day and night if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night as required; charterers agreeing to pay extra expense, if any, incurred by reason of night work, at the current local rate."

The steamer offered seamen to work the winches both at New York, where the steamer loaded, and at various ports in South America, where she discharged. The charterers' stevedores refused to work with them. The testimony shows that the seamen were accustomed to work the winches, and there is no evidence that they were incompetent. The only reason given for the refusal to work with them is that in the port of New York stevedores do not think sailors sufficiently skillful in operating the winches to allow cargo to be lowered as quickly as is required with safety to the longshoremen. There have been different rulings on this point in this district. Golcar Steamship Company v. Tweedie Trading Company (D. C.) 146 Fed. 563; British

Maritime Trust, Limited, v. Munson Steamship Line (D. C.) 149 Fed. 533; The Santona (D. C.) 152 Fed. 516. We think that the steamer fulfills her obligations under this clause when she tenders to the charterer men competent to work the winches. She is to be regarded in this case as having supplied the charterer with working winches, and, if the charterer for any reason cannot get its stevedores to use the winches in loading or discharging cargo, the loss so incurred is not chargeable to the steamer. If the services of competent winchmen are refused, either because the charterer wishes greater speed, or for the reason that the longshoremen, because of labor union regulations or otherwise, refuse to work with them, the expense of substitutes must be borne by the charterer.

The decree is reversed, with costs.

WHITTEMORE BROS. & CO. v. REINHARDT.

(Circuit Court of Appeals, Second Circuit. February 11, 1903.)

No. 136.

PATENTS—INFRINGEMENT—CAN OPENER.

The Cleveland patent, No. 727,905, for a can opener, being a lever device for attachment to cans or boxes having a tight fitting cover to assist in removing such cover, is a narrow one, and the claims cannot be broadened, nor any special latitude be given in applying the doctrine of equivalents. In the first and second claims a handle portion "substantially parallel with the surface of the receptacle" is made an element, and the third contains as an element "an offset in which the part of the lever between the body and the cover of the receptacle may lie," and none of the claims are infringed by a device in which neither of such elements is found.

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

This cause comes here upon appeal from a decree of the Circuit Court, holding United States patent, No. 727,905, for an improvement in can openers, issued May 12, 1903, to Newcomb Cleveland, valid and infringed.

James H. Griffin (J. R. Edson and H. C. Townsend, of counsel), for appellant.

F. F. Crompton and William J. Dolan, for appellees.

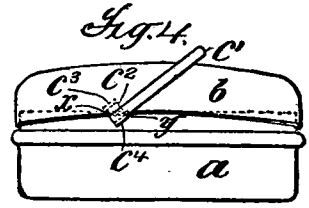
Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. As only a brief memorandum was filed in the Circuit Court, which did not discuss either the patent or the defenses, it will be necessary to quote at some length from the specifications.

"This invention relates to devices for opening receptacles—such as boxes or cans containing shoe-polish, stove-polish, baking powder, and other ingredients for which it is essential to provide a tight closure. The cover part of these receptacles is usually made with a very tight fit on the body portion, and often the contents of the receptacle is of such a nature as to act somewhat as a glue between the body and lid or cover. In such cases a direct upward push on the lid or its rim has generally been found quite inadequate to open

the receptacle. By my invention I provide a positively-operating lever-opener adapted to so co-operate with the box that the latter will act as the fulcrum-bearing and at the same time hold the lever in operative position until the box is opened—that is, the mere closure of the box secures the lever thereto. In carrying out my invention I make the fulcrum and resistance points of my lever-opener bear one upon the body portion and one upon the cover of the receptacle, and preferably the lever is partly enclosed in the receptacle and partly projects therefrom, the outside part or handle being in a position for ready manipulation when it is desired to open the receptacle."

Referring to the drawings which show various forms, the patentee states that he does not limit himself to any specified form or device "beyond what is called for in the claims hereto appended." Figs. 2 and 4 sufficiently disclose the device of the patent: Fig 2 showing



the lever-opener and Fig. 4 the receptacle, with cover on and lever-opener inserted, at the moment when, by moving the handle, C', upward or downward, the opener is revolved on its fulcrum, thus lifting up the cover. After an extended description of the various figures, the specification concludes:

"From the foregoing it will be seen that my improved lever-opener is of very simple construction, as it may be made of one piece and without rivets or other special fulcrum-bearings. The lever is firmly secured to the box by having a portion adapted to be clamped between the body and cover, and I do not limit myself to any special manner of doing this nor to any particular relative position of the parts other than that the fulcrum and resistance points of the lever bearing against two parts of a receptacle and the lever is held in operative position by the simple closing of these two parts."

The claims are:

"1. The combination with a receptacle and a cover fitting thereon, of a lever-opener comprising a portion lying within the receptacle, a portion lying between the receptacle and its cover, and a handle portion extending beyond the other portions substantially parallel with the surface of the receptacle.

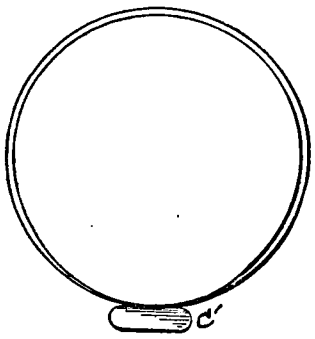
"2. The combination with a receptacle and a cover fitting thereon, of a lever-opener comprising a portion lying between the receptacle and its cover, a portion turned over the rim of the receptacle, another portion turned out under the rim of the cover, and a handle portion extending beyond the other portions substantially parallel with the surface of the receptacle in position for operation to open the receptacle.

"3. The combination of a receptacle comprising a body and a cover with a lever-opener partly inclosed and held between said body and cover when the receptacle is closed, said receptacle being provided with an offset in which the part of the lever between the body and cover of the receptacle may lie, to permit of a tight closure of the receptacle."

It will be noted that the first and second claims both contain as an element a handle portion extending beyond the other portions "substantially parallel with the surface of the receptacle." This quali-

fying phrase was inserted after two rejections by the Patent Office of the claims in which it appears. Its meaning is apparent upon inspection of the drawings. The handle, C′ (before it is raised or lowered), lies flat against the curved side of the receptacle, curved as the receptacle is so that it does not project, but the entire package is left compact and convenient for packing or handling. In one variety of the forms used by the patentee, when manufacturing under his patent, the handle, C′, instead of curving to the side, ran straight down across the curved surface of the receptacle to the bottom thereof; but it lay flat against the side of the receptacle and might fairly be said to be substantially parallel to the surface. Since the patentee has deliberately chosen to make this parallelism a feature of these two claims, it is not for the court to strike it out. The patent is a narrow one at best, and, while we do not express any opinion as to its validity, we are satisfied that the claims should not be broadened nor any especial latitude be given in applying the doctrine of equivalents.

The device of the defendant is substantially like the patentee's so far as the parts within the cover are concerned, and its lever action is the same, but the handle portion, C′, is not substantially parallel with the surface of the receptacle. As will be seen in the figure below it is tangential to such surface, so that instead of lying flat, housed up against the box or the cover it projects boldly therefrom. Defendant argues that by thus positioning it an improvement is effected; that instead of scratching one's fingers and, perhaps, breaking one's nails in an effort to move the lever handle, it is always presented in a shape easy to grasp and that it may be turned (thus raising the cover) much more readily and efficiently. Whether this be an improvement or not need not be determined. Certainly the handle portion of defendant's lever-opener is not substantially parallel with the surface of the receptacle and, therefore, is not within the first two claims of the patent.



The third claim contains as an element of the combination "an offset in which the part of the lever between the body and the cover of the receptacle may lie, to permit of tight closure of the receptacle." The specification states:

"Preferably I form an offset in the receptacle as shown, for instance, at b′ in the cover b, in which the portion C2 lies."

The draftsman has neglected to affix the letter, b,′ to any of the figures, but shading in one of the drawings (Fig. 1) and lines in a cross-section drawing (Fig. 3) indicate its presence. As thus depicted the offset is in the cover, which bulges out sufficiently to make a chamber or recess in which C2 may rest; but an inset in the receptacle (as distinguished from the cover) would accomplish the same purpose and be a fair equivalent. In one or more of the exhibits such an off-

set is found in devices made under the patent. It is not disputed that as made the covered receptacles of defendant do not have this offset or inset. Complainant, however, contends that since both box and cover are made of thin tin the continual putting on and taking off of the cover—especially if this is done with box and cover in the same relative position—will soon produce an offset in which C2 may lie. We are of the opinion that a distortion of box or cover thus produced is not the "offset" of the claim, which is an essential part of the device as put on the market; something which is done intentionally by the maker and not accidentally by the user, for the specification says, "I form an offset," etc., which means that the offset is formed by the patentee himself.

We do not find that the device of the defendant infringes any one of the three claims, and the decree is therefore reversed, with costs, and cause remitted to Circuit Court with instructions to dismiss the bill with costs.

O'BRIEN v. FOSTER HOSE SUPPORTER CO.

(Circuit Court of Appeals, First Circuit. December 9, 1907.)

No. 741.

1. PATENTS—ANTICIPATION AND INFRINGEMENT—ABDOMINAL PAD AND HOSE SUPPORTER.
   The Young patent, No. 638,540, for a combined abdominal pad and hose supporter, was not anticipated and discloses invention; also *held* infringed.

2. SAME.
   In accordance with the practice in this circuit, the decision of the Circuit Court of Appeals in Young v. Wolfe, 130 Fed. 891, 65 C. C. A. 199, followed.

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

For opinion below, see 153 Fed. 585.

Frederick L. Emery (Charles S. Jones, on the brief), for appellant.

J. J. Kennedy (M. B. Philipp, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This is an appeal from an interlocutory decree of the Circuit Court, directing an injunction and an accounting by reason of the infringement of the first claim of patent issued to Ella Foster Young on December 5, 1899, No. 638,540, on an application filed on October 19, 1897. There are two claims in the patent, but the second one is not involved in this litigation. The specification describes the invention as relating to efficient abdominal pads and hose supporters, having for its object, not only to support the hose in an efficient manner, but also to aid in producing a proper carriage of the body of the wearer, and maintaining the abdominal viscera in proper position. The claim in issue is as follows:

"1. In a combined abdominal pad and hose supporter, the combination with a flat abdominal pad having a continuous integral body with a smooth unbroken bearing or contact surface and of a size about equal to that of the upper central portion of the hypogastric region, of supports attached to said pad at its upper edge and hose-supporting straps attached to the lower edge of said pad, whereby in use strain is applied to said pad in substantially verticle lines and the pressure is localized, substantially as described."

The general facts are sufficiently stated in the opinion of the learned judge of the Circuit Court. The only substantial issue seems to be that of patentability; and, in conclusion of its argument at bar, the appellant puts its position with reference to this as follows:

"The single claim in suit is absolutely void of patentable novelty in view of the prior patents to Banfield, Fraser, and George, and also in view of the conceded earlier supporter referred to by both experts and mentioned in the Fraser and George patents."

As to the general topic of patentable invention, we refer to Young v. Wolfe, 130 Fed. 891, 65 C. C. A. 199, decided by the Circuit Court of Appeals for the Second Circuit on April 21, 1904. Apparently the case should have been entitled Wolfe v. Young, but this is of no consequence. This determined that each claim in the patent in suit covered what was invention. In accordance with our usual custom of yielding to decisions of the Circuit Courts of Appeals of other circuits, we perceive no reason why we should not follow this one. Therefore the only question left for our investigation is that of anticipation, and we open that only so far as it appears that alleged anticipations are shown to us which were not shown to the Circuit Court of Appeals in the Second Circuit. The George patent, referred to by the appellant, was especially considered in Young v. Wolfe; but it does not appear that the Banfield or Fraser patents were shown in that litigation. The Banfield, Fraser, and George patents alike were limited to stocking supporters, and the bearings in each case were on the hips. They come within the rule, which has been reiterated again and again, that an alleged infringer is far from maintaining anticipation by showing what more or less approximates the patented article, but which, nevertheless, requires to be readjusted so as to accomplish a new purpose before it can come into the same field with it.

The claim is also made, as explained by the learned judge of the Circuit Court, that the Circuit Court of Appeals for the Second Circuit overruled itself by its decision in Parramore v. Siegel-Cooper Co., 143 Fed. 516, 74 C. C. A. 386, with the concurrence therein of the Circuit Court of Appeals of the Seventh Circuit in Kleinert Rubber Co. v. Stein, 133 Fed. 228, 66 C. C. A. 282; but the learned judge of the Circuit Court was correct in not accepting this proposition. The later cases referred to did not involve the patent before us, so that the issue was not the same; and, the questions in each case being mainly questions of fact, it far from follows that one case overrules the other on account of apparently inconsistent expressions in dealing with details. Having considered the respective decisions, we do not doubt that Young v. Wolfe still stands unaffected.

On the question of infringement, we cannot hold that the Circuit Court was in error. The patent calls for a pull in a certain direction, which

direction is not mathematically vertical, but, by the terms of the claim, only substantially so. The appellant alleges that the pad of the patent in suit is rectangular; but it is not so shown, nor is there any requirement that it should be strictly so. He also claims that his pad is triangular; but it is not so as shown in his drawings. It is in the form of a perpendicular section of a truncated cone. Each may more or less approximate a rectangular form without either of them becoming a proper parallelogram. Each of them gives the pad an up and down pull, which is all that the claim in suit requires.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

DAVIS & ROESCH TEMPERATURE CONTROLLING CO. v. TAGLIABUE et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 98.

1. PATENTS—ASSIGNMENTS—CONTRACTS—CONSTRUCTION—"COMPLETED."
   Where an assignment of certain patents included all inventions of like nature or similar thereto which might thereafter be completed, the word "completed" was not used in the sense of "conceived," but should be construed to mean the finishing or perfection of something already commenced other than the bringing into existence of a new thing, and the assignor having testified that it was only desired that he should assign the invention for which applications for patents had been filed and those he was working on at the time, the word "completed" could not be given a broader signification so as to include inventions which had not been conceived at the time the assignment was executed.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 328.

   For other definitions, see Words and Phrases, vol. 2, pp. 1366–1368.]

2. SAME—BONA FIDE PURCHASER.
   Where a contract for the assignment of certain patents included inventions of a similar nature which the patentee might thereafter complete, the assignee of a subsequent invention not conceived by the party at the time such contract was executed, though with actual knowledge of such previous assignments, was not chargeable with notice that the word "complete" was intended to be given an extraordinary interpretation to include inventions not then conceived.

3. SPECIFIC PERFORMANCE—CONTRACT—CERTAINTY.
   If a contract is so uncertain or ambiguous that it requires testimony of subsequent dealings to make its meaning clear, it may not be specifically enforced in equity against a purchaser for value whether with or without notice of its provisions.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 61.]

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

For opinions below, see 148 Fed. 705; 150 Fed. 372.

L. B. Kennison and Jay Noble Emley, for appellants.

J. C. Chapin, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit in equity for the specific performance of a contract entered into on October 11, 1897, by the complainant and the defendant Roesch under which the complainant claims to be entitled to two inventions made by said defendant and assigned by him to the defendant Tagliabue. The contract follows:

"Whereas, I, Alfred Roesch, of the city of Brooklyn, county of Kings and state of New York, have invented certain new and useful improvements in air and fluid controlling and regulating devices, and have filed applications for United States letters patent therefor, which applications were filed and numbered as follows:

"Serial No. 618,160, filed January 6, 1897, for air controlling device;

"Serial No. 639,757, filed June 7, 1897, for automatic temperature regulator for water heaters;

"Serial No. 639,758, filed June 7, 1897, for automatic temperature regulator;

"Serial No. 639,759, June 7, 1897, for air controlling valve mechanism;

"Serial No. 639,760, filed June 7, 1897, for device for actuating fluid controlling valves by fluid pressure; and

"Whereas, the Davis & Roesch Temperature Controlling Company, a corporation organized under and pursuant to the laws of New Jersey, are desirous of acquiring the entire interest in said inventions and the letters patent to be obtained therefor:

"Now, therefore, to all whom it may concern be it known, that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Alfred Roesch, have sold, assigned and transferred, and by these presents do sell, assign and transfer unto the said Davis & Roesch Temperature Controlling Company the full and exclusive right to the said inventions as fully set forth and described in said various applications filed and numbered as aforesaid, and any and all inventions of like nature or similar thereto which I have already completed, or which may hereafter be completed by me. I do hereby authorize and request the Commissioner of Patents to issue the letters patent granted upon the foregoing applications to the said Davis & Roesch Temperature Controlling Company as assignee of my entire right, title and interest in and to the same and the inventions therein contained, for the sole use and behoof of the said Davis & Roesch Temperature Controlling Company and its legal representatives.

"In testimony whereof, I have hereunto set my hand and affixed my seal this 11th day of October, 1897. Alfred Roesch. [Seal.]"

The inventions which the complainant seeks to have transferred to it under its prayer for specific performance had not been conceived at the time of the execution of said contract. The question of primary importance in the case, therefore, is whether such inventions are included within the phrase, "inventions of like nature * * * which may hereafter be completed by me."

The word "complete" is generally defined to mean: to finish; to perfect; to bring to a desired condition or end. It ordinarily signifies the full accomplishment of something already commenced rather than the bringing into existence of something new. Inventions conceived by Roesch at the time of the execution of the contract and subsequently reduced to concrete form came precisely within the terms of the contract. But, as we have seen, this interpretation does not include the inventions in question.

The complainant, however, claims that, under all the circumstances, this word "completed" should be given a broader meaning—that it should be so interpreted as to embrace all inventions of the nature stated which Roesch should make in the future. And this contention

is not without foundation. It would certainly seem the parties must have intended that the corporation should receive all that Roesch had previously assigned to the partnership, viz., all future inventions auxiliary to, or complementary of, the original inventions. Still Roesch testified that it was only desired that he should assign the inventions for which applications for patents had been filed and those he was working on at the time, and the language of the assignment coincides with this claim. It is difficult to understand why the word "completed" should have been used unless it were used advisedly. It would have been easy to use a term of broader signification.

In view of the whole situation, therefore, and bearing in mind that this is not a bill to reform an instrument, we are unable to hold, as against the defendant Tagliabue, a purchaser for value of the patents in question, that the verb "completed" should be given any other than its ordinary meaning. Assuming Tagliabue's actual knowledge of the assignment, he is not chargeable with notice that its language should receive an extraordinary interpretation.

The language of the contract is not uncertain. Its meaning can be drawn from within the four corners of the instrument. No ambiguity is apparent. There seems to be no need of evidence of practical construction. And yet both sides have taken and presented a vast mass of testimony as to what the parties said, did, and wrote under the contract and with respect to it after it was executed. It is sufficient to say, regarding this testimony, that if the contract were so ambiguous and uncertain as to require testimony of subsequent dealings to make its meaning clear it would not be a contract which a court of equity would specifically enforce as against a purchaser for value with or without notice of its provisions. Uncertainty as to the meaning of a contract is fatal to a claim for its specific performance.

The decree of the Circuit Court is reversed, with costs.

DODGE NEEDLE CO. v. JONES.

(Circuit Court of Appeals, Third Circuit. February 7, 1908.)

No. 46.

1. PATENTS—INFRINGEMENT—KNITTING MACHINE NEEDLE.
The Currier patent, No. 743,152, for a knitting machine needle having a latch mounted in a slot on a pivot pin extending transversely through the needle, "the said pivot pin and the side walls of the body adjacent to the ends of the pin being compressed to form depressions, the compressed ends of the pins coinciding with the bottom of the said depressions," relates to an article characterized by its physical features, and not by the method of its construction, and, as limited by the language of its claims and the proceedings in the Patent Office, does not cover a structure having the pin riveted so as to form a head at the ends.

2. SAME—CONSTRUCTION OF CLAIMS—ABANDONMENT.
An applicant for a patent, who, after another applicant has been adjudged priority of invention as to certain of his claims in interference proceedings, canceled such claims, did not acquire any right in the subject-matter thereof by subsequently defeating the issuance of a patent to the other applicant on the ground of prior public use, but the same became abandoned to the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 107. Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

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

For opinion below, see 153 Fed. 186.

Nathan Heard and H. T. Fenton, for appellant.

Francis T. Chambers, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Eastern District of Pennsylvania, dismissing the bill of the complainant appellant, charging infringement against the defendant appellee of a certain patent, No. 743,152, granted November 3, 1903, to the Dodge Needle Company as assignee of one Arthur Currier, for an improvement in knitting machine needles. The following extracts from the specifications of the letters patent set forth the prior art as recognized by the applicant, and the character and structure of the needle devised by him for the purpose of overcoming the defects of the needles in the prior art, as described and differentiated therefrom:

"Needles for knitting-machines are commonly made by providing the body of the needle with a slot in which the end of the latch is pivoted, a pivot pin being passed through the body of the needle and the latch for this purpose and being headed over at its ends to retain it in place. One objection to this construction is that it is very difficult to spread or head over the end of the pivot pin, so as not to leave a slight bur or roughness which will catch on the fiber of the yarn and injure the same. Various expedients have been resorted to to cure this objection, one of them being to insert the pivot pin into a drilled hole in the body of the needle, said pivot pin passing through the usual eye in the end of the latch and being shorter than the width of the body of the needle, whereby the ends of pivot pin are below the surrounding surface of the side walls of the needle. To hold the pivot pin in place, the body of the needle was swaged or upset, so that portions thereof were displaced to partially close the drilled hole therein, the displaced metal overlapping the ends

of the pivot pin and operating to retain it in place. This manner of securing the pivot pin in place, however, has not been entirely successful, because it is extremely difficult to locate a pivot pin centrally in the needle body, so that its opposite ends are supported uniformly in the body of the needle, as is necessary to make a perfect needle. Moreover, difficulty has been experienced in making the countersinks in the opposite sides of the needle of uniform depth, this difficulty arising from the fact that the walls of the needle are very thin and the pivot pin is apt to have its ends extended unequally into the body of the needle. It has also been proposed to secure the pivot pin in place by first making a comparatively deep countersink in the side walls of the needle and heading over the ends of the pivot pin into said countersink in such a way that the edges of the heads on the pivot pin are below the surrounding surface of the side walls of the needle. This form of needle, however, is objectionable, because the making of the comparatively large countersinks in the side walls thereof materially weakens the needle at the very point where the most strain comes thereon and where the needle needs to be the strongest. Moreover, experience has demonstrated that even though when the needle is first made according to this method, the head of the pivot pin is carried below the side walls of the needle; yet after the needle has been in use some time the pivot invariably works loose and the thin edges of the heads of the pin will project above the surrounding surface of the side walls of the needle, thus forming a bur or roughness which will catch the fiber of the yarn. Still another way in which needles have been constructed is to provide the side walls of the needles with the usual countersinks into which the ends of the pivot pins are headed or spread, as usual. The headed ends of the pivot pins and a portion of the surrounding side walls of the needles have then been dressed off by a revolving tool to form countersinks, so that the ends of the pivot pins are carried below the surface of the side walls of the needle. It has been found in practice, however, that a revolving tool will leave a rough edge surrounding the countersink, and such rough edge is sufficient to catch and pull the fine fibers of delicate yarns, thereby unfitting a needle constructed as above described for many classes of work. Another disadvantage in this form of needle is that in forming the countersinks by dressing off or removing the portion of the needle body the said body is thereby weakened.

"It is the object of my invention to provide a novel form of knitting machine needle which will do away with all of the disadvantages above named and which at the same time will be so constructed that there is no bur or other roughness which can engage and pull the fiber of the yarn. Accordingly I provide my needle body and latch with the usual drilled hole, in which the usual pivot pin of suitable length is inserted, and after the pivot pin has been put in place it is shortened either by cutting or grinding off or hammering down the ends of the pin until it is of a length substantially equal to the width of the needle body, the ends of the pivot pin coming substantially flush with the body. Thereafter the needle is placed between suitable dies or punches, the acting faces of which are convex in shape and are of slightly greater area than the area presented at the ends of the pivot pin, and these punches meet the outer sides of the needle, cover the ends of the pivot pin, and shorten or swell the pivot pin in the body of the needle and in the hole in the latch thereof, the hole in the latch being enough larger than the upset pivot pin to leave the latch free to turn on the pivot pin. This operation of the punches compresses the material of the needle body to form a depression in each side of the needle and at the same time shortens or compresses the ends of the pivot pin and carries the said ends below the surface of the surrounding side walls of the needle, the ends of the pivot pin constituting and lying substantially flush with or a little below the bottoms of the depressions.

"The operation of shortening the pivot pin in the body of the needle operates to swell the same to thereby completely fill the hole in the body of the needle, whereby the pivot pin is firmly held in place and at the same time the ends of the pivot are carried below the surrounding side walls of the needle, a feature which experience has proved is necessary in this class of devices. Moreover, by forming the depressions by compression instead of by removing a part of the metal to form usual countersinks it will be seen that the full original strength of the needle body is preserved at the point where the said body is weakest and is subjected to the most strain."

The claims of the patent are as follows:

"1. A knitting machine needle comprising a body having a latch mounted on a pivot pin, the said pivot pin and the side walls of the body adjacent the ends of the pin being compressed to form depressions, the compressed ends of the pins coinciding with the bottom of the said depressions.

"2. A knitting machine needle comprising a body, a latch and a pivot pin in said body upon which said latch is loosely mounted, the side walls of the body adjacent the ends of the pins being compressed to form depressions, the ends of the pins being flush with and forming a portion of the bottoms of the said depressions.

"3. A knitting machine needle comprising a body, a latch, and a pivot pin in said body upon which said latch is loosely mounted, the outer side walls of said body having that portion which surrounds and is concentric with the ends of the pivot pin compressed to form depressions, the pivot pin also being compressed longitudinally thereof and the ends of said pin when compressed being flush with and forming a portion of the bottom of the depressions."

The following are the drawings accompanying the patent:

Fig. 1.

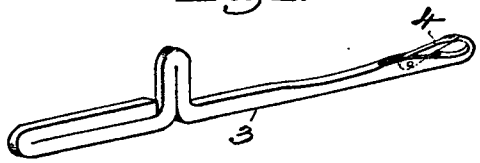


Fig. 2.

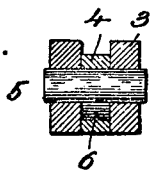


Fig. 3

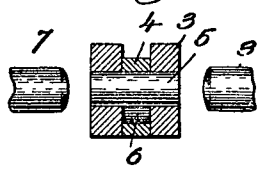


Fig. 4.

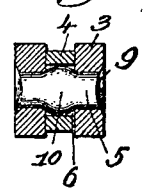


Fig. 5.

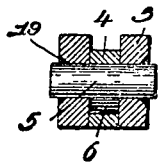


Fig. 6.

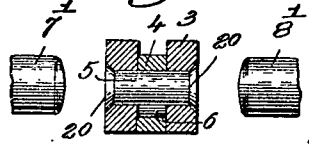


Fig. 7.

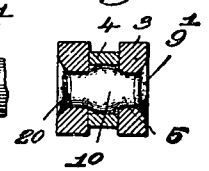
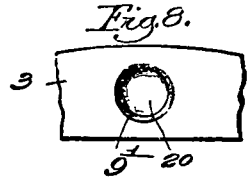


Fig. 8.



The defenses set up in the answer are: (1) Noninfringement; (2) anticipation; (3) lack of patentable novelty; (4) abandonment; and (5) public use and sale for more than two years before the application for the patent in suit was filed.

It is apparent, from reading the claims and specifications, that the patent relates to a structure characterized by its physical features, and not by the method of its construction. These physical features attach themselves to so small a part of the article or structure in question, and are, in consequence, so minute as to be incapable of recognition by the naked eye, and are measured by the hundredth, or even thousandth, part of an inch, and though the microscope and microphotography may be resorted to for illustration, within certain limits, the imagination must still be called upon to follow the changes that are suggested by the application of known laws of matter under the conditions described. These conditions are not referred to as depreciating the value of the patent, but only by way of caution, lest we exaggerate certain features of physical structure by the lines of the merely conventional drawings of the patent, or of the exhibits in the case. It can be readily understood, from the specifications of the patent and from the testimony in the case, how difficult, as well as important, it was to so mount the latch in the slot of the needle, as that the ends of the minute pivot pin, with their bearings in the necessarily very thin sides of the needle, should not so protrude as to catch, with their roughened or upset heads, the fiber of the yarns with which the swiftly moving needles are constantly being engaged and disengaged.

As referred to in the specifications, the prior art sought to overcome this difficulty in several ways: (1) By making the pivot pin, which passed through the eye of the latch into the sides of the slot, shorter than the width of the needle, whereby the ends of the pivot pin were below the surrounding surface of the side walls of the needle. The body of the needle was then swaged, or upset, so that portions thereof were displaced to partially close the drilled hole therein, the displaced metal overlapping the ends of the pivot pin and operating to retain it in place. (2) Another way cited to secure the pivot pin in place, was to make comparatively deep countersinks in the side walls of the needle, and to head over the ends of the pivot pin into the countersinks, so that the edges of the heads of the pivot pin are below the surrounding surface of the side walls of the needle. (3) The other way referred to, was to provide the side walls with the usual countersinks, into which the ends of the pivot pins are headed or spread, as usual. The headed ends and a portion of the surrounding side walls were then dressed off by a revolving tool. The objection stated in the specifications to this latter method, is, that a revolving tool will leave a rough edge surrounding the countersink, sufficient to catch and pull the fine fibers of the yarn. It is also objected that, like the immediately preceding method, the body of the needle is weakened by removing a portion thereof to make the countersinks.

In all these needles referred to as in the prior art, the ends of the latch pivot were secured in their bearings in the sides of the needle, by being headed or upset, whether on the surface of the sides of the

needle or at the bottom of a countersink formed therein. This heading or upsetting was necessarily produced by the force of tools, or of pressure applied longtitudinally to the pin, and effected a union to some extent between the end of the pin and the hole in which it was placed. The original method described in the specifications, of heading or riveting the heads of the pins on the surface of the sides of the needle, doubtless made a secure and strong emplacement of the pin, but the tendency of the bur and roughened heads on the surface of the needle, to catch the fibers of the yarn, made the difficulty to be overcome. The making of countersinks in the thin sides of the slot of the needle, by cutting away the material, by a revolving tool or other means, obviously weakened the structure at that point where strength was especially necessary. As a countersink or depression of some kind in the sides of the needle surrounding the pin holes, was absolutely necessary, in order to keep the heads of the pin away from the path of the yarn fibers, the contention of the appellant is, that it was the happy thought of the patent in suit, that, by longitudinal compression applied to the ends of the pin by opposing dies, the acting faces of which are convex in shape and of slightly greater area than that presented at the ends of the pivot pin, so as to cover an annular portion of the needle sides adjacent to and concentric with the pin heads, not only would the pin itself be shortened and thereby swollen in the holes in the sides of the needle, thus making it secure in its bearings, but, at the same time, and by the same operation, a depression on the sides of the needle would be formed by the compacting pressure of the die. A needle is thus produced with a countersink, the formation of which has not weakened the needle by cutting away any portion of the metal composing it, and the ends of the pin are tightened in their bearing holes without upsetting or heading. On the contrary, the heads form the bottom of the depressions, the center of the ends being slightly more depressed than their circumferential edges. A needle thus constructed, without initial countersinks and heads spread to fill them, but only with depressions made by pressure in the manner described, presents the desirable physical features of the withdrawal of the heads of the alleged pin from the path of the yarn fiber, without weakening the walls of the slot, and the tightening of the pin in the holes in the side walls without heading or spreading the ends of the pin at the bottom of the depression, thus avoiding the bur or roughness that often attaches to such a heading.

Appellant contends that the needle thus produced presents the identifying physical characteristics of a depression in the sides of the needle adjacent to the pin hole, longitudinal compression or shortening of the pin, which serves to tighten the same in its bearings in the sides of the pin, and compression of the metal of the said sides adjacent to said pin, by which the pin is further tightened in its bearings and the metal around said pin made denser and stronger, instead of being weakened by the removal of metal to make countersinks. This, he says, is the claim for an article or product of invention identified without the aid of the method by which it was produced. Without pausing to consider what force there may be in the criticism that, after all, the pin is made

that way; that is, the way described in the specifications, and therefore can only be thus identified, we proceed to consider the alleged infringing needle of the defendant.

After a careful examination of the record, we accept as a correct description of the defendant's needle, that given by defendant's expert, at page 437 of the record, in connection with his exhibit drawing, at page 604:

"The needle blank before slotting has countersinks made in its sides as shown in B B' in Fig. 1 of the drawing which I now submit. After these countersinks are constructed, the body A of the needle body has the slot A made in the middle thereof, leaving two sides A^1 and A^1, the hole D is then pierced through the side bars of the needle A^1 A^1, these two stages of construction being shown in Figs. 2 and 3. Fig. 4 shows the latch F and pivot pin E inserted in the needle. Fig. 5 shows the ends of the pivot pin E riveted down to fill the countersinks B with some surplus material E^3 raised above the surface of the side bars of the needle. Fig. 6 shows this surplus material E^3 removed from the head of the pivot pin, which is now flush with the side bars of the needle. Fig. 7 shows the pivot pin compressed; the imprints of the compressing die are shown at H, the heads of the pivot pin E^2 being driven into the body of the side bars of the needle. Below the head of the pivot pin E^2 is shown a portion of the pivot pin of its original diameter, while the expanded center of the pivot pin filling the hole in the latch of the needle is shown at E^5. I have noticed in my examination of these pivot pins that the expanded central portion thereof shown at E^5 usually begins somewhat within the body of the side bars of the needle, and that the inner ends of the holes in the side bars A^1 are usually somewhat expanded around their orifice by the swelling of the pin, and some of the metal of the side bars is carried a little above the inner surface of the side bars, as shown at G. The effect of the compression upon the heads is usually to transform the countersink from a straight-sided cone, as shown at B, Fig. 6, to a slightly convex or bulging shape, as shown at E^4, Fig. 7. The side view of the pivot of the finished needle is shown at Fig. 8."

That there are certain differences between the physical features of the needle thus described and that of the patent in suit, we think must be apparent from the reading of this description. These differentiations are, chiefly, large countersinks (whether made by compression or cutting away is not important), and the filling of these countersinks by the upsetting or heading of the ends of the pin. We think also it must be apparent that the heading or riveting of the pins, by which the countersinks are almost filled, was done prior to the compression applied to the heads of the pin and the surrounding metal of the sides of the needle and countersinks. Whether it is apparent, as a physical feature of the needle, that, after the riveting of the head there was this compression longitudinally of the pin and transversely of a portion of the metal in the sides of the needle, we do not know. We do know that the ends of the pin are held with measurable security in the walls of the socket, and that the central portion of the pin in the socket is expanded. To what extent this tightening of the ends of the pin in the hole and expansion of its central portion was due to the longitudinal compression of the pin and of the metal circumjacent to the holes, or to what extent it was due to the previous heading or riveting of the pin, we do not know. There was evidence which we think was sufficient to show that the heading or riveting of the pin in the counter-

DEFENDANT'S EXHIBIT DRAWING.
DEFENDANT'S NEEDLE

FIG. 1.

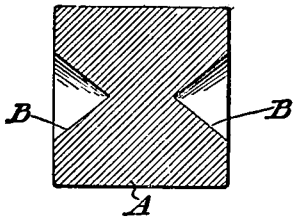


FIG. 2.

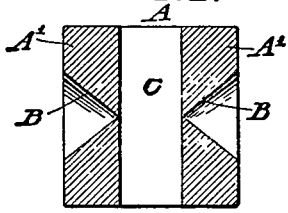


FIG. 3.

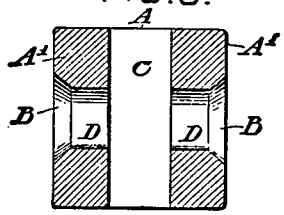


FIG. 4.

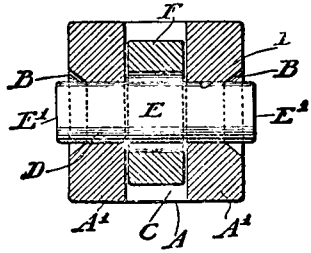


FIG. 5.

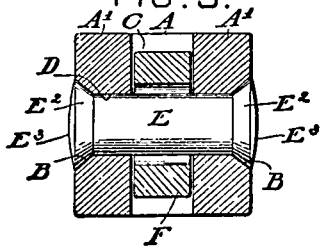


FIG. 6.

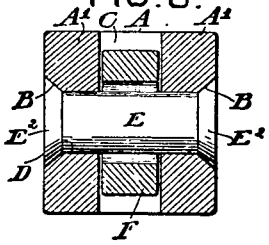


FIG. 7.

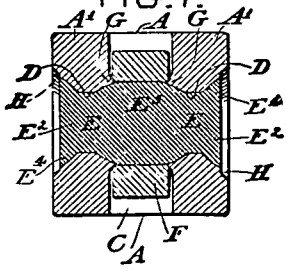
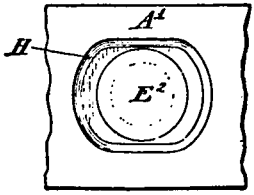


FIG. 8.



sink would of itself serve to tighten and secure the ends of the pin in the side walls of the slot.

If the three claims of the patent in suit are to be held to cover needles with pins that are headed, as well as those which are headless, then, aside from the prior art and from other evidence in the case, the defendant's needle is covered by these claims. Though much may be said for the argument made by the learned counsel for the appellee, that it is inevitably deducible from the patent in suit, that the patented structure is limited to the presence therein of a headless or substantially headless pivot pin, we prefer to deal with those limitations which we think the proceedings in the Patent Office and the prior art placed upon the claims of the patent.

The letters patent in suit note an application filed August 26, 1901. The last paragraph but one of the specification states that "this application is a continuation of and has been filed to take the place of my former application, filed November 8, 1899," and it appears, by reference to the file wrapper in the Patent Office, that this was allowed. If this is to be so considered, the proceedings in the Patent Office, under the original application of November, 1899, and the statements of the applicant in regard to the subject-matter of his claimed invention, become technically pertinent in the present case. We say "technically pertinent," because, whether the application under which the patent in suit was granted be called a formal continuation, or not, of the original application for a patent with reference to the same subject-matter, the admissions and statements of the applicant in the former case are not irrelevant to the issues now under consideration, and we are not to be asked to close our eyes to evidential facts upon a ground so slight as the one suggested.

The claims filed with the original application were four in number, three relating to the needle as a structure and one for the process of making it. The Patent Office refused to allow the process claim to be joined with the product claims, and the process claim No. 4 was therefore withdrawn. There is substantial similarity between the drawings submitted with this original application and the first four drawings of the patent in suit. The product claims were afterwards rejected, on the German patent to Mittlacher. This rejection brought about a correspondence between the Patent Office and applicant's counsel, and in a letter dated October 1, 1900, the latter, after proposing various amendments, among other things states, with regard to the Mittlacher patent:

"In this construction it will be apparent that when the rivet is pressed endways to shorten the same, that the ends of the rivets will spread out over the bottom of the countersink, so that the result will not be a needle with the ends of the rivet 'flush with the bottoms of the countersinks,' as claimed in claim 1, or the extremities of the rivet 'coinciding with the bottoms of the countersinks,' as specified in claim 2, or 'the bottoms of the countersinks and the ends of the rivets occupying a position in substantially the same plane,' as specified in claims 3 and 4. Instead, the rivet will be headed over upon the bottoms of the countersinks, so that the ends of the rivets and the bottoms of the countersinks will be in different planes which are the distance apart equal to the thickness of the head of the rivet."

And later, with reference to the pivot pin and the sides of the needle circumjacent to the hole, he says:

"The metal of one does not crawl over or overlap the metal of the other, as is the case in both the methods shown in the German patent."

Again, in another letter to the Patent Office, dated January 26, 1901, and cited by counsel for appellee, the applicant says:

"If the honorable examiner will kindly examine the last paragraph of page 4 and the latter part of page 6, together with Figure 7 of the drawings, he will see that in the knitting machine needle in this application, there are no heads in the ends of the pivot pin. That is, that portion of the ends of the pivot pin which is confined in the side walls of the needle body, is of substantially uniform size, and the end of the pivot pin forms the central portion of the bottom of the countersink."

Further on, he says:

"The pivot pin, therefore, of Huke differs from the pivot pin of Mr. Currier's application, in that its ends, which are confined in the side walls of the needle body, are not of substantially uniform size, but are instead, formed with heads or enlarged portions which fill the countersinks as in Figure 2. The specification of Mr. Currier especially states that the ends of the pivot pins are not upset in such a way as to make heads to stand in the countersinks."

These careful differentiations of what the applicant claimed as his invention from the needles of the prior art, applies with great exactness to the needle described and claimed in the patent in suit, exclusive, perhaps, of the second modification stated in the specifications. The correspondence in which these differentiations were made, resulted in the filing of four amended claims, the first three of which are identical, word for word, with the three claims of the patent in suit, except that the word "countersinks" is used, in place of the word "depressions," as used in the claims of the patent in suit. All four of the claims were, on June 1, 1901, declared objectionable by the examiner, on the ground that the "needle as an article of manufacture does not appear to be distinguished, at least in a patentable sense, from that shown in the patent to Huke et al. If there be anything patentable, it is in applicant's method of forming his needle, which could not be claimed in this application." What occurred between this action of the examiner and August 26, 1901, when a new application was filed, with specifications the same as appear in the patent now before us, and with five claims, the first three being the same as those now in the patent in suit and the fourth and fifth covering pivot pins having heads which fill the countersinks in the side walls of the needle, does not appear in the record.

It seems inexplicable, after the limitations above referred to, put by the applicant upon his amended claims in the proceedings connected with the original application and the rejection of those claims by the examiner, as above referred to, that he should, in this new application, in continuation of the old, put back those three claims, which he had so carefully limited and differentiated from needles having pins with headed or upset ends filling or partially filling the countersinks surrounding the holes, with the addition of two claims which covered the very needles from which he had so carefully differentiated his own invention. This cannot be explained on the theory that the first three

claims are to be considered as generic, and the fourth and fifth for a species of the genus, because the applicant, in the correspondence referred to, has defined the invention covered by these three claims as needles with headless pins alone, and the headless feature, as much as any other, inheres in the generic character of the invention covered by the claims. But so it is, and upon this renewed application an interference was granted to one Beckert, of Chemnitz, Germany, the manufacturer of the defendant's needles, and whose agent for selling the same the defendant is. Beckert's application for a patent was filed August 4, 1900, prior to Currier's renewed application, and his claims were substantially identical with its five claims. Currier, however, swore that he conceived the invention embodied in the first three claims —that is, of the headless pin construction—in 1897, but as to the invention expressed in claim 4 (which with claim 5 refers to small countersinks and conical countersinks, into which the heads of the pivot pins are upset or riveted, filling or partially filling the same), he says he did not conceive the same until January 26, 1901. Beckert could not carry his invention, as embodied in Currier's first three claims, back of 1900, but he clearly anticipated the invention embodied in claims 4 and 5 of the Currier application. The adjudication of the Patent Office, therefore, in regard to the fourth (and fifth) claim was in Beckert's favor, and in regard to the first three claims, was in favor of Currier. Afterwards, the fourth and fifth claims were withdrawn by Currier and the patent issued for the first three claims, which are the claims here under consideration.

In addition to the differentiations made in the correspondence above alluded to, we here have the applicant for the patent in suit, in his statement in the interference proceedings, plainly distinguishing, not merely specifically but generically, between the invention covered by the first three claims of his application, being the claims now of the patent in suit, and that covered by the fourth (and fifth), thus necessarily confining the three claims of the patent in suit to needles characterized by headless pivot pins. The very able counsel for the appellant seeks to avoid this conclusion, by the argument that, inasmuch as the three claims do not, in terms, refer to either headed or headless pivot pins, the invention of the patent in suit does not consist, nor is it dependent upon whether the opposite terminal ends of the pivot pins are headed, or whether they are headless; that either is a mere incident to the essential characteristic of the thing described and claimed; that either is simply a species of the genus, and it is the latter which constitutes the invention made and the invention claimed; and that the applicant's disclaimer in the interference proceedings was merely with reference to the species, and not to the generic form exemplified by the headless structure.

The fallacy of this argument lies in a misconception of the facts upon which it rests. The differentiations made in the correspondence with the Patent Office above referred to, in regard to the stated references, is inconsistent with the distinction here attempted between "genus" and "species." The elements which constitute the invention are certain characteristic physical features. It is a combination, in which

each feature is an essential part. As said by the learned judge of the court below, "the use of compressing dies to force in the heads and surrounding surfaces to form depressions, which is the only distinction asserted," is in no respect new.

It is also to be noted, that the interference proceedings between Beckert and Currier left Beckert, on the ground of priority of invention, with full title to the pin described in claim 4 (and 5) of Currier's last application. This result was not questioned, or in any way criticised by Currier. Beckert was left, therefore, with the unquestioned right, not only to use headless pivot pins, filling or partially filling the countersinks, in conjunction with some other form of needle than one having the pins longitudinally compressed simultaneously with a portion of the needle side circumjacent thereto, but in conjunction with that exact form as described in claim 4 of his own application, and in claims 4 and 5 proposed in the last application for the patent in suit, and afterwards withdrawn.

The history of the case, as above recited, makes the headless pins, compressed in the manner described, simultaneously with a portion of the circumjacent surface of the needle sides, the generic invention of the patent in suit, and the defendant's needle, with its headed pins upset so as to fill or partially fill the countersinks circumjacent to the holes, is not covered by the claims thus limited and defined. Little need be added to what has been said by the learned judge of the court below as to the effect of the public use proceedings upon the issue here involved. After the finding by the Patent Office, that Beckert was entitled to priority of invention, as to the needle structure covered by the fourth (and fifth) claim of Currier's application, and this, upon the express statement by Currier that he had not conceived of the needle having headed pivot pins until January 26, 1901, public use proceedings were brought about by Currier and the appellants, as to needles with these same headed pins, and protesting against the granting of a patent to Beckert therefor. The protest concludes as follows:

"The ground of this protest is, that knitting machine needles, containing the invention described in the fourth claim of Beckert's application, have been in public use and on sale in the United States for more than two years prior to the filing of the above-entitled application of Beckert, and that this public use and sale has been notorious and extensive."

The ground of this protest was sustained by the Commissioner, and the patent refused to Beckert. Appellants, however, can take nothing by this finding. Whatever view we take as to the question, whether or not the application of August, 1901, was a continuation of the original application of November, 1899, it seems clear that, after the withdrawal of claims 4 and 5 of the new application, the invention covered thereby was abandoned, and needles with headed pins, as described therein, became public property, and cannot now be monopolized by the appellants. But it is also clear that, though the application of August, 1901, may be a continuation of the original application of November, 1899, so far as the first three claims filed with this later application are concerned, it is an independent and new application, as regards the fourth and fifth claims thereof. The public use, therefore, carried back

more than two years prior to Beckert's application of August 4, 1900, antedates the new application of Currier, of August, 1901, for a still longer period, and prevents, not only Beckert's fourth claim, but the claims of the patent in suit, from covering needles with headed pins.

The decree of the court below is hereby affirmed.

H. F. BRAMMER MFG. CO. v. WITTE HARDWARE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1908.)

No. 2,665.

1. PATENTS—INFRINGEMENT.

Plagman's patent, No. 608,220, August 2, 1898, for an improvement in mechanical movements, especially for use in washing machines, is not infringed by a machine constructed in accordance with the specification of patent No. 740,868, October 6, 1903, to Johnson.

A slidable cylinder is an essential mechanical element of each of the combinations claimed by Plagman, and it is absent from the machine of the defendants.

2. SAME—ABSENCE OF ONE ELEMENT OF COMBINATION AVOIDS INFRINGEMENT.

The absence from an alleged infringing device of a single essential mechanical element of a patented combination is fatal to a claim of infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 387.]

(Syllabus by the Court.)

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

Taylor E. Brown (C. Clarence Poole, on the brief), for appellant.

Arthur C. Denison (Taggart & Wilson, on the brief), for appellees.

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

SANBORN, Circuit Judge. This is a suit for infringement of letters patent, No. 608,220, issued to Plagman August 2, 1898, for an improvement in mechanical movements, especially for use in washing machines. The defendants' machine is sufficiently described in letters patent, No. 740,868, to Johnson, October 6, 1903. The purpose of the improvements claimed in each of these patents was to facilitate mechanical movements for the translation of the continuous rotary motion of a horizontal shaft in the same direction into the reciprocating motion of a vertical shaft in opposite directions. The state of the art when Plagman made his invention has been sufficiently portrayed for the purposes of this case in the opinions of this court in Brammer v. Schroeder, 106 Fed. 918, 46 C. C. A. 41, and International Mfg. Co. v. H. F. Brammer Mfg. Co., 138 Fed. 396, 71 C. C. A. 633, and it would be a futile discussion to review it here again. It is enough to say that while we held in the latter case that Plagman's specification disclosed for the first time in the art a new construction comprising a driving shaft, a driving pinion, a driven shaft, and a slidable cylinder having cogs or teeth engaged by the driving gear in combination with stationary or stop-guides, and movable arms connected with the cyl-

inder and adapted to engage the cams, and that he was entitled to a liberal application of the doctrine of mechanical equivalents, yet the state of the art was such that his invention was by no means a pioneer therein. It consisted simply in an improvement in the arrangement of the stop-guides so that they should be stationary and of the teeth and movable arms upon the cylinder, so that the former should engage with the pinion and the latter with the stop-guides more simply and effectively. The validity of Plagman's patent is challenged by the defendants, but in view of the proof upon the issue of infringement it is unnecessary to consider that question in this case, and it is here dismissed.

The claims of the patent in suit read in this way:

"1. A shaft which revolves continuously in one direction, and is provided upon its inner end with a gear or pinion, combined with a vertically-moving cylinder provided with pins or projections between its ends, and which pins or projections mesh with the teeth of the pinion or gear, a vertical shaft upon which the cylinder is splined, and stop-guides with which two of the teeth upon the cylinder engage, substantially as shown.

"2. A suitable frame, a horizontal driving shaft journaled therein, provided with a pinion or gear at its inner end, a vertical shaft provided with a suitable device at its lower end, and a cylinder having a rising and falling movement upon its upper portion, and which cylinder is provided with teeth of unequal lengths, combined with suitable stop-guides with which the long teeth upon the cylinder engage, and which cylinder has a vertical rotary reciprocating motion with the vertical shaft, substantially as described.

"3. A mechanical movement composed of a suitable framework, two shafts placed at right angles to each other, the driving shaft being provided with a gear or pinion upon its inner end, and a vertically moving cylinder splined upon the vertical shaft, and which cylinder is provided with teeth or projections of unequal length, combined with a stop-guide, having two curved surfaces which extend in opposite directions, and with which curved surfaces the pins upon the cylinder engage, the cylinder being raised and lowered and made to reverse its rotary movement by the teeth of the pinion catching under the pins or projections upon the cylinder, while first raising the cylinder and then lowering it, substantially as set forth."

In operation Plagman's vertical or dasher shaft has no vertical motion, and its reciprocal motion is communicated to it by the teeth-bearing cylinder which is splined upon it so that it slides on it vertically, but not horizontally. The defendants' machine has no slidable cylinder, its actuating teeth are attached directly to the vertical shaft which is thereby caused to rise and fall with each reciprocatory motion. The importance which Plagman attached to this cylinder is disclosed by the following excerpts from his specification:

"It [the invention] consists of a vertical shaft which has a rotary reciprocating motion, a cylinder which is splined upon the shaft and has a vertical movement thereon, etc. * * * This shaft is grooved, as shown at O in Fig. 1 upon one or more sides so as to receive splines P formed inside of the cylinder F which is placed thereon, and which has a vertical play upon the shaft while the operating shaft is in motion. * * * While the driving shaft is in motion, the cylinder alternately rises and falls upon its vertical shaft and is caused to rotate, first in one direction and then in the other, by the meshing of the teeth of the gear or pinion with the pins or projections upon the cylinder."

This sliding cylinder splined to the vertical shaft is specified and claimed in combination with other mechanical elements in each of the

claims of the patent. Conceding, without discussion, that the defendants' machine embodies the mechanical equivalent of every other element claimed in the Plagman patent, how can it be said to infringe his combination in the absence of the slidable cylinder?

It is true that one may not escape infringement by consolidating two mechanical elements or parts of a patented machine or combination into one, or by separating one into many, if after the change the united part, or the separated parts, perform the same function as before by substantially the same mode of operation. Bundy Mfg. Co. v. Detroit Times-Register Co., 94 Fed. 524, 538, 36 C. C. A. 375, 389; Mabie v. Haskell, Fed. Cas. No. 8,653; White v. Walbridge (C. C.) 46 Fed. 526. But the function of Plagman's combination was the production of reciprocal without any vertical motion of the vertical shaft by means of the sliding cylinder and the other elements he claimed. The defendants' machine does not perform this function by the same mode of operation. It produces reciprocatory and vertical motion of the vertical shaft without the cylinder by the application of the teeth or arms directly to the vertical shaft. If the combination of a defendant shows a mode of operation substantially different from that of the complainant, infringement is avoided even though the result of the operation of each is the same. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Brooks v. Fiske, 15 How. 211, 221, 14 L. Ed. 665; Union Steam Pump Co. v. Battle Creek Steam Pump Co., 104 Fed. 337, 343, 43 C. C. A. 560.

The fact may be conceded that the advance in the art evidenced by the invention of Plagman would have been as great if he had applied it directly to the vertical shaft, and had omitted the cylinder, and that he might have claimed and have sustained his claim to a combination of the other mechanical elements of his present claims without the cylinder. Combinations of those elements, both without and with the cylinder for the purpose of translating continuous rotary motion in the same direction into reciprocating rotary motion in opposite directions were well known, and had been portrayed in many publications, patents, and machines. He claimed these elements in combination with the sliding cylinder, and he did not claim any combination of them without the slidable cylinder. If a patentee by his specification and claims industriously makes an unnecessary device an essential mechanical element of the combination he claims, he is thereby estopped from maintaining that a combination which omits it infringes. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100.

The statute requires an inventor to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his discovery." Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383). When he has done so he has thereby disclaimed and dedicated to the public all other improvements and combinations to perform the same function that are apparent from his specification and that are not evasions of the specific combination he claims as his own. Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 984, 10 C. C. A. 216, 220; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 347, 72 C. C. A. 304, 311.

The claims of Plagman read in the light of his specification and of the state of the art disclose no attempt or intent on his part to claim such a combination as that of the appellee, because he industriously made the slidable cylinder an essential element of his combination. It was the combination of the other mechanical elements with this cylinder that he claimed, and he thereby disclaimed every combination of them without it, or its mechanical equivalent, and it has no equivalent in the defendants' combination. The absence from a combination that is alleged to infringe of a single essential element of the patented combination is fatal to the claim of infringement. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 451, 23 C. C. A. 223, 242; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 718, 45 C. C. A. 544, 569.

The court below dismissed the bill on the ground that there was no infringement, and its decree is affirmed.

BRUNSWICK-BALKE-COLLENDER CO. v. ROSATTO.

(Circuit Court, E. D. Pennsylvania. February 21, 1908.)

No. 43.

1. PATENTS—CONSTRUCTION OF CLAIMS—REFERENCE LETTERS TO DRAWINGS.
   The use in a claim of a patent of a letter of reference to the drawings which show a part composed of two pieces does not limit the patentee to a two-piece construction where it is not of the essence of the invention claimed.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 243.]
2. SAME—INVENTION—BOWLING ALLEY.
   The Wiggins patent, No. 623,933, for a bowling alley having a concave side trough or gutter, discloses novelty, but is void for lack of invention, being merely for the substitution of one common form of construction for another, the function remaining the same, and the substituted form having previously been similarly and suggestively used in other structures, and without any extraordinary, even if of a fair, degree of merit.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 20.]
3. SAME—RETURN RUNWAY.
   The Wiggins patent, No. 554,611, for a ball runway for bowling alleys, is void for lack of patentable invention.

In Equity. Bill for the infringement of letters patent, No. 623,933, issued April 25, 1899, to W. H. Wiggins, for a bowling alley; and also of letters patent, No. 554,611, issued February 11, 1896, to the same, for a ball runway for such alleys. On final hearing.

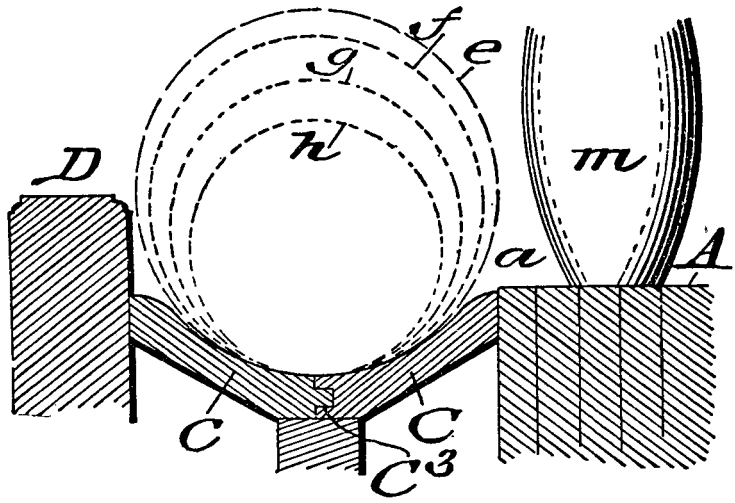
James Q. Rice, for complainants.
E. Hayward Fairbanks, for respondent.

ARCHBALD, District Judge.[1] There are two patents in suit, both issued to the same inventor, and both relating to certain adjuncts of bowling alleys. Infringement is admitted as to the one, for a ball run-

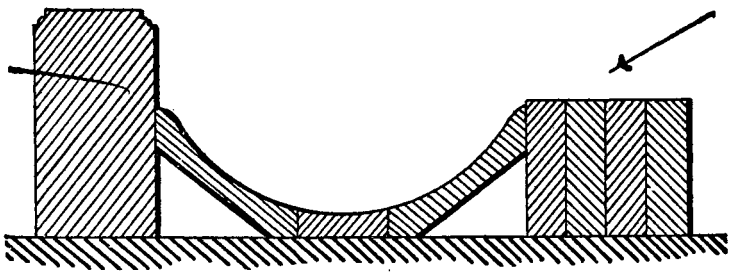
[1] Specially assigned.

way or return way, which has been copied without any pretense at a difference; and is clearly established as to the other, for a concave side trough or gutter, the only distinction attempted being that the respondent makes it in three pieces where the figures of the patent show but two, the inventor being supposed to have confined himself

COMPLAINANT'S GUTTER.



DEFENDANT'S GUTTER.



to the latter construction by the use in the claim of a reference letter.[2] I have recently considered the effect of such a reference in Kelsey

[2] "The combination with the bed, or ball way, A, of a bowling alley; and a suitable stringer, or strip, running parallel with the edge of the alley-bed at a suitable distance therefrom, of a bottom piece, C, the top surface of which is concave, in cross-section, and operates to cause a ball rolling thereon to travel centrally thereto; all in substantially the manner and for the purpose hereinbefore set forth."

Heating Co. v. James Spear Stove Co. (C. C.) 155 Fed. 976, and see no reason to vary from what is there said. An additional authority to those cited will be found in Electric Candy Machine Co. v. Morris (C. C.) 156 Fed. 972. There is no occasion in the present instance in order to save the invention to limit the claim to the particular construction shown in the drawings, and the reference to them must therefore be regarded as simply generally descriptive, which the change from two pieces to three which has been made by the respondent cannot be permitted to evade.

The case turns therefore on the validity of the patents and considering first the one for a concave gutter, there can be no question as to the novelty, as applied to a bowling alley, of this construction, the only kind previously used being square. It is true that in the Arff & Bornholdt table, designed for a sort of pin pool game, with cue, and balls, and pins, a concave trough, on each side of the table, is shown. But while this may be a suggestive, it is not a directly anticipatory, use, the purpose of it being to return the balls to the player, instead of to take care of those which by inaccuracy of aim have gone off the track, the one being slow moving and innocuous, where the others are destructively swift. The same thing is to be said with regard to the Chambers game, where pins are displaced by slowly trundled balls, which are returned to the play end of the table by means of concave troughs on either side. And so also in the Roberts Bowling-crease, while the side gutters may be brought somewhat nearer to the case in hand by being applied to bowling alleys, they are V and not concave or U shaped, and slope back also to the starting point so as to automatically return the balls. These are all the references of any consequence, and whatever lack of invention they may indicate in the adaptation of a concave trough as the side gutter of a bowling alley, the novelty of it, as so applied, remains.

This patent has been before the courts with varying results. It was declared invalid by Judge Lacombe, on application for a preliminary injunction, in the Klumpp Case (C. C.) 124 Fed. 554, on the strength of the Chambers and the Roberts patents, although the defendants, having sold out their interests, subsequently submitted to a decree. 131 Fed. 93. But in the Beyer Case (C. C.) 145 Fed. 353, it was sustained by Judge Ray on final hearing, and on appeal he was affirmed. 146 Fed. 1022, 76 C. C. A. 678. Similar decrees in favor of the patent were also secured in suits brought by the present complainants in the Eastern District of New York and in the district of New Jersey, the cumulative force of which, and the apparent acquiescence of the public as so indicated, is not without its effect. It is suggested that none of these cases was closely contested, if indeed some of them were not collusive, and it must be confessed that they do not seem to have been fought out, as has the one here. But, however that may be, at the most they are persuasive only, and are not to be followed, if upon independent consideration a different conclusion is reached. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 865.

The question as to this patent is therefore the invention involved, which at best is not much, but is claimed to be enough, on the

strength of the advance made and the utility shown. It consists, as it is said, not simply in the idea of a concave gutter, but in the general arrangement of which this is a part, by which definite and desirable results are obtained. A serious defect of the square gutter, according to this, is that misplayed balls, flying off the alley bed, bound from side to side, not only being thereby themselves chipped at the finger holes, but splintering and battering down the exposed and unsupported alley edge, and loosening and starting the nails in the gutter bottom. In a concave gutter, on the other hand, not only does the ball center at once, and proceed quickly in a right line to the pit, avoiding wearing contact with the alley edge, but the pieces which form the gutter bed are made to brace and guard the alley stringers, contributing to the same end. Such a gutter, also, is much less noisy, as it is said, and being round cornered instead of square is more easily kept clean. As affecting the play, several advantages are claimed. In a square gutter, for instance, the lines, as it is pointed out, are all straight, and the edge of the alley in consequence is not well defined to the bowler's eye, disturbing the accuracy of his aim. And not only cannot a ball get back onto the alley from a concave gutter—a fruitful source of dispute—but neither can the outer pins of the back row be hit by a ball, in such a gutter, doing away with the necessity for cutting the gutter down at that end, as is sometimes done. Skilled bowlers, moreover, often deliver a curving ball, which at points hangs over the edge of the alley, so that if the alley bed is at all worn it lets the ball down into the gutter, spoiling the bowl; which forms an additional reason why the alleys have to be kept up and emphasizes the importance of whatever saves the wear. There is also said to be a popular sentiment among players in favor of a concave over a square gutter because of the belief that it conduces to a better score, pins falling into it being more liable to fly back and knock down others, confirmatory of which, in order to eliminate such "scratch" plays, the bowling rules now require that the last three feet of the gutter shall be square. The superiority so claimed for a concave over a square gutter, and the defects with which the latter are charged, are earnestly denied by the respondent, and cannot be said to be clear. The displacement of the one by the other, which, to a certain extent, has been proved, is also attributed to the monopoly of bowling alley construction which the complainants enjoy, and to a sentiment which they have been careful to inspire. But without going into this, utility is not always the test of invention, however persuasive of it at times. Daylight Glass Co. v. American Prismatic Light Co., 142 Fed. 454, 73 C. C. A. 570. And, conceding all that is claimed for the one gutter over the other, the question still remains whether anything inventive is in fact shown.

It is to be observed, as to this, that a concave gutter is a common and not at all complicated construction, which any ordinary workman, possessed of the usual mechanical skill could produce, if the necessity for and the desirability of it was seen. And it would no doubt surprise most of them to learn that it had been monopolized by a patent, which prevented its use, if for any reason they were called to put one in. It is also a most natural one for a ball, conforming as it does to

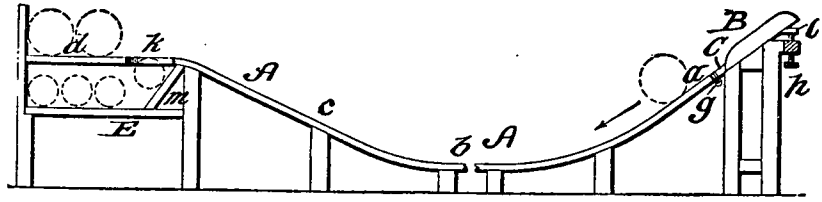
its shape, and is found in the patents referred to above in a cognate and suggestive, if not a directly anticipating, use. The patentee, thus, invented nothing new in this regard, but simply took that which was at hand, in general use, and applied it without change of function in place of another common form, because of its supposed superiority for the purpose. The force of this is evidently felt by counsel, as shown by the suggestion alluded to above, that the invention does not reside broadly in the idea of a concave in place of a square gutter, but in the relation which that form of gutter is made to bear to the other parts of the alley, by which new and beneficial results are produced. The fact, however, is that, putting aside the verbiage of the patent, by which the advantages of the device are proclaimed, the whole invention will be found to lie in the simple provision that the gutter shall be concave instead of square, with that which this necessarily brings about. It would unduly extend this opinion to quote from the specifications in proof of this, but a careful reading leads to nothing else. And, confirmatory of it, it will be noted that, as expressed in the single claim of the patent, and aside from the combination specified with the other parts, the invention is made to consist essentially, in "a bottom piece, * * * the top surface of which is concave in cross section," to which the functional quality ascribed, that "it operates to cause a ball rolling therein to travel centrally thereto," adds nothing, if indeed it is not out of place.

Nor, as bearing on the question of invention, was the adoption of this device attended by any of the circumstances which are sometimes relied on to make that out. There was no preceding and insistent demand, for instance, for a new character of gutter to take the place of the old one, the defects of which were recognized and remained unsupplied. Neither were other inventors striving unsuccessfully to attain the same end. Nor was the advance made by the concave over the square gutter so marked, nor has it gone into such immediate and unquestioned use, as to show that it met an expectant need. On the contrary, the advantages claimed for it, are regarded by many who are competent to speak, as exaggerated if not fanciful, and the demand for it as altogether forced; while those qualities which may have some substance, such as the bracing and protection of the edges of the alley, and the centering of the balls by the concavity of the gutter, preventing them from bounding from side to side, are the natural and obvious results of the means employed. Without anything therefore to take it out of the ordinary, or anything structurally new devised, the case presenting nothing more than simply the substitution of one common form of construction for another, the substituted form also having been already similarly and suggestively used, and being of no extraordinary, even if of a fair, degree of merit, the function, also, if improved, remaining practically the same, invention is not made out, and the patent cannot be sustained.

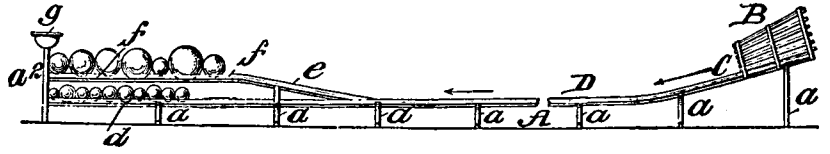
Nor is the other patent in suit more fortunate. The ball track or return way, which is there shown, consists of a sharply descending portion at the pit end, down which the balls acquire a considerable impetus, an intermediate flat or horizontal portion along which they run, and an oblique ascending portion, up which they proceed, but

which so moderates and overcomes their momentum that they come to a rest on the horizontal terminal at the end, without ramming into each other or the stop post, as they otherwise would, to say nothing of smashing the fingers of incautious players while selecting a ball. But the sizes of the balls differ, some being large and some comparatively small, and the return way must do for both, calling, for convenience, for a separation of them at the end. They also move at a different speed, with the result that if the ascending grade is graduated to check or brake that of the small ones, it is not enough for the large ones, which fly up it with undue force. And, on the other hand, if accommodated to the large ones the small ones will not go up it at all. To remedy this, the grade is fixed with reference to the large balls alone, and a cut out hole or opening is introduced into the runway, at the foot of or a slight distance up the incline, as stated in the specifications, small enough to permit the large balls to pass over, but large enough to let the small ones through, which are thus gathered together on a lower rack. But however ingenious and effective this may be, in some respects at least it has been anticipated. the same general arrangement appearing in the Reisky patent, excepting only that there the cut out hole for the small balls is located at the top instead of at the bottom of the retarding incline. The applications of Reisky and

REISKY.



WIGGINS.



Wiggins were pending in the patent office at the same time, and upon an interference being threatened Wiggins disclaimed and Reisky was given a patent for the generic idea, Wiggins confining himself to his own special form. If that were all, the question between the two would be whether there was a saving distinction. But the Reisky patent, representing the generic idea, has itself been the subject of controversy and can no longer be regarded as valid. It was sustained, it is true, by the Court of Appeals of the Second Circuit in the Thum Case, 111 Fed. 904, 50 C. C. A. 61; but was questioned by Judge Loch-

ren, on application for a preliminary injunction, in the Koehler & Heinrichs Case (C. C.) 115 Fed. 648. And a runway with an accelerating and retarding incline at opposite ends having been found to have been previously used in the Catskills, a formal disclaimer was entered by the present complainants, as owners of the patent, excluding a construction in which the homing of the balls was not accelerated, and confining it to one in which greatly increased speed in their return from the pit to the play end was secured and injurious concussion at the same time prevented. But this was held by Judge Wallace in the Klumpp Case (C. C.) 126 Fed. 765, to eliminate whatever was previously patentable, and this on appeal was affirmed (131 Fed. 255, 65 C. C. A. 447); a certiorari from the United States Supreme Court being subsequently denied (198 U. S. 587, 25 Sup. Ct. 803, 49 L. Ed. 1174). This then being the fate of the Reisky and the fundamental idea being thus declared old, it is difficult to see how anything patentably inventive remains. The only distinction in the device in suit consists, as we have seen, in the location of the sorting hole, which is put at the foot of the retarding incline or a slight distance up it, instead of at the top, thereby allowing the small balls to be separated and proceed to the play end, without other check than such as they receive from passing over and along the intermediate horizontal section of the return way, and permitting the incline to be graduated to suit the large balls alone. No doubt this contributes materially to the successful operation of the device, which is incomplete and imperfect without it. Nor is it to be disposed of upon the suggestion, that, as compared with the Reisky, it amounts to nothing more than the mere shifting of a hole. Patents have been sustained upon changes which were no greater. Neither does it follow that, because the Reisky was anticipated, the Wiggins is also, the inventive advance, although a mere improvement, being possibly sufficient. Conceding all this, however, I am forced to conclude that this cannot be said of it. The successive acceleration and retarding of the balls by oppositely inclined planes at either end with a horizontal section in between, not being new, nor the sorting of the large and the small balls by a cut out hole, located in the path of both, it cannot be regarded as inventive, simply to make use in that connection of the well-known principle, that small balls, impelled by the same impetus, move with less momentum than large ones, and thereupon to adjust the means employed for checking the two by a relocation of the sorting hole at the foot of the retarding incline or such a distance up it as will be effective for the small balls, leaving the rest of it to be graduated to suit the large ones. This is the whole inventive idea, which is thus comprised not only in the mere shifting of the cut out hole a little one way or the other, to accommodate it to the different speed of the balls, but the use, in so doing, of an obvious expedient to meet an obvious need. This is not invention, and the patent, being without anything to sustain it, is therefore void.

The same conclusion having been thus reached as to both the patents in suit, the bill must be dismissed, with costs.

LOVELL v. SEYBOLD MACH. CO.

(Circuit Court, S. D. New York. January 10, 1908.)

1. PATENTS—INFRINGEMENT—BOOK-TRIMMING MACHINE.

The Lovell and Bredenberg patent, No. 490,877, for a book-trimming machine, was not anticipated and discloses invention, but is an improvement merely, and not a pioneer, and is entitled only to a narrow construction and a limited range of equivalents. The machine is designed and adapted to take books one by one and feed them to the trimming mechanism, to be operated on successively, and, in view of the limitations imposed on it by the prior art, is not infringed by a machine constructed to receive and trim a pile of books at a single operation, and which is also an improvement in a different line upon prior devices, and omits some of the means shown in the patent.

2. SAME.

The Lovell and Williamson patent, No. 734,907, for a book-trimming machine, claim 11, if conceded novelty and invention, is for a combination of old elements, and must be limited to substantially the means shown and described. As so construed, *held* not infringed.

In Equity. Suit to restrain alleged infringement of United States letters patent No. 490,877, dated January 31, 1893, to Charles W. Lovell and Alfred Bredenberg, and No. 734,907, dated July 28, 1903, to Charles W. Lovell, as inventor and assignee of David Williamson, his co-inventor, both for book-trimming machines.

A. G. N. Vermilya, for complainant.

Grafton McGill (Alfred M. Allen and Melville Church, of counsel), for defendant.

RAY, District Judge. While the patents in suit are for book-trimming machines, an art which had commanded attention for many years and brought to it the efforts and inventive skill of many persons, it cannot be successfully asserted that this art had made such advance that there was little or no room for further progress and decided improvements, or that the machines and devices described in the claims and specifications of the first patent in suit were not improvements on those which had come before, and so much so as to disclose new and novel features and patentable invention. Having examined the prior art, and the devices of the complainant, and his claims and specifications, I am prepared to decide, and therefore hold, that patentable novelty is disclosed and that the claims of patent No. 490,877 in issue here are valid, having in view the prior art. There is no anticipation or prior use of these book-trimming machines, whether some or all of the elements of the combination be old or not. The prior art does not disclose the combinations of these claims. Nor do we have a mere aggregation of old devices. While we have had feeding devices similar to the one shown, and also book and pamphlet cutting or trimming devices similar, in some respects, to those shown and described, we have not had these or the elements of these claims in this combination, or in any combination, operating in substantially the same way to produce the same result, viz., a properly trimmed or cut book.

But these facts by no means dispose of this case, for we are brought face to face with the problem of giving construction to these claims, having in view the prior art to which I have referred, and ascertaining their true scope and meaning. In doing this we are met by prior patents and by a file wrapper which, read with the claims in suit and the specifications of the patents, involve us in considerable doubt. Clearly the patentees were not pioneers, and they have not produced a pioneer invention. They were improvers, and as such are to be treated, and in the light of that fact must these claims in question be construed.

The Lovell and Bredenberg patent of January 31, 1893, No. 490,877, has 34 claims, 4 of which, only, are in suit—claims 3, 4, 5, and 9. These claims read as follows:

"3. The combination with automatic trimming mechanism comprising clamping devices for clamping fast the book to be trimmed and knives for trimming its side and end edges, of feeding mechanism adapted to carry the books to be trimmed successively into position to be acted on by said trimming mechanism, and also subsequently to feed the trimmed books from the trimming mechanism.

"4. The combination with primary and secondary trimming mechanisms adapted to make successive cuts at right angles to each other for trimming a book, of a feeding mechanism for transferring the partly trimmed book from the primary to the secondary trimming mechanism.

"5. The combination with primary and secondary trimming mechanisms adapted to make successive cuts at right angles to each other for trimming a book, of feeding mechanisms for carrying the books to be trimmed in succession first to the primary and then to the secondary trimming mechanisms."

"9. The combination of an intermittently operating trimming mechanism comprising clamping devices for clamping a book and knives for trimming its edges, an intermittently advancing feeding mechanism adapted to carry the books to be trimmed successively into position to be acted on by the trimming mechanism, and a driving mechanism adapted to actuate alternately the feeding mechanism and the trimming mechanism, whereby the books are first fed to the trimming mechanism, then engaged and clamped and trimmed by the latter and then released and again fed forward."

As we read the claims, we are struck with the language employed and idea expressed in each, to wit: Claim 3: "Clamping devices for clamping fast the book to be trimmed," and "knives for trimming its side and end edges," and "feeding mechanism adapted to carry the books to be trimmed successively into position to be acted on." In claim 4: "Mechanisms adapted to make successive cuts at right angles to each other for trimming a book," and "feeding mechanism for transferring the partly trimmed book," etc. Claim 5: "Mechanism for carrying the books to be trimmed in succession first," etc. Claim 9: "Clamping devices for clamping a book," and "adapted to carry the books to be trimmed successively into position," etc. All this conveys the idea that the books are to be carried one by one to the trimming mechanism of claims 3 and 9, and one by one to the primary trimming mechanism, and one by one thence to the secondary trimming mechanism of claims 4 and 5, and that one book only is to be trimmed at a time at each trimming mechanism. Of course, it does not imply that one book may not undergo the trimming process at one mechanism while another book is being trimmed at the

other. Possibly it should be remarked here that claims 4 and 5 by their terms call for primary and secondary mechanisms, while claims 3 and 9 do not.

This idea of a book-trimming machine for trimming one book at a time, and so designed, and, it is asserted, so limited by express terms in each of the claims in suit, is emphasized by the language of the specifications.

Prevailing Mode.

The specifications first describe the customary mode of trimming a book as follows:

"It is now customary in the manufacture of paper covered books or pamphlets to trim them by piling them together in as deep a pile as is practicable, placing this pile in a paper-cutting machine, bringing down a clamp upon the pile, and then operating the knife to shear off the surplus paper from the edge of the pile; this operation being performed three times for the tops, sides, and bottoms of the books."

Defects of Mode.

The specifications then point out the defects and undue expense of this mode of doing the work as follows:

"This method of trimming is defective, in that the books at the top of the pile are cut to a smaller size than those at the bottom by reason of the effect of the clamp which holds the pile, and which in coming down invariably draws the upper portion of the pile away from the gage. The operation is also unduly expensive by reason of the numerous manipulations necessary, whereby the labor cost is rendered considerable."

Object of the Invention.

Next they state the object of the invention as follows:

"The object of our invention is to produce a machine into which the books may be fed one by one, and which will automatically trim the books to exact size, and deliver the trimmed books out of the machine. By cutting the books one at a time, no appreciable difference is made in the size to which the books are cut, and by feeding them to the cutting or trimming mechanism automatically they are cut in rapid succession and the expense of trimming is thereby greatly reduced."

Of What Does the Invention Consist?

Next the patentees state in what their invention consists in the following words:

"Our invention, therefore, consists broadly in the combination with automatic trimming mechanism of feeding mechanism adapted to carry the books successively to the trimming mechanism. By preference the feeding mechanism also delivers the trimmed books from the trimming mechanism."

In describing what the trimming mechanism may consist of, and the mode of operation, the specifications in many places use such expressions as these: "Between which the book is firmly clamped," and "the book being clamped against this block," and "may be employed for holding the book," and "to which the book is fed," and "adapted to engage books supplied to the machine and feed them one after another," and "feed table on which the operator lays the books one after another," and "encounter the books and push them along until they are successively brought into proper position to be acted

upon by the trimming mechanism," and "thus the one feeding mechanism feeds each book in succession first to the primary mechanism," and "thereupon the frame, D, rises, the book being lifted on the table, B," and "cuts through the edge of the book," and "thereupon the frame, D, descends to its first position the plate, B, following it down and lowering the partly trimmed book to its original level," and "the cross-bar, I, pushing the trimmed book over the plate, C, and onto the delivery plate, b," down which it slides and falls out of the machine.

Defendant insists that complainant's patent, properly construed and limited, as it must be, does not broadly cover a similar book-trimming machine which is designed to receive and clamp and trim and deliver a pile composed of several books or pamphlets, all together; the pile remaining intact from the beginning to the end of the operation; that this is true, even if the machines of complainant are strong and efficient enough to receive and trim such a pile, and that for this reason among others defendant does not infringe; that defendant's alleged infringing machine is of a different construction and operation, and is especially designed and constructed and adapted to receive and transmit and trim a pile of books, consisting of several, each process operating on the pile as a unit and effectively and efficiently doing the work on the pile or unit; that thus by it several books are trimmed on one edge by one movement of the knife at one cutting station, and at the ends by one movement of the knives at the next cutting station. The defendant says this is a new, or at least a different, conception and combination from that of the patentees of complainant's patent, and marks another or different step in advance in the art, and that, while complainant is entitled to all its patentees invented and described, and may trim piles of books if it can, still, so far as its monopoly is concerned, it is limited to what is specifically described in its patent and that defendant, occupying the position of an improver in the same art, is entitled to the full benefit of its conception and advanced step, if its machine discloses any, and hence does not infringe the limited claims of the patent in suit; that in no event is its device that of the patent in suit, or covered by it or within its claims. The defendant says its trimming machine is constructed on a totally different plan from that shown in the Lovell and Bredenberg patent, and follows in its general plan the lines of the older paper-cutting and paper-trimming machines. It contends that defendant's type of machine is very well illustrated in a patent to Withey of June 15, 1890, No. 229,795, meaning, I suppose, patent to Withey of June 15, 1880, No. 228,795, as I find no such patent as is referred to in the printed brief in either the proofs or exhibits. This takes us to the prior art, which we will examine before taking up more in detail complainant's construction and operation.

The invention of the patent to Withey is for "pamphlet trimmer," an analogous art, and "has for its object to produce an organized machine for rapidly trimming large quantities of paper to a uniform size." It consists, partly, in the combination with (1) the paper cutting mechanism, (2) a rotatable table, (3) provided with suitable paper holders upon which to (4) hold the paper in gaged position, and (5) means to automatically intermittingly rotate the table at the proper

time to bring the paper holders, supplied with a pile of paper to be trimmed, under the action of the cutting device, (6) shown as a knife, (7) guided in ways inclined to the surface of the pile of paper to give a drawing cut, and (8) the knife cutting down through the pile of paper upon (9) a cutting bed attached to the paper holder; also (10) a presser to press and hold firmly the pile of paper just behind the line where the knife cuts it, (11) the presser being adapted to apply a positive pressure of about the same amount to piles of different thicknesses; also (12) a uniformly rotating shaft, in combination with the rotatable table, and (13) intermediate devices to impart an intermittent motion to the table, and (14) in the combination, with the knife, of the presser and devices to actuate it properly at the desired time in relation to the movement of the other devices. We have, therefore, in a paper-cutting mechanism complete: (1) A rotatable table; (2) paper holders to hold the paper to be trimmed or cut; (3) means for rotating the table automatically and intermittingly, so as to bring the paper at the proper time under the cutting knives or device; (4) a cutting bed or block underneath the paper placed for cutting; (5) a presser operating behind the knife to press and hold the paper while being trimmed; (6) a uniformly rotating shaft operating in combination with the table; (7) intermediate devices to impart the intermittent motion to the table; (8) devices to actuate the knife and presser at the proper time, so they will operate in relation to the movement of the other devices.

In operation a person places a pile of paper to be cut in a holder on the table, and it is carried to and underneath the cutting device, and then pressed or clamped and cut as the knife descends, and released as it ascends, when the table and holder, carried with it, again rotates, and another pile is brought under the knife or knives. As we have but one knife, I take it the pile is cut on one side, and then shifted so as to present another uncut side before again coming under the action of the cutting device. The knife cuts down through the pile to the cutting block, the necessity and utility of which is apparent. Of course, the table is at a standstill when the knife operates, and vice versa. The pressing or clamping device takes hold of the paper before the knife strikes it. I see no reason why this would not trim an unbound book after the several signatures have been sewed together. I think it unnecessary to describe the construction and mode of operation of the mechanism moving the table, the knives, and the presser. In this old machine we have no feeding mechanism independent of the table, which, operating as a feeding device, carries the paper from its first position when placed thereon in one of the paper holders to the cutting device. In both the prior art and in complainant's machine, as well as in defendant's, we have a feeding device. In the prior art and in defendant's machine it is the rotatable table, while in complainant's it is the endless chain described. Complainant's machine, in this respect, does not follow the prior art; but the defendant's does.

In the patent in suit we have no paper holder as such; but we do have an equivalent, and we have means for rotating the table or its

substitute automatically and intermittingly, so as to bring the books to be trimmed under the cutting or trimming knives at the proper time; a cutting bed or block for the knife to strike after it has passed through the paper; a presser or clamp to grasp and hold the book while being cut; a rotating shaft operating with the table; intermediate devices to impart intermittent motion thereto, and mechanical devices to actuate the knives and clamp, or "presser," at the proper time, so they will operate in relation to the movement of the other devices. It seems clear to me that Lovell and Bredenberg were plainly taught every idea of means and operation and result by this Withey patent. Deliver the book on the rotatable table, or a substitute, hold it in position, carry it to the cutting or trimming device or knives, halt, clamp or press it firmly, and then cut or trim the side, or side and ends, and then release and pass on. Lovell and Bredenberg improved the various movements, simplified the cutting, added and arranged more knives, so as to avoid changing the position of the thing to be cut or trimmed, and added the delivery chain ladder device, operating as does an endless chain, an old and a well-known device, so as to obviate the necessity of placing the book directly in the cutting machine and taking it therefrom by hand. This feeding device of the complainant's patent in part takes the place of the rotatable table of the prior art; but defendant does not use it. But still the book or paper to be cut must be placed in or on this feeding device by hand, and taken therefrom by hand, or else dumped. Clearly Lovell and Bredenberg were improvers, but not pioneers. They have a new and improved combination of old elements, some of them improved, with an element substituted.

The complainant's book-trimming machine follows along old lines with improvements. The defendant's book-trimming machine follows along old lines, in many respects the same old lines, as did Lovell and Bredenberg, as they had the right to do, with improvements and changes such as it had the right to make. The defendant has added to the old art additional cutting stations, as did Lovell and Bredenberg; but I see no conception amounting to patentable invention in doing this. The defendant does not use the endless chain or ladderlike feeding mechanism of complainant's patent. But I cannot see that it was invention to add that merely or that defendant is an infringer if in place thereof it uses the old rotatable table of the prior art, even if it be the equivalent for practical purposes of complainant's feeding device. An old element in the art the defendant has the right to use in a combination of its own.

Was there patentable invention in the adoption of the primary and secondary cutting or trimming mechanisms? The object is to cut or trim the front of the book, and then the ends, or vice versa, without removing it from the machine. But I do not see invention in putting two trimming devices on or in connection with the same revolvable table actuated intermittingly. To do this, in my judgment, required only ordinary mechanical skill and judgment. Much was said on the final hearing as to the proper interpretation of claims 4 and 5 in the use of the expression:

"The combination with primary and secondary trimming mechanisms adapted to make successive cuts at right angles to each other for trimming a book."

I do not see any ambiguity in this expression. It is very evident that the cutting devices are not necessarily set at right angles to each other, and that the knife or knives of the one are not to be set at right angles to the one knife or to those of the other, but that the book, being on its support and carried to the first cutting station, is then to be trimmed by a knife coming down squarely and truly across its front edge, or by knives coming down squarely and truly across the ends, as the case may be. Having been thus trimmed at one station, it is carried to the next, where a cutting device is so arranged and located that its knife or knives, as the case may be, comes down and makes a cut at right angles to the first cut. Any other arrangement of the cutting devices would defeat the purpose of the machine, which is to properly trim the book. Properly done, the cuts across the ends must be exactly parallel to each other, while the cut across the front edge of the book must be exactly at right angles to the cuts across the ends It is entirely immaterial whether the ends or the front edge of the book be first cut or trimmed.

What the complainant claims in claim 3 is the combination with (1) automatic trimming mechanism, comprising (a) the clamping devices for clamping the book and (b) knives for trimming its side and end edges, of (2) feeding mechanism adapted (a) to carry the books to be trimmed successively into position to be acted upon by such trimming mechanism and then (b) to feed or carry the books from the trimming mechanism. Here we have the single trimming mechanism, knives which will completely trim the book, and a clamping device which will hold it while being trimmed, and a feeding device to carry the book to such mechanism before being trimmed and take it away after being trimmed. This feeding device which Lovell and Bredenberg have described is not used by defendant. If some one or any of the old feeding devices was intended or is covered by the claim, it is void, as not disclosing patentable invention. It would be a combination well known to the prior art. To "feed the trimmed books from the trimming mechanism" simply carries them away from it and does not deliver them from the machine itself. So "to carry the books to be trimmed successively into position to be acted on" simply carries them from the place where first placed in the machine by the operator. The language is broad; but the prior art, already described, has and shows this very combination, viz., a feeding table to carry the paper to the trimming device or mechanism, which mechanism comprised a presser or clamp and a knife, and then take it away. Adding two more knives, or one more, does not distinguish it from the prior art.

Claim 4 calls for primary and secondary trimming mechanisms, but not automatic trimming mechanism; that is, two sets of knives and clamps, each set at a different point, and a feeding mechanism for carrying the book from the one to the other.

Claim 5 only differs from 4 in that it has feeding mechanism for carrying the books to be trimmed, one at a time, or "in succession," first to the primary and then to the secondary trimming mechanisms.

Claim 9 has (1) an intermittingly operated trimming mechanism, (2) intermittently advancing feed mechanism to carry the books "successively"—that is, one by one—into position to be acted on, or trimmed, and (3) a driving mechanism which actuates alternately the feeding mechanism and the trimming mechanism. Here we have but one trimming mechanism, comprising two or three knives, three being understood, and the clamping device. Here again we have the feeding mechanism described, and, while such a mechanism is old, I am inclined to think the combination as a whole discloses patentable invention, but of a narrow, not a broad, nature. If we undertake to say that this claim is broad and to be broadly construed, and may carry and trim any number of books at one cut of the knives, and that the elements of the combination include any one of their kind known to the prior art, or any well-known equivalent, we find an "intermittingly operated trimming mechanism, intermittently advancing feed mechanism, driving mechanism actuating alternately the feeding and trimming mechanisms," all old in the prior art, and it is an old combination and discloses no patentable invention. In view of the prior art, it discloses patentable invention for the reason that, read with the specifications, as it should be, the claims refer to certain specific things therein described and used in the combination to do certain things in a certain way and produce a given result. Construed narrowly, as it should be, the defendant does not infringe.

Now, what does the complainant claim as the novel patentable conception of the patent in suit? It says, referring to the brief:

"None of these machines [of the prior art] were automatic; that is, none would take a series of books, or stacks of books, one after another, and completely trim them and feed them to a place convenient for removal."

But Withey's patented device would take piles of paper, or stacks of paper, one after another, if placed therein, and feed them to the trimming mechanism, and thence to a place convenient for removal. The principal trouble was that only one side was cut at a time, and hence the position of each pile had to be changed while in the machine and presented to the knife or cutter four times if you desired to cut each side, or three times if you desired to cut three sides only. And it was automatic.

Complainant further says:

"These considerations [replacing skilled labor with machinery, and reducing cost] determined that the machine must be automatic. It must of itself perform all the operations from the time the book or stack of books was fed to it until, completely trimmed, they were ready for removal."

This, I take it, was not a patentable conception.

Complainant next says:

"Then came the leading thought of the invention, to wit, a plurality of trimming mechanisms and devices for feeding the book or stack of books."

But if one trimming mechanism would trim one edge or end of the book while the machine was operating, or three sides if three knives were provided, surely two such mechanisms would trim two sides or ends, and three would trim three sides as the side or end was presented to it, and hence only a mere duplication of mere trimming devices was

necessary. This was hardly a patentable conception. And mere mechanical skill would duplicate or triplicate the devices. But this problem remained: Either the book must change its position, or the second cutting device must be so arranged as to cut a different edge or end of the book. To do this involved mechanical skill only. And the prior art taught that a rotatable table holding the book would so present a book to the fixed knife.

Complainant further says (and I am quoting from the brief):

"This thought crystallized into operative devices which appropriately feed the pile of sheets committed to its care, would seize and hold that pile, clamping it tightly, that the cutting might be true, and cutting the pile while thus held, is the heart of the invention of Lovell and Bredenberg, as set forth in patent 490,877," etc.

A plurality of trimming mechanisms, devices for feeding the book or books, clamps as a part of the trimming device to hold the book while being trimmed, is the heart of the invention; but, aside from a plurality of cutting devices in the same machine, there is no new thought or conception here. A trimming mechanism, a feeding device, and a clamping device as part of and working with the trimming mechanism, were old—shown in the prior art.

Again:

"Theirs [referring to Lovell and Bredenberg] was a long step forward in the art, and, while there were novelties in the specific form of some of the devices they conceived, described, and employed, the soul of the invention lay rather in the combination of devices calculated to do certain things in automatic sequence, to accomplish the end in view, than in the exact form of any one of the several devices they had so combined."

The long and short of the complainant's contention is that invention resides in the combination of old devices in such a manner as to completely trim a book on its front edge and two ends without removal from the machine; and, I repeat, the only problem was to so arrange two trimming mechanisms that as the table carrying the book, or the feeding mechanism, doing the same thing, moved, it would present, without the book itself being turned, the edge of the book to the knife of the first trimming mechanism and the ends of the book to the knives of the second trimming mechanism. This was done; but I do not think that Lovell and Bredenberg monopolized by their patent the right to construct, use, and sell a book-trimming machine having a plurality of trimming mechanisms.

The defendant has devised and constructed a machine which is within the claims of the patent broadly construed, construed as we would construe the patent of a pioneer, but which is not within the claims of the patent narrowly construed, as they must be in view of the specifications, the prior art, and the action of the Patent Office, and of the fact that both the patentees of the patent in suit and the defendant are mere improvers in a confessedly crowded art. I do not think complainant's device made in accordance with the patents is an operative device for trimming more than one book at a time properly and successfully. One or more of defendant's witnesses so states, and the reasoning is to my mind satisfactory. Again, I do not think it was ever intended that it should. The language of the claims and

specifications negatives such a claim. I am familiar with the rule that a patentee with a valid patent, having described one thing it is designed to do and will do, is entitled to the benefit of all it will do, whether he knew it or not when he took his patent. But I find no satisfactory evidence that complainant's book-trimming machine, made in accordance with the patents in suit, will do the work of trimming a pile of books properly and successfully. It will not operate in the same way to produce the same result, or produce the same result, that is attained by the defendant's machine.

I think this case quite similar to Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 75 C. C. A. 77, where the court said, after holding the patent valid:

"The defendant by the elimination or modification of the claimed details of the patented construction, and a readjustment of relative size and location of supporting bars, diaphragms, and flow box, either permissible by reason of the disclosures of the prior art or not covered by the claims in suit, has succeeded in constructing a noninfringing machine."

That is what this defendant has done. It has so varied its construction, its ideas of means and means, its operation and result, as in view of the prior art and the specifications and claims of the patent in suit it had the right to do, that its machine, the "Seybold continuous feed trimmer," described in Exhibit F, does not infringe. Identity of result from the operation of two different machines is some evidence of infringement; but it is not sufficient evidence. It must appear, where the patent is for a combination, that the machines have the same combination of elements operating in substantially the same way and producing substantially the same result, unless it should appear that the complainant has a patent for one of the elements used by defendant and that the defendant has appropriated that element. A patented machine is infringed by another machine which incorporates in its structure and operation the substance of such invention. Infringement is not avoided by adding other elements, or by discarding nonessentials; but it incorporates the substance of the invention when it uses all the elements of the claims of the patent operating in substantially the same way to produce substantially the same result. Infringement is not avoided by mere changes of form, or location of parts, or change of material, or the substitution of equivalents well known to be such at the time of the invention. But such is not this case. In feeding books one at a time to the trimming mechanism, to be trimmed one at a time and then fed one at a time out of the machine, or in feeding books one at a time to the first cutting station, and then one at a time to the second station, and then one at a time on to the delivery point, it was unnecessary to clamp the book until it reached the first trimming station. Hence no provision was made for doing this. But in defendant's machine, designed for another purpose, designed to operate in a different manner and to produce a different result, the complete trimming of a pile of books, it was necessary to keep the pile in perfect alignment and position from the starting point up to the first trimming station, or mechanism; and hence other and additional devices had to be pro-

vided, and corresponding modifications and provisions made. Hence, when the books are first placed in defendant's machine, they are clamped. In complainant's machine and with its feeding device it is impossible to do this. This is not a mere addition to complainant's machine. To do this it was necessary to discard the feeding mechanism of complainant's machine and claims, and substitute another provided with a clamping device, and which other was not the well-known equivalent, but a different one, operating differently, and carrying and delivering the books in a different manner. Here, as elsewhere, the machines are differentiated.

It is now so well settled by the decisions of the Supreme Court of the United States as to make the rules fixed and inflexible that "no one is the infringer of a combination claim unless he uses all the elements thereof"; also, while the inventor "is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, it may not add to or detract from the claim"; also, "where the patent does not embody a primary invention, but only an improvement in the prior art, the charge of infringement is not sustained if defendant's machines can be differentiated"; also, "a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than where the invention is simply an improvement, although the last and successful step, in the art theretofore partially developed by other inventors in the same field." Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 406, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100, and cases cited. Judge Day, in giving the opinion of the court, defines the word "pioneer," as applied to an invention, and says:

"This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before."

This, evidently, is the meaning Justice Day had in mind in using the words "pioneer character." Also, when there has been a rejection and an amendment in the Patent Office:

"It is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim, and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices."

Also, where the patent was an improvement but not a pioneer:

"Conceding that this spiral rod and its connections with the cylinder in the manner and for the purposes stated is a novel feature in the combination and entitled to protection, it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor. The distinction between pioneer inventions permitting a wide range of equivalents and those inventions of a narrow character, which are limited to the construction shown, has been frequently emphasized by the decisions of this court." Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 617, 621, 27 Sup. Ct. 307, 51 L. Ed. 645.

The claims of the patent in suit, or two of them, were somewhat narrowed in the Patent Office; and as this was an improvement merely, and not a pioneer, the complainant is limited "to the construction shown," and is not entitled "to any considerable range of equivalents," and is limited to "the means shown." So limiting the claims of the patent in suit, No. 490,877, as the feeding device shown and described with some other of the means shown are not used by defendant, I am constrained to hold that defendant does not infringe the claims of that patent.

Coming to patent No. 734,907, to Lovell and Williamson, for improvements in book-trimming machines and analogous devices, and to claim 11 thereof, the one in suit here, we have:

"In a cutting machine, a plate-carrier, mounted to move laterally and in turn supporting a clamping-bar and a knife-carrier, together with means for holding said plate-carrier in different lateral positions, all substantially as set forth."

This combination is of old elements in an old art, and is not a pioneer. It is substantially limited to the means shown and described. We have a plate-carrier, a clamping-bar, a knife-carrier, and means for holding the plate-carrier in different lateral positions. The plate-carrier is mounted to move laterally and supports the clamping-bar and a knife-carrier. This device, as I understand it, is for moving the two sets of knives and clamping-bars in a trimming mechanism, designed, say, to trim each end of a book at the same time, towards each other or from each other, as it is desired to trim books of different lengths. A "set" is a knife and a clamping-bar. In a framework a carriage runs back and forth, and moves books from one position to a third position by means with which we are not at present concerned. At this third position the device of claim 11 is located. The plate-carriers are placed one on each side of the position occupied by the pile of books. Each consists of a frame supported on rods, four in number, two at each end, one above and one below the frame, and passing across it. They are threaded to correspond with orifices in the frames, with right and left-hand screw threads, respectively. Both frames are supported by the same rods. The outer ends are provided with bevel gears, which mesh with others on a rod having a handle, and by turning this handle the carriers are moved nearer to or further from the center of the main frame, as may be desired. It depends on which way the handle is turned. In "ways" on each carrier there is mounted a clamping frame which carries at its upper end a clamping-bar. When the uprights of this frame are brought or moved down, the clamping-bar impinges on one edge of the book. The other edge is also clamped at the same time by the other bar. Each carrier supports in its "ways" a knife-carrier also, the upper part of which carries a knife blade and the frame and knife-carrier are both connected to a rocking lever. This clamping-bar is slotted at the lower side, and a roller cutter bed registers with the slot. When this lever is rocked towards the feed end of the machine, the clamping frames are drawn downwards till the clamping-bars rest on the ends of the book, respectively. If pressure is now continued, the clamping-bars will

press firmly on each end of the pile of books; but, as the table underneath prevents the further downward movement of the clamping-bars, the point where the lever is pivoted to the frames becomes a fulcrum, and the knives are forced upward and their edges are forced against and trim off the edges of the pile of books. By a reverse stroke the clamps are opened and the pile of books is advanced to a fourth position, where by a similar device operated in the same way the front edge of the book is trimmed. Moving the carriers by turning the rods moves the frames and clamping-bars and knives towards the center or away from it, as desired. It goes without saying that the closer to the knife the clamping device is the better.

Complainant says that, if the clamps and knives are separately carried, they must be separately adjusted, which is, of course, true, unless a mechanism is provided to accurately adjust the carrier of each at the same time and by the same movement. He says that Lovell and Williamson, aware of the difficulty and the delay of separate adjustments, overcame it by mounting a clamp and a knife in one carrier, and arranged that the carrier and all its burden should be moved as a whole to make the adjustment. As it is necessary that the clamp shall take hold before the knife commences its work, and continue to hold during the cutting, the frame carrying the clamping-bar and the frame carrying the knife are both attached to the one rocking lever and operated by it. If this device, which is made up of old and very familiar elements, is new, or rather presents a new combination operating in a new way to produce a new or improved result, and does, it may be patentable. If such is the case, I think it is.

But defendant says it is anticipated by the prior art, and refers to patent to Elder, No. 10,122, October 11, 1853, to Snow, No. 51,234, November 28, 1865, to Sands, No. 355,557, January 4, 1887, and to Noyes, No. 218,307, of August 5, 1879. The Noyes patent is for a cutting or trimming mechanism for cutting and trimming wood veneer; but it is a trimming machine, and I think an analogous art. In this device we have a plate-carrier, the carrier on which the uprights carrying or supporting the clamps and knives or saws are supported and with which they move, and they are mounted so as to move laterally, or one so moves, and both might equally as well. There are means for holding said plate-carrier in different lateral positions. These means differ from those actually described in the patent in suit; but this, with many to select from, is a mere matter of selection. Mr. Steuart says, speaking of this Noyes patent:

"The specific arrangement called for by claim 11 is found in the Noyes patent, No. 218,307, August 5, 1879. Referring particularly to the last-mentioned patent, it will be seen that there is a frame, B, at the left-hand side of Fig. 2, and a frame, A, at the right-hand side of Fig. 2; these two frames being each of them a plate-carrier in the sense in which that term is used in the claim. The frame, B, is adjustable by slot and bolt connections with the side frame, C, of the machine. In the frame, B, there is mounted the clamping-bar, D, and a knife-carrier, J; these two parts being movable toward and from each other, so as to cut the work which is passed between them. The construction in the Noyes patent is indistinguishable from that called for by claim 11 of the Lovell and Williamson patent, and the operations of the two are identical. In both the clamping-bar descends so as to rest on the work preliminary to the actual cutting operation, and in both the power is applied

through mechanism which draws the knife-carrier and clamping-bar toward each other, so as to effect the clamping and cutting operation."

After describing certain of the constructions of the Noyes device, that patent says:

"With this construction, when the veneer has been arranged upon the center cross-bars of the end frames, A, B, the lever, F, is swung downward. The first effect of this movement is to draw the clamping blocks or bars, D, downward, to clamp the veneer upon the cross-bars of the frames, A, B. As the downward movement of the lever, F, is continued, the next effect is to force the bar, J, and the cutter, K, upward, and cause the teeth, k', to cut out the wood or chips between the tenons and form the shoulders of the said tenons."

This describes almost exactly the clamping and cutting operation of the Lovell and Williamson patent in suit. The other similarities of construction and operation are equally marked. It seems to me that anticipation is clearly shown, and that in this claim 11 we have no patentable invention disclosed, in view of the prior art. Should we assume that there is, it is of a most narrow character, in view of the prior art; and complainant is not entitled to any considerable range of equivalents, when charging infringement. He must show that defendant is using substantially the combination of claim 11 of Lovell and Williamson's patent in suit, so limited in its construction. Computing Scale Co. v. Automatic Scale Co., supra. A mere description of defendant's machine, Exhibit F, demonstrates that defendant is not using that combination, unless we allow the broadest possible range of equivalents. To this construction complainant is not entitled. In the first place, the defendant's construction does not require a frame or carrier to hold and move the knife and clamp together, and in it I am unable to find such a device or arrangement. If there is found such a device or arrangement so operating, it is of a character and construction so different from that of claim 11 in suit that it is not an equivalent of which the complainant can avail himself. The two machines in this regard are so clearly differentiated that infringement of claim 11 is not made out. On this point the witness Steuart says:

"A. The defendant's machine, shown in Complainant's Exhibit F, has simply adopted the ordinary common adjustment of two knives upon a carrier, where it is desired to operate upon work of different size. I do not find in the defendant's machine any part which answers at all to the term 'plate-carrier' as used in the claim; nor do I find in the defendant's machine any parts which correspond to the clamping-bar and knife-carrier as called for by said claim."

The result is that defendant does not infringe, and the bill of complaint must be dismissed, with costs.

SANTA CLARA COUNTY v. GOLDY MACHINE CO. et al.

(Circuit Court, N. D. California. February 21, 1908.)

No. 14,562.

1. REMOVAL OF CAUSES—PETITION—CITIZENSHIP.

Where a removal petition based entirely on diversity of citizenship was filed by one of the defendants alone, and wholly failed to disclose the fact that the other defendant was merely a nominal or formal party to the action, and such fact did not sufficiently appear elsewhere in the record, the petition was fatally defective, since, for the purpose of removal, the parties must be considered collectively.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 170.

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

2. SAME—AMENDMENT.

Where a removal petition is defective for failure to state the necessary jurisdictional facts, the omission is fatal to the right of removal, and cannot be settled or cured in the federal court by amendment.

J. H. Campbell, Dist. Atty., and C. C. Coolidge, Asst. Dist. Atty., for plaintiff.

William A. Beasley, H. Ray Fry, and William A. Bowden, for defendant Goldy Mach. Co.

VAN FLEET, District Judge. The petition for removal was filed by the defendant Goldy Machine Company alone, and wholly fails to disclose the fact, now sought to be shown in opposition to the motion to remand, that the defendant Tilden was a merely nominal or formal party defendant to the action; nor is that fact sufficiently made to appear elsewhere in the record. In fact, no reason is stated in the petition why Tilden did not unite in the application to remove, nor anything said as to his citizenship. In this respect, therefore, the petition failed to make a case entitling the first-named defendant to remove the case here by reason of diversity of citizenship of the parties—the sole ground relied upon for claiming jurisdiction in this court—since for this purpose the parties must be collectively considered. It is upon the case made by the record upon which removal is asked and had that the question of jurisdiction depends, and if there is a failure to state the necessary jurisdictional facts the omission is fatal to the right of removal, and cannot be supplied or cured in this court, for the reason that the case is not properly here, but jurisdiction still remains in the state court. Crehore v. Ohio & Miss. Ry. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144. In that case, after discussing the decisions of that court from which this principle is deduced, it is said:

"It thus appears that a case is not, in law, removed from the state court upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further'; and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' Stone v. South Carolina, 117 U. S. 430, 432, 6 Sup. Ct.

799, 29 L. Ed. 962; Carson v. Hyatt, 118 U. S. 279, 287, 6 Sup. Ct. 1050, 30 L. Ed. 167. If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal.

"All this is made entirely clear by the express requirement of the act of 1875 that the Circuit Court shall remand 'to the court from which it was removed' any cause brought from that court, whenever it appears that it is not one of which the federal court can properly take cognizance. Cameron v. Hodges, 127 U. S. 322, 326, 8 Sup. Ct. 1154, 32 L. Ed. 132. If a suit entered upon the docket of a Circuit Court as removed upon the ground of the diverse citizenship of the parties was never, in law, removed from the state court, no amendment of the record made in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of the date when it was there docketed; for the only mode provided in the act of Congress by which the jurisdiction of the state court of a controversy between citizens of different states can be divested is by presenting a petition and bond in that court showing, in connection with the record, a case that is removable. The present motion, in effect, is that such amendment of the record may be made in the Circuit Court, as will show that this case might have been removed from the state court, not that, in law, it has ever been so removed."

This is not an instance of a merely defective or informal statement of the necessary facts, but an entire absence of essential facts. In the former case the defect may be cured by amendment in this court (Powers v. Ry. Co., 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673; Kinney v. Savings & Loan Association, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103); but in the latter, as we have seen in the case first cited, it may not. If the matter set up in the affidavits filed by the defendant Goldy Machine Company in this court had been incorporated in its petition, a different case would be presented, which might fall within the principles of the cases relied on by it; but the facts stated in the petition for removal do not bring it within the application of those principles.

The motion to remand the cause to the superior court of Santa Clara county must be granted, and it is so ordered.

UNITED STATES v. MAGNUS & LAUER.

(Circuit Court, S. D. New York. January 13, 1908.)

No. 4,906.

CUSTOMS DUTIES—CLASSIFICATION—CHLOROPHYLL—"COLOR."

Chlorophyll, a coloring matter used in staining oils and foodstuffs, is not a "color," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1630], but is dutiable as an unenumerated manufactured article under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1262.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,560 (T. D. 28,018), affirmed the assessment of duty by the collector of customs at the port

of New York on an article known as "chlorophyll." The opinion filed by the Board of General Appraisers is as follows:

McCLELLAND, General Appraiser. The merchandise which is the subject of these protests is invoiced as "chlorophyll soluble in fat, soft," and "chlorophyll liquid soluble in alcohol and water." It was returned by the appraiser as a color, and duty was accordingly assessed at the rate of 30 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1630]. Various claims are made in the protests for rates of duty other than assessed; but counsel for importers in their brief announce that they rely on the claim made for duty at the rate of 20 per cent. ad valorem under the provisions of section 6 of said act. (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

Sadtler, in his handbook on "Industrial Organic Chemistry," at page 440, has this to say of chlorophyll: "This is a green coloring matter of fresh vegetation, and is abundantly present in nature, but it has not been found possible to isolate it in a pure state adapted for use. It is stated that chlorophyll forms a beautiful green color with zinc as mordant, which is adapted for dyeing, but it has not as yet been used in practice." The official examiner in the appraiser's department, who passed the merchandise, in his examination assents to this statement, and, being further examined, testified as follows: "Q. Do you agree, as stated here, that it has never been used as a dye? A. No; I do not think it can be used as a dye, because the tinctorial properties are not strong enough. Q. Do you mean by that that it cannot fix a color? A. Well, yes; I do not think it can be used practically for dyeing purposes. Q. Are you familiar with Persian berry extract, which was the subject of G. A. 6,272? A. Yes. Q. How does this article, so far as its coloring power is concerned, compare with the Persian berry extract which was the subject of that G. A.? A. Well, it is used for the same purposes—can be used for the same purposes.

* * * * * * * * * *

The board found in said G. A. 6,272 (T. D. 27,054) that Persian berry extract was exclusively used for the purpose of staining foodstuffs, and held it to be a nonenumerated manufactured article, subject to duty as such under the provisions of section 6; and in this case it is established to our satisfaction that the merchandise involved is adapted only to similar uses, except that that represented by Exhibit 2 may also be used for coloring essential oil. We do not think that the merchandise represented by either Exhibit 1 or 2 is a color, within the meaning of the language of paragraph 58, under which duty was assessed; and there being no special provision therefor in the existing tariff act, nor one under which even under the application of the similitude clause, it may be said that it is provided for, it follows that duty must be assessed upon the merchandise as claimed under the provisions of section 6 for unenumerated manufactured articles.

To that extent the protests are sustained, and in all other respects they are overruled. The decision of the collector is modified accordingly.

J. Osgood Nichols, Asst. U. S. Atty.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

HAZEL, District Judge. Decision affirmed.

In re MARINE IRON WORKS.

(District Court, E. D. New York. March 14, 1908.)

1. BANKRUPTCY—INSOLVENCY—"MARKET VALUE" OF ASSETS—WHAT CONSTITUTES.

The fair "market value" of a corporation's assets, for the purpose of determining its solvency when it committed an alleged act of bankruptcy, was the value which the corporation might have realized on them for itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 84.

For other definitions, see Words and Phrases, vol. 5, pp. 4383–4388; vol. 8, p. 7717.]

2. SAME.

Where, on creditors' petition in bankruptcy, issues as to the alleged bankrupt's solvency and indebtedness to petitioners have been found in their favor by a special commissioner, though the excess of liabilities over assets were not large at the time of the alleged act of bankruptcy; through disagreements between the bankrupt corporation's stockholders and outstanding judgments a forced sale would not have produced proceeds sufficient to meet the corporation's obligations; since the filing of the petition rent, receivership expenses, etc., have accrued, while the property has deteriorated; it appears that a refusal to confirm the commissioner's report would not put the corporation upon its feet, or bring about any benefit equitably; and some time has been given the parties to effect a satisfactory arrangement, and nothing has been done—a decision in favor of the creditors, and directing that an adjudication be had, will be entered.

In Bankruptcy.

Putnam, Twombly & Putney, for petitioning creditors.
L. W. Widdecombe, for alleged bankrupt.

CHATFIELD, District Judge. The Marine Iron Works is a corporation with comparatively few stockholders. Certain judgments were obtained against it, and, a sale being imminent under execution upon one of these judgments, certain other creditors filed a petition in bankruptcy. An answer was interposed denying insolvency, controverting the indebtedness to petitioning creditors, denying the making of written admission of insolvency, but admitting that a sale under execution upon a judgment was advertised, which the alleged bankrupt had not vacated or discharged five days before the date of sale.

Upon a reference to a special commissioner, the issues have been found in favor of the creditors. The special commissioner, while changing the amount somewhat, upholds the validity of the petitioning creditors' claims. He has inquired into the valuation of the alleged bankrupt's property, and reports that it was insolvent. The bankrupt questions the valuation as found by the commissioner, and it appears that the excess of liabilities over assets, at the time of the alleged act of bankruptcy, was not large. Certain options to purchase lands under water, which may in the future be of considerable value, were considered to be of no value by the special commissioner, and there is no reason to differ with his opinion that this option was then unsalable. The entire situation makes it apparent that if the officers of the bankrupt, who were also some of its creditors, had been in entire accord with all

of the stockholders, the property might have been saved; but with the disagreements existing, and judgments outstanding, it is apparent from the record that a forced sale would not have produced proceeds sufficient to meet the obligations of the corporation, nor did the assets exceed the liabilities at a fair market value—that is, at a value which the corporation might have realized on them for itself. In re Hines (D. C.) 144 Fed. 143. Since the date of the filing of the petition in bankruptcy, which was August 3, 1906, rent has been continually accruing, and the expenses of a receivership and a very long and voluminous reference have resulted, while the property has deteriorated.

There seems to be no legal reason for dismissal, and it is impossible to imagine that refusal to confirm the report at the present time could put the corporation upon its feet, or bring about any benefit equitably. Some time has been given to the parties to see if an arrangement could be effected, inasmuch as so few individuals are directly interested in the bankruptcy proceeding; but, nothing having been done, it is considered that the matter must be determined upon the strict lines of the issue as referred to the special commissioner, and as to that his opinion must be confirmed, and a decision rendered in favor of the creditors, and directing that an adjudication be had.

PLAUT v. GORHAM MFG. CO. et al.

(District Court, S. D. New York. February 4, 1908.)

BANKRUPTCY—POSSESSION OF PROPERTY—RECOVERY—JURISDICTION.

Where a complaint alleged that the bankrupt's receiver occupied the premises in controversy under a lease held by the bankrupt for the month of August, 1906, and that defendant wrongfully dispossessed such receiver in September under a warrant issued by a magistrate without jurisdiction, and had since been in possession, the bankruptcy court had jurisdiction of the suit by the bankrupt's trustee to recover possession of the property under the lease; the property having been once in the possession of an officer of such court.

Myers & Goldsmith, for complainant.

George Carleton Comstock (J. Noble Hayes, of counsel), for defendants.

HOLT, District Judge. This is a demurrer to a complaint on the ground that the court has no jurisdiction. The suit is brought to recover the possession of property under a lease held by the bankrupt, which the defendant claims was terminated by a judgment in dispossess proceedings.

The complaint alleges that the receiver occupied the premises for the month of August, 1906, and that the defendant the Gorham Manufacturing Company wrongfully dispossessed him in September, under a dispossess warrant issued by a magistrate without jurisdiction, and has since been in possession. I think that these allegations show that this court has jurisdiction. I understand the test to be whether the property is or has been in the possession of an officer of the bankruptcy court. If it is in such possession, claimants can be cited into the bankruptcy court to determine the validity of any claims or liens asserted against

it. In re Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Kellogg, 121 Fed. 333, 37 C. C. A. 547; In re Eppstein (C. C. A.) 156 Fed. 42. If it has been in such possession, and has been wrongfully withdrawn from such possession, suits may be brought in the bankruptcy court to recover it. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. It is in the cases where property claimed to belong to the bankrupt is and always has been in the possession of another party that this court has no jurisdiction, as held in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, unless the property has been fraudulently or preferentially transferred, as provided for in the amendments of the bankrupt act in 1903.

My conclusion is that the demurrer should be overruled, with leave to the defendants to answer on payment of costs.

BALTIMORE & BOSTON BARGE CO. v. KNICKERBOCKER STEAM TOWAGE CO.

(District Court, D. Maine. February 21, 1908.)

No. 41.

1. TOWAGE—INJURY TO TOW—LIABILITY OF TUG FOR WANT OF PROPER SKILL.
Where the master, in charge of the operations of two tugs engaged to tow a loaded barge down the Kennebec river, at the request of the master of the barge delayed starting until the tide had passed the most favorable stage, and also placed the tugs alongside on either quarter of the barge, although he had never towed down the river in that way before and disapproved of it, he became responsible for such method, in the absence of an agreement to the contrary, and bound to the exercise of reasonable care and skill; and the tug owner was liable for a grounding of the barge through improper handling by the tugs, due to the failure to appreciate the effect of the currents on a tow so made up, although, if they had been allowed to tow in the usual way, the injury would probably have been avoided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 15.]

2. SAME.
Evidence considered, and *held* insufficient to sustain an allegation that the injury of a barge by striking some rocks outside the channel while being towed by two tugs down the Kennebec river was due to any negligence or want of skill on the part of the tugs, which were towing in the customary manner and kept the channel, but rather to show that the sheering of the barge was despite the efforts of the tugs to prevent it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 36.]

In Admiralty.

Edward C. Plummer, for libelant.
Benj. Thompson, for respondent.

HALE, District Judge. This libel in personam is brought to recover damages sustained June 3, 1906, by the libelant's barge Jeannie, while being towed down the Kennebec river by the respondent's steam tugs Perry and Seguin; also to recover damages sustained August 21, 1906, by the libelant's barge Emilie, while being towed down the Kennebec river by the respondent's steam tugs Seguin and Charlie Lawrence.

1. The facts relating to the injury to the Jeannie are substantially as follows: The barge Jeannie is a whaleback barge, about 265 feet in length, 26 feet beam, and drawing at the time of her injury 13 feet forward and 13.3 feet aft. The respondent company is the owner of a large fleet of steam tugs, and has been engaged in the towage business on the Kennebec river for many years. The testimony tends to show that, during the season, it generally tows about 3,000 vessels. The steam tug Perry is a vessel of 107 gross tons and is equipped with engines which develop about 400 horse power. At the time of the injury she was in command of Capt. Frank Dingley, who has had large experience as master of steam tugs on the Kennebec river. The steam tug Seguin is a vessel of 98 gross tons, built at Bath especially for Kennebec towage. She has condensing engines which develop about 400 horse power. At the time of the injury she was in command of Capt. Alfred H. Hogan, who has been master of steam tugs for many years; his experience being mainly upon the Kennebec river. The Kennebec river is a tidal river, upon which, for many years, there has been a large amount of navigation. Nearly all vessels tow on the river. With reference to the passage where the injury happened at Thorn's Head, 20 miles below Pittston, the place of starting, and only 3 or 4 miles above Bath, the testimony and the chart show that in going down the river vessels of 12 feet draft and upwards are obliged to make a turn to port of about three points in a distance of somewhat less than half a mile, and in that space there are several currents setting in different directions, due to the two branches of the river, through which the tide ebbs and flows, and due, also, to the location of islands and shoals. On the ebb tide the current sets out of Whiskeag creek and by Thorn's Head, where these currents come together. A black buoy marks a ledge which is passed on the starboard hand going down the river. A red buoy marks the sand spit a little below and on the opposite side of the river. In order to pass these places in safety it is necessary for a vessel to pass the black buoy close aboard and then swing sharply to port in order to pass between Thorn's Head and the red buoy. The general tendency of the ebb tide coming out of the Whiskeag Narrows is to set a vessel off from Thorn's Head. There is testimony that a vessel was never before known to strike on Thorn's Head.

On Saturday, June 2, 1906, the barge Jeannie completed her loading at the Independent ice house at Pittston. She had on board 2,345 tons of ice, and was drawing 13 feet forward and 13.3 feet aft. She was under the command of Capt. Herbert W. Jellison, a master mariner of 20 years' experience. Mr. Haley, the superintendent of the American Ice Company at that point, notified the respondent that the barge was ready for sea. Capt. Dingley, the agent of the towboat company at Bath, gave directions for the two steam tugs, Perry and Seguin, to go to the Jeannie on Sunday morning for the purpose of towing her to the mouth of the Kennebec river. Pursuant to this order, the Perry, in command of Capt. Frank Dingley, proceeded to Swan's Island on Sunday morning. From that point he towed the schooner Hattie to the Independent ice house at Pittston, anchored her in the river, and then went alongside of the Jeannie, which was

headed up river with her starboard bow against the wharf. The Perry then made fast to the port side of the Jeannie about 8 o'clock. At this time the other tug had not arrived. There is testimony of certain conversation between Capt. Dingley of the Perry and Capt. Jellison of the barge with reference to starting down river. About 10 o'clock the second tug was observed coming up river. The Jeannie was then started from the wharf; and the Seguin, in charge of Capt. Hogan, assisted in winding her. While the Perry was waiting alongside the Jeannie, Capt Dingley of the Perry and Capt. Jellison, the master of the barge, had some talk as to the character of the river and the manner in which the tugs should tow the barge. Upon their conversation I shall comment later. After the barge was turned, the Seguin made fast on the starboard quarter. About 10:20 the tugs started with the barge down river, the tide having fallen several inches. The tugs proceeded down river until they reached the vicinity of Thorn's Head, some 20 miles below Pittston. The tide at this point runs ebb nearly two hours earlier than at Pittston. While passing Thorn's Head, the snout or bow of the Jeannie struck the shore in practically a direct line down the river. She was considerably damaged below the water line, but immediately came off the ledge. The Seguin took a short hawser ahead, the Perry made fast again to the port quarter, and thus they towed the barge to Bath. The foregoing statement of the facts is, I think, without conflict.

There is a conflict in testimony as to what the talk was between Capt. Dingley and Capt. Jellison in reference to the manner in which the tugs should tow the barge. Capt. Jellison of the barge testifies:

"We had the tug Perry tied up on our port quarter and the tug Seguin was tied up on our starboard quarter.

"Q. By whose orders did they assume those positions, so far as you know?

"A. By their own. They had no orders from me. They placed them there at their own option."

Capt. Dingley, the master of the Perry, testifies that he arrived at the Jeannie at 8 o'clock on Sunday morning; that she was then headed up river, with her starboard side against the wharf; that he went on the port quarter, threw a line out at each end, and said to Capt. Jellison:

"Take in your lines and we will start you down."

Capt. Dingley testifies as to his conversation with Capt. Jellison as follows:

"He [Capt. Jellison] says: 'Where's the other boat? I'm going to have two boats.' I says, 'She will be right along.' 'Well,' he says, 'we will wait until he comes.' I says, 'Captain, let us start you along,' and he says, 'Not until the other boat comes.' He says, 'How are you going to tow me?' and I says, 'With one boat alongside and one ahead,' and he says, 'No; I am going to tow with a boat on each side.' I says: 'Captain, you had better let us tow you that way. We can handle you better.' But he says, 'I want a boat on each side.' I says, 'Captain, usually when strangers come here, we generally handle them our own way.' 'Well,' he says, 'you are going to handle me my way.' I says, 'If we handle you your way, you ought to be responsible if you have the say about it.' I says, 'When we handle them our way, we assume the responsibility; but when we don't, we do not.' He says, 'You are going to tow me with a boat on each side.'

I says, 'You're the doctor, but,' I says, 'let me start you before the tide gets to hawsing.' I says, 'It is about high water.' He says, 'Wait until the other boat comes.' I says, 'The boat was ready to start about the same time and she was taking a boat away from Murdock's, and I was expecting her every minute.' While we were talking, Mr. Haley says, 'There she comes now.' I took my glasses and looked, but it was not the Delia; it was the Seguin. I says: 'Captain, here comes the boat now. Let us take in our lines and get started.' So he did, and we got half swung round when the Seguin got there.

"Q. Now, Captain, when you first had this talk with him, which was when you first reached the barge, what was the state of the tide? A. Very near high water.

"Q. You say about what time you came alongside of him? A. We left the barge about 8 o'clock.

"Q. Did he say at that time anything with reference to whose orders he was acting under about having a tug on each side? A. Yes; his people's.

"Q. What did he say about his people? A. He said his people ordered him to have two tugs; he was to have two tugs.

"Q. Did he say how the tugs were to tow him? A. He didn't say anything about having been ordered as to how the tugs was to tow him.

"Q. What did you say to him when he said he was going to have a tug on each side? A. I told him it was an awkward way.

"Q. Anything about what effect it would have to have a tug on each side? A. He says they docked me with boats on either side.

"Q. What reply did you make to that? A. I says, 'Certainly, Captain, that is the only way they can do.' 'But,' I says, 'we go down a shoal river, and we have to cross the tides at some points, and a boat alongside cannot do as well as a boat with a hawser over the bow.'

"Q. Did you tell him what advantage the hawser over the bow would have about swinging her? A. I told him we could swing much better with a hawser over the bow than he could alongside.

"Q. Anything said as to whether you ever towed with a boat on each quarter on the river? A. I says, 'We never towed a vessel down the river that way before.'"

Later in the examination, Capt. Dingley further testifies:

"The Seguin came up around his bow. His bow was off. He lay diagonally across the river, swinging very slowly. The Seguin came up and says, 'Where do you want me; a hawser ahead?'

"Q. What reply was made? A. 'Alongside.'

"Q. Who said that? A. It was asked a second time, and nobody answered the second time. The second time, I says, 'The captain says he wants you alongside.'

"Q. And what did the Seguin then do? A. Made fast alongside.

"Q. Whereabouts? A. On the starboard quarter.

"Q. And then you started down the river, did you? A. We did.

"Q. When you got started down the river, at the time you started down the river, what time was it? A. Just as we got swung round, the church bells rung at South Gardiner, and I looked at my clock and it was 20 minutes past 10.

"Q. Then as you went down the river did your boat continue on the port side and the Seguin on the starboard? A. Yes, sir.

"Q. And when you got straight down the river what did you do about going full speed ahead? A. We went full speed ahead where the river was straight and good, and when we came to the turns we would slow up or back, as the case would be, whichever way we would turn.

"Q. Make the turns all right? A. Yes; made the turns all right; a little slow at one or two.

"Q. How did the barge appear to answer her helm? A. Slowly.

"Q. But she did respond, did she? A. She did."

This was the first trip that Capt. Jellison had ever made upon the river. No disaster occurred until the arrival at the black buoy, half

a mile to the westward of Thorn's Head. The testimony shows that, when the barge had gotten sufficiently far beyond the black buoy to make the turn, the wheels on both the tugs and the barge were starboarded. At some time after this the engines of the Perry on the port side of the barge were reversed. Capt. Dingley of the Perry had charge of the tow. The barge then, with the tugs on either side, began to swing to port. The Seguin on the starboard side was going ahead, while the Perry on the port side was backing, which tended to swing the tow to port. But somewhere after passing the black buoy the Seguin ceased to work its engines forward and began to back. There is some indefiniteness as to the precise point at which the Seguin began to back. It is claimed by the libelant that if she had continued to go forward, leaving the Perry, on the port side to continue to back, the turn would have been properly made, and Thorn's Head would have been passed in safety. The testimony convinces me that the barge was under the control of the tugs. I do not find anything to persuade me that she did anything to prevent the tugs from exercising complete control and dominion over her. It is clear that they did not successfully pass Thorn's Head. Capt. Jellison of the barge testifies that he does not know why the Seguin backed; that Capt. Dingley of the Perry did not know; and that, soon after the accident, Capt. Dingley said that if the Seguin had not backed he would have made the turn.

The respondent insists that if the tugs had been attached to the tow in the manner first designated by Capt. Dingley, namely, one forward on a short hawser and the other on the port side, the towage service would have been successfully performed; that in fact it could readily have been performed with one tug forward on a short hawser, and without the aid of a second tug. The testimony on the part of the respondent is that Capt. Jellison insisted upon having the barge towed with a tug upon either side of her, and that, with great reluctance, Capt. Dingley towed her in this way. But the testimony falls short of proving an agreement on the part of the libelant to bear the responsibility of this method of towage. The tugboats were not common carriers. When Capt. Dingley found that he was unable to convince Capt. Jellison that the latter's method of towing was open to serious objection, Capt. Dingley had the right to refuse the towage service. If the delay occasioned by the protracted conversation had made it too late to start down the river that day, he had the right to delay the towage service until the following day, when an earlier start could have been made.

In the case of The Naos (D. C.) 144 Fed. 292, 299, this court held that the captain of a tugboat was in fault in starting at too late an hour, "even if he was urged to this delay by the charterer."

In the case at bar, Capt. Dingley adopted this method of towage without obtaining Capt. Jellison's assent to assuming the responsibility for it. As to the effect of such assumption of responsibility, if there had been any, it is not necessary for me to consider. Capt. Dingley testifies that he had never towed barges in this way before; and he now says that if he had towed the barge in the method which he had suggested he could have done it successfully. But, having adopted this method of performing the towage service when he had the

right to decline it, he must be held to the use of the reasonable skill of a prudent mariner in conducting the towage after this method.

In The Margaret, 94 U. S. 494, 24 L. Ed. 146, in speaking for the Supreme Court, Mr. Justice Swayne held that, although the steam tug performing the towage service was not a common carrier, nor an insurer, it was bound to exercise reasonable skill and care in every particular relating to the work until it was accomplished; that she was bound to know the channel of her home port, and whether, under all the circumstances, it was safe and proper to attempt to perform the towage service; and that if what occurred was inevitable the tug should have forecast it and have refused to proceed.

In Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477, the Supreme Court held that, as a necessary incident to the engagement, the tug assumed supreme control of the tow. In speaking for the court, Mr. Justice Hunt said:

"When the master of a tug undertakes to transport a barge he must apply the means for that purpose. He must furnish the motive power not only, but he must direct her location, whether on the port or the starboard side, whether she shall be the inside boat or the outside boat, when and how she shall be lashed to other boats; * * * and what shall be her course of navigation."

In The Garden City, 127 Fed. 298, 62 C. C. A. 182, it was held by the Court of Appeals for the Sixth Circuit that the master of a tug is bound to possess such degree of skill and judgment for the protection of his tow as might fairly be expected from a man of his calling under all the circumstances in which he is placed.

In Winslow v. Thompson, 134 Fed. 546, 67 C. C. A. 470, it was held by the Court of Appeals in this circuit that the tug is bound, first, to know the condition of the channels and other waters where she assumes to tow.

In Schuyler v. Tillyer (C. C.) 41 Fed. 477, it was held by the Circuit Court, Eastern Pennsylvania District, that, while the tug did not stipulate for the absolute safety of the schooner, yet she was bound to meet such requirements of her service as would enable her to render it with safety to the schooner. She must know the depths of water in the channel, the obstructions that exist in it, the state of the tides, the proper time of entering upon her service and, generally, all the conditions which are essential to the safe performance of her undertaking. In that case, the court said:

"If she failed in any of these requirements, or in the exercise of adequate skill or care, she is justly subject to an imputation of negligence."

In the case of The Florence (D. C.) 88 Fed. 302, Judge Coxe, sitting in the District Court, held that it was the duty of the master of a tug to see that the tow is properly made up, and that he must know the conditions of the river, the width of the channel, and the effect of the tide; that he is the pilot of the voyage, and responsible for the navigation of both vessels.

In the case of The Deer, Fed. Cas. No. 3,737, Judge Blatchford says:

"The fact that the existence of the sunken pier was known to those navigating the steamboat makes the running of the barge upon it conclusive evidence

of negligence, under the circumstances, in the absence of proof of any vis major."

In Thompson v. Winslow (D. C.) 128 Fed. 73, this court quoted these words of Judge Webb in an unpublished opinion:

"The slightest departure from the highest skill and care is almost certain to be attended with loss, and, although the mere fact of trouble raises no presumption of fault, it does call for the sharpest scrutiny of all the attending circumstances."

In The Somers N. Smith (D. C.) 120 Fed. 572, this court quoted Judge Fox:

"Knowing * * * all these dangers, * * * a much higher degree of skill, care, and attention is demanded of him [the master of the tug] than if he had undertaken the same movement under circumstances free from danger."

Moore v. The C. P. Morey, Fed. Cas. No. 9,756, has been called to my attention as a controlling authority. In that case a tug took in tow a schooner and was furnished by the schooner with a frozen towline. The tug asked for a better line. She was told, substantially, to do the best she could with the frozen line. Judge Blatchford held that she did the best she could with it, and there her duty terminated; and he held that the tug was not in fault for any difficulties arising in consequence of the use of the line, provided it was used with reasonable care.

Goodwin v. The C. Durant, Fed Cas. No. 5,552, has also been called to my attention. In that case the tug acted in pursuance of the directions of the libelant, and of the pilot placed in control by the libelant. The action was in contract. The court held that the respondent had not broken the contract of towage.

In the case at bar the respondent cannot be held as an insurer. The fact that there was an injury is not sufficient to find the respondent in fault. It must be held to the use of the reasonable care exercised by ordinarily prudent mariners under all the circumstances. In The Niagara (D. C.) 20 Fed. 153, Judge Addison Brown held this "reasonable care" to be "such due care and diligence in handling the tow as a man of ordinary precaution would exercise in the preservation of his own property."

Did the respondent use such care in this towage service? The fact that Capt. Dingley never had towed in this way before, and that he says he was unwilling to do so, are facts that suggest a very close scrutiny into the details of his actual performance of the towage service. Was he in the exercise of such skill as prudent mariners employ when towing a barge with a tug made fast to either quarter? The fact that he was averse to this method of towage does not excuse him from the exercise of reasonable care in performing it. The fact that he knew enough about the dangers of this method of performing the towage service to warn the barge is not conclusive on the question whether he competently knew the condition of the channels and the effect of the tides upon a barge towed with a tug on either quarter, within the meaning of the first proposition of Winslow v. Thompson, supra. The evidence persuades me that he did not un-

til too late, discover the effect of the current upon his tow. He had been accustomed to another method of towage. He was not familiar with the construction of the Jeannie. He did not, I think, appreciate the effect of the current upon a whaleback barge with a large overhang forward. I have already referred to much of the testimony, but not to all of it. The whole testimony, taken together, leads me to the belief that he did not have the necessary experience or skill in that particular method of towage; and I am persuaded that the injury resulted from this cause. After a full examination of the evidence, I am of the opinion that the captain in command of the tugs failed in the exercise of reasonable care in manœuvring one or both tugs; that he failed in judgment as to the time to back the Seguin on the starboard side; that he was also guilty of a fault alleged in the libel, in that he failed to back the steam tug Perry on the port side in time to swing the barge. I think his error in seamanship resulted from the fact that he did not realize the effect of the current upon the barge with a tug made fast upon either quarter. There is no evidence which persuades me that, upon the day of the injury, there was any unusual swiftness in any current, or that the barge was in fault.

In Hall v. Little, Fed. Cas. No. 5,939, it was held that steamers which navigate in a channel with which they are familiar must be held to a knowledge of the currents incident to the state of the water, and they must be held responsible if they allow themselves to be driven by such current to the infliction of an injury.

In The Granite State, 70 U. S. 310, 18 L. Ed. 179, the Supreme Court held that where a vessel had the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her, the court is not called upon to inquire as to the precise detail wherein the steamer was not managed with nautical skill.

In the case before me it is not necessary to decide which fault in seamanship produced the disaster; nor is it necessary to decide whether the libelant is correct in its testimony that this peculiar method of towing was adopted at the option of the respondent, or whether it was a service urged upon it, as its testimony indicates. The master in control of the tugs adopted a certain method of towage, which he was not at law or in fact compelled to adopt. In the carrying out of such service he must be held to the reasonable care of a prudent mariner.

This case does not present the question which came before the court in Moore v. The C. P. Morey, supra. I have already stated the decision in that case. In the case at bar I will assume, for the purpose of comparison of the two cases, that Capt. Dingley is wholly correct in his statement that the method of towage was urged upon him and that he adopted it reluctantly. I have found that, not being a common carrier, he had the right to refuse such towage service, and that, as a matter of fact, having adopted this method of towage, he did not perform it with the reasonable skill to be expected of a prudent mariner. In other words, I have found that he did not "do the best he could under all the circumstances of the case."

Goodwin v. The C. Durant, supra, does not present a case in point. In that case the action was in contract, and the court held that the respondent had not been shown to have broken the contract, in that it

acted in pursuance of the directions of the libelant and of the pilot who was placed in control by the libelant.

In the case at bar the tugs had full control. Whatever fault there was in seamanship in coming around the turn was the fault of the tugs and not of the barge. The testimony is indefinite; but it is sufficient to convince me that if Capt. Dingley had caused the Perry on the port side to begin backing at the proper time, and if the Seguin had continued to go ahead, the movement of the vessels to port would have been sufficient to escape Thorn's Head, and to make the turn successfully.

I am, therefore, of the opinion that, in the case of the injury to the Jeannie, the respondent did not, in its towage service, exercise the degree of skill and care that might be fairly expected of a prudent mariner under the circumstances. I hold that the respondent was in fault, and that the injury happened solely on account of the fault of the respondent.

2. The facts relating to the injury to the Emilie are, in substance, as follows: The barge Emilie is a vessel of 1,069 gross tons, 216 feet long, 35 feet beam, and at the time of her injury was drawing 15 feet 6 inches forward and aft. On August 21, 1906, she completed her loading of ice at Pittston. About 12 o'clock the steam tug Charlie Lawrence, in command of Capt. Blanchard, started her from the wharf and carried her into the stream. The tide was then flowing. Half an hour later the steam tug Seguin arrived in command of Capt. Hogan. The tugs waited nearly an hour before starting, so as to start before high water. The Seguin took a hawser about 20 fathoms in length through the bow chock. The Lawrence was made fast on the port quarter to help steer. At the time of starting and during the towage service the wind was light from the eastward, and the weather was clear. The tugs proceeded down the river. Capt. Blanchard of the Lawrence was standing on the port side of the bridge of the barge forward of the pilot house, while his mate was standing at the wheel of the tug. Capt. Nordell and the assistant engineer were at the wheel of the barge. Capt. Blanchard gave the captain of the barge orders to follow the Seguin. The tugs with their tow proceeded for about three-quarters of an hour under one bell, giving a speed of 2½ or 3 miles, as estimated by Capt. Blanchard, and 5 knots, as estimated by Capt. Nordell. When in the vicinity of Goodwin's Point, off the southern end of Nehumkeag Island, the barge dragged across a point of rocks, striking a glancing clip and sliding by. The alleged fault in towage is that the barge "was towed violently upon some rock or ledge at or near Goodwin's Point," and, further, that the damages and injuries sustained were caused wholly by the negligence and unskillfulness of defendant, its servants and agents controlling the tugs, "in not following the safe channel of said river, instead of towing said barge upon the rocks or ledge aforesaid, and, further, laying a course so near said submerged rocks at Goodwin's Point as to cause a vessel of the size and capacity of libelant's barge, heavily laden, to strike upon said submerged rocks."

Capt. Nordell, the master of the barge, a mariner of experience, testifies that he was never on the river before; that the Seguin was

made fast with the usual length of hawser to swing the vessel quickly; that he received his orders from Capt. Blanchard, who remained on the Emilie's bridge during the towage service, and that these directions were to follow the Seguin; that the two tugs gave the Emilie a speed of about 5 knots through the water; that within a distance of about a mile the Seguin was on both the port and starboard bows of the barge, which Capt. Nordell then supposed was due to the crooked channel; that when near Hawthorn's Rock, the place of the injury, the Seguin cut right across the Emilie's bow to starboard, and that Capt. Blanchard called to Capt. Nordell to port his wheel; that Capt. Nordell followed the Seguin as near as he could; that she sheered a little to port and then sometimes to starboard, although these sheers were not more than one point; that he supposed these sheers were caused by the Seguin following the channel; and that he supposed the channel was crooked.

Capt. Blanchard, who was in charge of the towage service, has been engaged in service on the Kennebec river for 42 or 43 years, and had been master of the Charlie Lawrence for 24 years. He testifies that he is familiar with the waters at Nehumkeag Island, had sounded there every year, and had not observed any change; that the channel at that point is scant 100 feet in width, and that it carries a depth of 17 feet; that such draft is sufficient to tow a barge of the Emilie's size; that at the time of the towage service he supposed the Emilie was drawing 16 feet, when, as a matter of fact, she was only drawing 15 feet 6 inches, both forward and aft; that he asked Capt. Nordell about the steering of the barge, and that the latter said she did not steer very well; that he told Capt. Nordell that he would have to steer pretty fine, as the river was crooked and narrow; that they started about an hour before high water; that he does not know of any better way to handle a barge than the method adopted, with a tug ahead on a short hawser and a tug made fast on the port quarter, because with steam tugs, made fast in that way, they can swing back and forth quicker than they can do with a tug on each quarter, and that they are in the habit of towing in this way on the Kennebec river; that in towing down the river they have ranges to run by, so as to tell whether they are in the deep water of the river or not; that he steered by such ranges; that as they came down the river the Seguin followed the ranges, but the barge did not do quite so well; she would vary a little; and when they got to the northern end of Nehumkeag Island, ready to turn, she took a rank and sudden sheer to starboard, towards the island; that he then stopped his tug, which was working under a slow bell; that he reversed his engines and ordered the wheels of the barge and tug to starboard; that the tug's wheel was rolled over quickly; that he thinks the barge sheered toward the island about 3 points from a straight course down the river; that when she sheered the Seguin hauled to port about 3 or 3½ points; that when they checked the sheer to starboard the tug started to go to port, and at that time they were a length or more above the rocks on Goodwin's Point; that the barge made a rank sheer to port about 3 points from a straight course down the river; that he then ordered his boat to come ahead under a hard-aport wheel, which would tend to twist her off; that at that time

the Seguin was trying to go to starboard, and he ordered the helm of the barge to be ported, but that she did not get over in time; that, when he saw the barge was going to strike, he stopped his boat, as he did not want to give her any more headway to cause her to strike too hard; that if he had reversed full speed astern it would have had a tendency to haul the barge's bow to port and get her over still more to the port side; that if she had been 30 feet to the westward she would not have struck; that he could not account for the sudden sheer of the Emilie, unless it might have been that they were going a little bit too strong, or something like that, or might have been making the turn a little quick, but they were not making more than 2½ or 3 miles an hour, and that speed was none too much to give her steerage way. He says, further, that he cannot understand why she took a sheer, and that they were trying to break it. Capt. Hogan testifies that he was in the habit of sounding out the channel to ascertain the depth of water; that the channel between Goodwin's Point and Nehumkeag Island is practically clear; that there is plenty of room for a vessel like the Emilie to go down as she was; that at the time of this towage service there was 18 feet of water at Goodwin's Point and 18 feet or better in the channel; that the channel is about 100 feet wide for a distance up and down the river of three-quarters of a mile; that he gave the Emilie about half speed; that his boat was running under one bell, which was slow for that part of the river; that if the Emilie had followed the course of the Seguin she would have gone clear all right, as the Seguin was at no time out of the deep channel; that up to the time of the injury the Emilie had been following fairly well, but that, he thinks, she sheered to the westward about three points, and he hauled to port to break her starboard sheer; that he then hauled to the westward to steady her, but that the Emilie went about three points to the eastward on her next sheer; that when she was sheering back he watched her, and when he saw her sheer to the eastward he hauled to starboard to break her sheer; that then she dragged the bottom; that by the hawser he did not know she was dragging, but that he learned the fact from the captain of the barge when he got her down to the flats, at the mouth of the river.

I heard the testimony of the witnesses. When they were upon the stand I saw that they had a careful examination. I have considered the whole testimony with care. I cannot find that the libelant has adduced sufficient evidence to sustain the burden that is upon it to prove negligence on the part of the respondent. Clearly it has not sustained the contention in the libel that the tugs were at fault in not following the channel of the river and in towing the barge too near the submerged rocks. It is true that the testimony shows the Emilie some 30 feet outside the channel at the time she struck, and that the burden is thus cast upon the respondent to explain this fact. But the fact is explained by the evidence, to the substance of which I have already referred. The whole evidence convinces me that the divergence from the channel was caused by the sheering of the barge. It does not appear that the sheering was caused by any negligence on the part of the tugs. It does affirmatively appear that the tugs followed the channel closely; that they followed the ranges along the shore. The courts

have repeatedly held that the mere fact of sheering is not sufficient to prove negligence on the part of tugs. Sheering might come from one of many different causes. It is quite as likely to proceed from the fault of the tow as from that of the tug. In the case at bar, whether the sheering resulted from the barge being too full aft, from her steering hard, or from her not answering her helm readily, are matters that the court need not decide. I have quoted the testimony of Capt. Blanchard in reference to the possibility of the tugs "going too strong"; but this remark does not furnish sufficient reason for condemning the tugs, for he further testifies that the speed at that time was not more than barely enough to give steerage way. The fact that the captain in charge of the tow indicated this as a possibility would have been a very suggestive piece of evidence, if I could find that the tugs were, in fact, proceeding rapidly. But the testimony shows the exact contrary. It shows affirmatively that the forward tug was proceeding slowly in the channel, taking care to follow the monuments upon the shore.

In the case of The Lady Wimett (D. C.) 92 Fed. 399, Judge Coxe, sitting in the United States District Court, said:

"The course which the Wimett took was the usual one. * * * When the Niobe encountered the return current near the end of the Erie Basin Pier she took a decided sheer to starboard. The Wimett endeavored to overcome this sheer by every means in her power and would, in all probability, have succeeded had not the chock and cleat given way in succession, leaving the Niobe helplessly adrift. The court has read the entire testimony, having in mind the allegations of fault against the Wimett and is forced to the conclusion that none of them has been established. * * * The Wimett's course was not too close to the breakwater. * * * The Wimett was entirely capable of towing a single canal boat to Buffalo and there is no reliable testimony to the contrary. The line was the ordinary length, and the pretense that a bridle was necessary seems wholly without support."

In The Winnie, 149 Fed. 725, 79 C. C. A. 431, delivering the opinion of the Circuit Court of Appeals, Judge Coxe said:

"The burden was on the libelant to prove fault on the part of the tug; in this he failed. The testimony preponderates overwhelmingly in favor of the claimant to the effect that the tow was made up in the usual way. This being so, we cannot escape the conclusion that liability cannot be predicated of a finding that the tow was made up in an unusual way. The libelant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel.

"It is not at all unlikely that the damage was caused by the swells of passing ferryboats, but the court is not called upon to enter the realms of conjecture in an attempt to ascertain how the accident was caused. It is enough for the present cause that the tug did not cause it. * * * The master, according to the great preponderance of proof, exercised the reasonable care, caution and maritime skill required. The tug was not an insurer, and cannot be held liable merely because the Fermoil received an injury while in her custody."

In the case at bar it is unnecessary to decide whether the towage would have been safer in reference to sheering if the unaccustomed method had been pursued of putting a tugboat on either side of the barge. The result in the case of the Jeannie a few weeks before created no presumption in favor of that method of towing; and in the

case of the Emilie I cannot condemn the respondent for not following the method of towing pursued in the case of the Jeannie.

In the matter of the Emilie, I am constrained to find that the libelant has not sustained its contention that the respondent was at fault, either in not following the channel of the river, or in towing the barge too near the submerged rocks, or in any other allegation of its libel. The testimony shows that the tugs were, in fact, following the channel of the river and were not towing too near the submerged rocks. It persuades me that the injury resulted from the sheering of the barge; that this sheering accounts for the barge going out of her course upon the rocks in spite of the efforts of the tugs to break her sheer. In the case of the Emilie, I find that the respondent was not at fault.

The result, then, is that in the matter of the first injury, namely, to the Jeannie on June 3, 1906, I find the respondent at fault. In the case of the injury to the Emilie, on August 21, 1906, I find that the respondent was not at fault.

An interlocutory decree may be entered in favor of the libelant. An assessor may be appointed to assess damages in accordance with this opinion. The libelant may recover its costs.

UNITED STATES v. MARRIN et al.

(District Court, E. D. Pennsylvania. March 3, 1908.)

Nos. 44–46.

1. CRIMINAL LAW—FAILURE OF PROOF AND VARIANCE—MANNER OF RAISING QUESTIONS.

   A failure of proof and a variance between the allegations and proof are questions properly raised by a motion for a new trial, and not by motion in arrest.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2461.]

2. SAME—ARREST OF JUDGMENT—WHEN PROPER.

   A criminal judgment will only be arrested for matter appearing of record which would render the judgment erroneous if given, the evidence being no part of the record for such purpose. The rule in civil cases that the matter alleged in arrest must be such as would have been sufficient upon demurrer to overturn the action or plea applies, also, to criminal cases.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2423.]

3. SAME—NEW TRIAL—UNFAIR NEWSPAPER ARTICLES READ BY JURY.

   Though one accused of conspiring to use the mails in carrying out a scheme to defraud would have been entitled to the withdrawal of a juror where it appeared that jurors had read newspaper articles charging him with having lived in luxury while a fugitive from justice; containing illustrations evidently intended to belittle and place him in a mean light before the jury and in the community; representing him as hardened and indifferent to the sufferings of his victims; referring to his associate's conviction of a similar offense, and asserting that accused was joined with him in the scheme to defraud, set forth in the case on trial and in others; connecting accused with alleged swindlers and criminals; referring to his demeanor in court in a contemptuous way; charging that his witnesses were of bad character, unreliable, "bartenders, bank cashiers, waiters,

and rounders of many types," etc.—he is not entitled to a new trial, he having directed his counsel not to insist upon the withdrawal of a juror, after an examination of the jurors as to whether they had read the articles, and having expressed a willingness to proceed with the trial.

4. POST OFFICE—UNLAWFUL USE OF MAILS—PROOF.
Where one was tried for conspiring to use the mails to carry out a scheme to defraud, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], making it an offense to conspire to commit an offense against the United States, and under section 5480 [page 3696], making it an offense to use the mails to carry out a scheme to defraud, it was sufficient for the government to show that written or printed matter about the scheme charged was mailed to one of the three persons named in the indictment as the persons defendant planned to defraud, and that copies of the same printed matter was sent through the mails to a mailing list throughout the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 86. Use of mails for frauds and counterfeiting, see note to Timmons v. United States, 30 C. C. A. 86.]

5. SAME.
In an indictment for conspiring to use the mails to carry out a scheme to defraud, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], making it an offense against the United States, and under section 5480 [page 3696], making it an offense to use the mails to carry out a scheme to defraud, the names of as many persons defendant planned to defraud may be used in the indictment as the pleader may know, and all mail connected with the scheme, shown to have passed through the post office to any person whether named in the indictment or not, is evidence upon the question of the existence of the scheme.

6. CRIMINAL LAW—WRIT OF ERROR—PRESUMPTIONS.
Where, in a trial for conspiring to use the mails in carrying out a scheme to defraud, on an indictment charging a scheme to defraud named persons and others whose names were unknown to grand inquest, there was no showing that any other persons than those named were known to the grand inquest, it must be presumed on writ of error that the indictment in this regard truthfully states the fact.

7. POST OFFICE—CONSPIRACY—UNLAWFUL USE OF MAILS—EVIDENCE.
In a trial for conspiring to use the mails in carrying out a scheme to defraud, the cashbook, checks, and entries of cash in defendant's deposit book in a trust company, made during the continuance of the scheme, were properly admitted to show the conspiracy.

On Motion and Reasons for a New Trial.

J. Whitaker Thompson and John C. Swartley, for the United States.
V. Gilpin Robinson and John Creth Marsh, for defendant.

HOLLAND, District Judge. In this case, in due time after verdict, the defendant filed motions in arrest of judgment and for a new trial. Neither of the six reasons set forth in arrest of judgment raises any question which the court can consider on this motion. Both questions variously stated, to wit, a failure of proof and a variance between the allegata and probata, are questions properly raised by a motion for a new trial. After verdict, a judgment will only be arrested for matter appearing on any part of the record which would render the judgment erroneous, if given. The rule in civil cases "that the matter alleged in arrest of judgment must be such as would upon demurrer have been sufficient to overturn the action or plea" is the same and applicable in criminal cases. Wharton's Criminal Pleading & Practice (8th Ed.)

§ 759; Sadler's Criminal Procedure, § 516. The indictment and record of the trial can alone be considered, and the evidence is no part of the record for the purposes of passing upon a motion in arrest of judgment. Commonwealth v. Gurley, 45 Pa. 392; Commonwealth v. Kammerdiner, 165 Pa. 222, 30 Atl. 929; Commonwealth v. Newcomer, 49 Pa. 478. Thus the motion will be sustained when it appears from the record that the court is without jurisdiction, or that the act of Assembly on which the indictment is framed is unconstitutional, or that the indictment is insufficient, but not when a support of the reasons depends upon a reference to the evidence adduced. Such objections can only be raised on a motion for a new trial, and as they are involved in the reasons set up in this motion, we will pass to the consideration of the motion and reasons for a new trial. They are 61 in number, but they will be considered as summarized by counsel for the defendant at the argument.

First. "The newspaper accounts of the trial, as published in the North American, and read by the jury, were so unfair, distorted, and biased in favor of the government as to prejudice the defendant and deprive him of a fair trial." On the morning of September 23, 1907, the trial began, and the copies of the North American containing the offending matter were published and issued on the 23d, 24th, 25th, 26th, 27th, 28th, and 30th of September and the 1st, 2d, and 3d days of October. On the morning of the latter date, counsel for the defendant made a motion for the withdrawal of a juror, for the reasons above stated. The reports of the trial complained of, to say the least, were highly improper. They were calculated to hold the defendant up to contempt and create a prejudice in the mind of any person in whose hands a copy containing them might fall. They were not only highly sensational, but material portions of the evidence were distorted and some of the statements without foundation in fact. Reference is made to the fact that Marrin fled. This is repeated over and over again. The witnesses who testified narrated the same story in court that they had to the North American two years before. Great prominence was given to illustrations evidently intended to belittle the defendant and put him in a mean light before the jury and in the community. These illustrations were accompanied with comments representing the defendant as hardened and indifferent to the sufferings of the people who had been defrauded by him and his associates. The articles made repeated references to Francis as convicted of a similar offense and sentenced to the penitentiary, and the unqualified assertion is made that the defendant was joined with him in the scheme to defraud, set forth in the case on trial and in others. Reference is frequently made to Francis being brought from the penitentiary to testify. Illustrations show Francis and Marrin in conference, with special and prominent reference to them as "Partners Francis and Marrin conferring." He is connected with a number of other alleged swindlers and criminals, who it is said had been engaged in similar enterprises. He is charged with being a fugitive from justice, living in Paris in luxury with money received from the Storey Cotton Company. His demeanor in court and his manner upon the stand and his testimony are spoken of

in a contemptuous way. The witnesses called by him are said to be of bad character and unreliable; they are discredited by disparaging insinuations, in such statements as that "bartenders, bank cashiers, waiters, and rounders of many types were included in the collection of alibi witnesses called for the defense."

Following are some of the statements complained of:

"Marrin's trial comes directly as the consequence of charges made by the North American in the winter and spring of 1905 against the collection of swindlers, the chief of which was the Storey Cotton Company, and their nest, the Philadelphia Consolidated Stock Exchange, otherwise known as the 'Con Stock Exchange.' The revelations made by this newspaper were made daily for more than a month. At first the conspirators tried to brazen out the storm, their main refuge being in outcries against 'sensational journalism.' Finally Marrin fled, a receiver was appointed for the fraud, and the house of cards tumbled down upon the dupes who had builded it. Postal Inspector Dixon was removed as a result of the scandal which developed when a check made to him was found among the papers of the defunct company.

"Other Swindles Smashed.

"The North American having set the United States authorities on the trail of the Storey Cotton Company swindlers then turned its guns on the Provident Investment Bureau, and speedily closed up that swindle. Stanley Francis, its head, who was one of the principals in the Storey Cotton Company fraud, was caught, and after a desperate fight convicted and sentenced by Judge Holland to five years' imprisonment. The Supreme Court took a year from his sentence on the ground that the defendant had not been tried properly on one of the five charges against him. The North American then smashed the Haight & Freese bucket shop, and caused the 'Con' stock exchange to be banished from its quarters in the Bourse. Marrin was a fugitive for more than a year. He fled to Europe, where, with F. Ewart Storey and Thomas H. Quinlin and Sophie Beck, the woman head of the concern, and other members of the concern, he lived in luxury. He returned to this country and was arrested by Chief Postal Inspector Cortelyou in the Hotel Genessee, Buffalo, last November. Marrin was held under $25,000 bail by United States Commissioner Keating of Buffalo, but this was afterwards reduced to $10,000 by Judge McPherson."

On Wednesday, September 25, 1907, the headlines were as follows:

"Marrin's Letters to Storey Dupes Read to the Jury.

"Glittering Promises that Built up Swindle.

"New Alias Found.

"The Defendant Ran Branch Office as 'Stewart' is Sworn.

"Francis to Testify.

"Convict Will be Taken from the Penitentiary to Court.

"Seen at the Marrin Trial.

"Frank C. Marrin alias Stone, alias Harper, alias Stewart, wears a studied expression of bored indifference most of the time. Professor Thompson acted as the 'Judas' sheep for the herd of dupes—in New Jersey whom he led to the Storey Cotton Company's shambles. He will probably tell to the jury to-day the same shameful story he told to the North American more than two years ago. * * * Pathetic and realistic was the picture of despair and poverty made by the victims of the smashed swindle as they sat beside a long table, inside the bar enclosure, and selected from a heap of correspondence lying letters that had been received from the headquarters of the Storey Cotton Company. Irving S. Miller, a one-armed watchman, was one of these searchers. His grizzled head was held low to the table, while he held, one after the other, the envelopes in his teeth and took from them with his remaining hand the letters that had lured him to give his hard-earned savings

to the swindlers. * * * He had put by $1,300 to provide for the needs of himself and his family in his old age. This money was swept away, before Marrin, Sophie Beck, and the rest of the gang fled to Paris where they lived in luxury. Stanley Francis was brought from his cell in the Eastern Penitentiary to confer with Marrin and defendant's counsel. * * * Francis is evidently well supplied with money. He was fashionably dressed."

Stanley Francis, who at the time of the trial, was serving a sentence in the Eastern Penitentiary, did not appear as a witness in the case.

On October 2d the following appeared:

"Storey Cotton Co. Victims Helped Marrin Cut Big Dash at Races.

"Bet $30,000 at Once While Lambs were Being Sheared.

"Woman Warned.

"Witness for defense admits she told him to beware of Farrel. * * *

"Farrel, of the many aliases, also told of this big bet and of others almost as large. He told also the names of the race horses owned by Marrin during this period. One of these was Lightning Tom, presumably named after Marrin's brother 'Tom,' said to be the fastest telegrapher in the country and the owner of the noted 'Marrin Pirate' wire, which supplies bucket shops and pool rooms throughout the country with quotations and race results. Others were Mollie Donohue, Daffy Down Dilly, and a score of others with names equally eccentric. Edward Marrin and Farrel testified that the Thomas Harper who posed as treasurer of the Storey swindle was 'Pat' Kearns, Marrin's brother-in-law. Bartenders, bank cashiers, waiters, and rounders of many types were included in the collection of alibi witnesses called by the defense."

It is very clear that the publication of such statements, comments, and illustrations tended to create a strong prejudice against the defendant, and to prevent a fair and impartial trial. Such treatment may be required in the preliminary stages of an effort of a daily paper to uncover some fraudulent scheme being practiced upon the public. It is no doubt a difficult and at times a perilous task to expose the vices and the vicious in public or private life, but very much greater are the difficulties and dangers which beset a journal in the work of driving out skillful swindlers entrenched behind schemes, which, upon their face, have all the appearance of fair business transactions, and who are armed with the power of wealth and position afforded by their ill-gotten gain; and when engaged in such commendable public service, being sure of its ground, the journal is no doubt justified in stating every fact and legitimate inference, either direct or remote, bearing upon the subject or relating to the parties in such vigorous manner and readable style as are best calculated to carry conviction. The whole life, the evil associates, other crimes past and present of the persons exposed, may be fused with the direct facts supporting the charge with all the skill and dash of the modern reporter and within the domain of truth, though highly colored, is not disapproved. But when the object is effected, and the party exposed is in court to defend against the crime charged, he is entitled to a fair and impartial trial, and this spirit of fairness of a generous people "never to strike when a man is down" has been carried into the law of the land in insisting upon an orderly and impartial administration of justice by a court and jury, even when the character of the defendant is bad, and he is charged with a most heinous offense of which conviction seems almost certain.

It has been well said by Judge McPherson, in the case of **U. S. v.** Odgen (D. C.) 105 Fed. 371, Id., 10 Pa. Dist. R. 1:

"Much may be permitted to the zeal of the press in detecting and exposing public wrongs. This is often very difficult work, and much freedom of expression is rightly allowed to those who are thus serving the public; but, after the preliminary stages have been passed and the inquiry has come before a court of law, it does serious harm to the cause of justice to pursue the prisoner with invective, or to interfere with his trial by usurping the proper functions of the judge and the jury."

In the following federal cases new trials were granted: U. S. v. Odgen, supra; Meyer v. Cadwalader (C. C.) 49 Fed. 32; Morse v. Montana Ore Purchasing Co. (C. C.) 105 Fed. 337; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. Pennsylvania Cases: Com. v. Landis, 12 Phila. (Pa.) 576; Com. v. Johnson, 5 Pa. Co. Ct. R. 236; Com. v. Jacques, 1 Dist. R. (Pa.) 287; Hasson v. Railroad, 21 Wkly. Notes Cas. (Pa.) 96. Other states: Cartwright v. State, 71 Miss. 82, 14 South. 526; State v. McCormick, 20 Wash. 94, 54 Pac. 764; People v. Murray, 85 Cal. 350, 24 Pac. 666; Walker & Black v. State, 37 Tex. 366; Carter v. State, 77 Tenn. (9 Lea) 440; People v. Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; Farrer v. State, 2 Ohio St. 54.

But it needs no citation of authority to show that the defendant would have been entitled to the withdrawal of a juror in this case had he insisted upon the motion, but this he did not do. At the suggestion of his counsel, each one of the jurors was interrogated as to whether he had read the articles published in the papers in question, and while it appeared one of the jurors read all of them, and four read some of them, yet, as a result of the examination, the defendant directed his counsel not to insist upon his motion, and the latter stated to the court that his client had said to him "that in the face of the assurance that is given by the jury, he (the defendant) does not feel as if he ought to press for the withdrawal of a juror." With this statement, the motion to withdraw a juror was overruled. Thus, with knowledge of the effect which such publications must have in creating a prejudice against him, the defendant, a man of varied experience, and of more than ordinary intelligence, determined to take the chances of a verdict in his favor, and he is not now entitled to a new trial.

We do not insist that counsel is required to note what statements appear in the public press during the trial in which he is engaged, nor do we insist that he is required to at once bring it to the attention of the court when an objectionable publication appears. The performance of his duty at the trial and fidelity to his client require that his attention should be directed to a proper conduct of the case, and it would be, in our judgment, against public policy to charge him or his client with the knowledge of such publications during the trial. But when he is in possession of such knowledge during the trial, and appears in court with a motion for a withdrawal of a juror because of such publications, and is permitted to interrogate the jury, whose answers satisfy the defendant of their impartiality, and the defense expresses willingness to proceed with the trial, and so states to the court, he is not afterward

entitled to successfully attack a verdict against him upon the ground that the articles were prejudicial.

In the case of Com. v. Flanagan, 7 Watts & S. (Pa.) 419, on a conviction for murder, Justice Rogers for the Supreme Court said, in overruling a motion for a new trial:

"That great excitement should extensively prevail among the people in the vicinity, after the commission of so great an outrage, may be readily believed, without express proof of its existence; that it did exist, we have no reason to doubt; but that the state of feeling was unknown, either to the prisoners or their counsel, cannot be supposed without proof. Ample time was allowed by the court for consultation as to whether they would apply for a continuance, and also time to make the necessary preparation for the argument. It was with their own consent the cause was tried; and it is now too late, after taking the chance of an acquittal, to allege that as a reason for a new trial. Had a continuance been granted (and there is ground to believe it would not have been refused), the necessary measures might have been taken to change the venue to a neighboring county, where impartial justice would have been administered. In McCorkle v. Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420. it is ruled that a party must not take the chance of a verdict in his favor, and keep a motion for a new trial in reserve. If the court should lend a ready ear to applications of this nature, causes will always be tried in the midst of the excitement, relying on that, in case of conviction, as a valid reason for a new trial. It would follow that, the greater the excitement and the more enormous the offense, the greater chance there will be of a final acquittal."

Second. The defendant was placed on trial under three indictments, charging a conspiracy to devise a scheme or artifice to defraud by use of the United States mail. Each of these indictments contained three counts, each count of each indictment alleging a conspiracy as to the same three persons "and others unknown," each count setting forth the same conspiracy, but alleging a different overt act. Thus indictment 44 in each of the three counts charges a scheme or artifice to defraud Heidenthall, Makely, and Eavey, by name, and "divers other persons whose names are to this grand inquest unknown," etc. These counts differ from each other only in the name of the person to whom the letter was mailed, which constitutes the overt act. In the first count the letter was alleged and proven to have been mailed to Heidenthall, in the second, to Makely, and in the third, to Eavey. The second and third counts were not pressed by the government because the mailing was not in either case proven, and the jury returned a verdict of "guilty on the first count in manner and form as he stands indicted, and not guilty as to the remaining counts thereof." It is now urged, "the government having failed to prove a conspiracy to defraud the three persons named in the indictment, the court erred in permitting evidence of a scheme to defraud the public generally." The defendant is not indicted for a scheme to defraud "three persons" and "others unknown," nor for using the United States mails in carrying out a scheme to defraud, but he is charged under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], with having conspired to commit an offense against the United States. It is true, the crime with which he is charged to have conspired to commit against the United States government is the crime forbidden by section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], of "using the United States mails in carrying out a scheme or artifice to defraud." He who devises a scheme or artifice to defraud

intends to use it to defraud some particular person or persons, or any one of the general public who may be reached and entrapped, so that it may be said, and so charged, that the scheme was devised with intent to defraud any one with whom communication concerning it was had by mail.

The government, after proving the conspiracy to commit this offense against the United States, was required, in order that the conspiracy might be indictable, to prove an overt act on the part of one or more of the conspirators in carrying out the conspiracy to commit the offense against the United States. This crime against the United States was the use of its mails in carrying out the scheme to defraud, and it was, therefore, necessary for the government to allege in the indictment, and prove at the trial, that the defendant devised a scheme or artifice to defraud; used the mails; and either sent or received mail connected with the scheme. If he were indicted for committing a fraud, of course it would be necessary to name the persons defrauded, and proof of fraud committed upon others would be improper, but, as we have said, the crime with which he is charged to have conspired to commit against the United States is not to defraud any person or persons, but to use the mails in carrying out a scheme to defraud, and the persons communicated with through the mails are only important to identify and show the scheme. The names of as many may be used in the indictment as the pleader may know, and all mail connected with the scheme, shown to have passed through the post office to any person whether named in the indictment or not, is evidence for the jury upon the question of the existence of the scheme. The failure of the government to show a communication by mail with some of the persons named cannot be said to be a failure to prove the existence of the scheme to defraud so long as it has been shown, as in this case, that printed or written matter about the scheme charged was proven to have been sent by mail to at least one of the persons named, and that copies of the same printed and written matter relating to the alleged scheme was sent through the mails to a mailing list throughout the United States. The names of the persons to whom the communications were directed were not so important to the defendant in his defense as the subject-matter of the circulars and letters mailed on the question of the existence or nonexistence of the scheme. There was ample proof of its existence, and a failure to show a communication with two of the persons named is immaterial. There was no evidence to show that any other persons than the three named were known to the grand inquest, it is therefore presumed that the indictment in this regard truthfully states the fact. U. S. v. Riley (C. C.) 74 Fed. 210. What has been said as to the objection raised on indictment No. 44 will apply to similar reasons for a new trial set up under indictments Nos. 45 and 46.

Third. The cashbook, certain checks, and entries of cash in defendant's deposit book in a certain trust company made during the continuance of business of the Storey Cotton Company were offered in evidence by the government, and over defendant's objection were admitted, all of which are assigned as reasons for a new trial. All this evidence is so clearly relevant to show the conspiracy, the scheme, and the defendant's connection with both that a further discussion is un-

necessary. We are not convinced there was any error committed in the charge of the court. A re-examination shows the law was correctly stated, and the facts commented upon with fairness to both sides. The objections raised by the defendant to portions of the charge are without merit when the whole of it is considered in connection with the evidence.

For the reasons above given, the motion for a new trial is overruled, and a new trial is refused.

AMERICAN LOAN & TRUST CO. v. GRAND RIVERS CO.

(Circuit Court, W. D. Kentucky. March 9, 1908.)

1. CORPORATIONS—MORTGAGES—FORECLOSURE — PROCEEDS OF SALE — PERSONS ENTITLED.

   Property of a corporation having been sold in receivership proceedings, an order was passed directing the payment of $3.61½ on each $100 bond of the corporation, and that there should remain in court for the holders of outstanding bonds amounting to $84,200 the sum of $3,043.83, and that each bondholder on surrendering his bonds into court for cancellation should be entitled to withdraw his pro rata of that sum. All of the money was paid out except $1,140, which had remained in the registry of the court since 1894. *Held*, that the money paid into court was a trust fund for the benefit of the bondholders, and, if not claimed by the holders of the outstanding bonds, was subject to redistribution, either to the other bondholders whose claim had not been paid in full or to general creditors, if any, and, if none, to the holders of the corporation's capital stock.

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DEPOSITS IN COURT—STATUTES.

   Rev. St. § 995 [U. S. Comp. St. 1901, p. 711], requires money paid into courts of the United States, or received by its officers, to be deposited with the treasurer or assistant treasurer of the United States, or a designated depositary, to the credit of the court, and section 996, as amended by Act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578 [U. S. Comp. St. 1901, p. 711], declares that no money so deposited shall be withdrawn except on order of the judge, and that it shall be the duty of the judge or judges of such courts to cause any money so deposited which has remained in the registry unclaimed for 10 years or more to be deposited in a designated depository of the United States to the credit of the United States. *Held*, that section 996, in so far as it required money deposited in a federal court unclaimed for 10 years to be turned over to the United States, was unconstitutional, as depriving the owners thereof of their property without due process of law.

3. ESCHEAT—PERSONAL PROPERTY—PARENS PATRIÆ—FEDERAL OR STATE GOVERNMENT.

   Where money has been deposited in a federal court, and remains unclaimed for a long period, such money, if subject to escheat, belongs to the state, and not to the federal government, as parens patriæ.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escheat, §§ 18–20.]

Geo. Du Relle, U. S. Atty., for the motion.

EVANS, District Judge. The bill of complaint in this case was filed November 3, 1893, and sought the foreclosure of a mortgage upon certain property located in Kentucky. The mortgage was executed by the defendant (a Kentucky corporation), and was to secure the payment of its negotiable bonds amounting to $1,500,000. A decree was

entered directing the sale of the property, and it was done. Most of the bonds seem in some way (the details of which are not material) to have been taken up in the reorganization scheme whereby an association of the holders of a large proportion of the bonds became the purchaser of the property. Some 842 of the bonds (each for $100) were not included in this arrangement. By the terms of an order entered July 19, 1894, it was provided, inter alia, "that there shall remain in court for the holders of outstanding bonds as hereinafter provided the sum of $3,050." The thereinafter provision was in this language:

"It further appearing to the court that the property sold under the decree brought the sum of $77,000, and that the expense of the foreclosure and receivership amounted to $22,841.97, leaving a balance of $54,158.03 as the net avails of the mortgaged property, it is considered by the court that there is coming to the holder of each $100 of the bonds the sum of $3.61½. It is therefore ordered that there shall remain in court for the holders of the outstanding bonds, amounting to $84,200, the sum of $3,043.83 and the sum of $6.17 for probable future costs, and each bondholder upon surrendering into court for cancellation his bonds will be allowed to withdraw his pro rata of said sum."

Under the operation of these orders all of the $3,050 has been paid out except $1,140. This unclaimed balance has remained in the registry of the court since July, 1894, and yet remains there to meet the purposes for which it was paid in. The bonds to which that money is applicable are still outstanding, and the holders of them were adjudged in the order referred to to be entitled to their pro rata shares of the fund in court. In short, the money was paid into court in special trust for that particular purpose, but if it is not claimed by the holders of those bonds, then it is manifest, upon the face of the record in the case, that it should, by redistribution, be paid to the other bondholders, very much the larger part of whose debts were not paid by the distribution of the $3.61½ on each bond, or if not, then general creditors, if any of the corporation, or, if none, then the holders of the capital stock in the defendant company would evidently be entitled to the remnants.

The United States was never a party to the suit, and had no interest in the subject-matter in litigation, nevertheless the district attorney, on its behalf, has moved the court to enter an order causing the money so in its registry to be deposited in a designated depository of the United States to the credit of the United States in accordance with section 996 of the Revised Statutes as amended by the Act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578 [U. S. Comp. St. 1901, p. 711]. Sections 995 and 996 as the latter was amended are as follows:

"Sec. 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court. [U. S. Comp. St. 1901, p. 711.]

"Sec. 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as afore-

said, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States."

It might in some possible state of case be an important question whether independently of such legislation the courts may not have the inherent power to regulate and control the custody of funds in their registries, but such power apart, recognizing the wisdom of doing so, such moneys are by the courts customarily—perhaps universally—deposited in designated depositories, but always "in the name and to the credit of the court," as suggested by section 995, and it might be so deposited with the Treasurer of the United States or with one of the assistant treasurers, and when so deposited would be perfectly safe, but would still remain under the control of the court, and not of Congress, and might at any time be drawn out upon the order of the judge or judges, respectively, to meet the trusts under which it had been paid in. If this were all, there need be no trouble, but by the act of February 19, 1897, c. 265, 29 Stat. 578 (U. S. Comp. St. 1901, p. 711), another clause was added to section 996. It may be well to repeat the language of the amendment and addition which it is essential now to consider. It is as follows:

"And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, *to the credit of the United States.*"

We italicize the words of particular importance in this connection. To do what is required by this language would entirely pervert the object and purpose of the trust upon faith in which the money was paid in. It would remove the money altogether from the control of the court, make it the property of the United States, and put it under the control of Congress. It would arbitrarily seize and transfer it to the government, and in this way deprive all persons who might have an interest in it of that interest without giving them a day in court in respect to the claim of the United States. In short, the property would be escheated to the United States. Hence, in his brief, the learned district attorney, after quoting section 996 as amended, has stated the contention of the government in the following language:

"It is not sought to construe this provision to mean that it is the duty of the judge to cause any and all moneys which have remained in the registry of the court ten years or longer to be deposited to the credit of the United States. The construction contended for is this: That in every case in which it appears from the records and proceedings therein, that a right exists on the part of some person to withdraw such moneys in the registry of the court that his right to withdraw such money has been adjudicated or is not denied or is not in litigation, and that ten years or more have elapsed since that right accrued, without any application on his part to withdraw the same, such moneys become, by force of the statute, the property of the United States, and that it is the duty of the court to cause such moneys to be deposited to the credit of the United States, without any proceeding whatever between them and the person in whose name the money stands, for the purpose of determining his right to the money."

It is important to inquire whether property can be thus forfeited to the United States by the mere fiat of Congress when it is a fund in

court, clearly and certainly belonging to some private citizen as to whom there is no claim that there has been a failure of heirs, but whose only fault has been delay, forgetfulness, or negligence in withdrawing the money. The first section of article 14 of the amendments to the Constitution of the United States prohibits any state from passing any law whereby any citizen shall be deprived of life, liberty, or property without due process of law, and the fifth amendment to the Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." It has often been held that the fifth amendment limits the powers of the United States only, and obviously the fourteenth amendment applies alone to the states, but the two together cover the whole subject, and prohibit in every way the arbitrary taking of life, liberty, or property by either government. Here, it is proposed to take certain property for public uses without compensation, or an effort to ascertain whether there is an owner or who he is, and to thus deprive certain persons of their property without any process of law whatever. We need not contend, in respect to property of which there is no individual ownership ascertainable, that the powers of the appropriate government may not be exerted to forfeit or escheat it, but if a government inherently possesses such a right, and might enforce it by due proceedings, the proposition here is to enforce or assert the right by mere legislative enactment without any proceeding whatever, either by a court or by a duly authorized public officer. In many of the states, and in all other countries where the common law has prevailed, so far as we can ascertain, there must be a proceeding instituted—formerly a writ of escheat or inquest of office—in which either actual or constructive notice is given to all persons in interest before a judgment declaring the property to have been forfeited or to have escheated can be entered by a court. Here, Congress has undertaken to take the power of adjudication or ascertainment from the courts in whose hands the property is, and to whose credit it had been placed in a depository, and itself to exercise that power, making indeed not the "court" but the "judge" the person to execute its decree, ipso facto the lapse of a certain length of time, all without requiring notice to anybody (not even the parties to the suit) and without any power in the court to exercise any discretion, even though the litigation might still be in progress. To maintain this right it is contended that the United States, as parens patriæ, is entitled to have the court do what the statute in question has authorized. This proposition demands consideration, and none the less that it is altogether new as applied to any right of escheat in the United States outside of the territories and the District of Columbia. Under the feudal laws, the sovereign was the "father of the country," and, when there was a failure of heirs, land reverted to him by escheat upon taking certain steps, the initial one of which was an entry. In this country, at least, upon failure of heirs, the laws of escheat usually operate upon personal property as well as land, and questions arising under them have, in a few instances, come before the Supreme Court, and its opinions upon them will be noted.

It was held in the case of the Mormon Church v. United States, 136 U. S. 1, 57, 10 Sup. Ct. 792, 808, 34 L. Ed. 481, that the United States is parens patriæ in the territories, and the court observed:

"Chief Justice Marshall, in the Dartmouth College Case, said: 'By the Revolution, the duties, as well as the powers, of government devolved on the people. * * * It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department.' 4 Wheat. 651, 4 L. Ed. 629. And Mr. Justice Baldwin, in McGill v. Brown, Brightly, N. P., 346, 373, a case arising on Sarah Zane's will, referring to this declaration of Chief Justice Marshall, said: 'The Revolution devolved on the state all the transcendent power of Parliament, and the prerogative of the crown, and gave their acts the same force and effect.' Chancellor Kent says: 'In this country, the Legislature or government of the state, as parens patriæ, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it.' 4 Kent. Com. 508, note. In Fontain v. Ravenel, 17 How. 369, 384, 15 L. Ed. 80, Mr. Justice McLean, delivering the opinion of this court in a charity case, said: 'When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the parens patriæ.'"

The court also, in Hamilton v. Brown, 161 U. S. 256, 263, 16 Sup. Ct. 585, 587, 40 L. Ed. 691, et seq., having the law of Texas upon escheats under consideration, discussed the question in some of its phases, said:

"By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. Attorney General of Ontario v. Mercer, 8 App. Cas. 767, 772; 2 Bl. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of the court, file a traverse, in the nature of a plea or defense to the King's claim, and not in the nature of an original suit. Lord Somers, in the Bankers' Case, 14 Howell's State Trials, 1, 83; Ex parte Webster, 6 Ves. 809; Ex parte Gwydir, 4 Maddock, 281; In re Parry, L. R. 2 Eq. 95; People v. Cutting, 3 Johns. 1; Briggs v. Light Boats, 11 Allen, 157, 172. The inquest of office was a proceeding in rem. When there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor. Bayley, J., in Doe v. Redfern, 12 East, 96, 103; 16 Vin. Ab. 86, pl. 1. In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state. 4 Kent, Com. 424; 3 Washb. Real Prop. (4th Ed.) 47, 48."

On pages 267, 268, of 161 U. S., and page 589 of 16 Sup. Ct. (40 L. Ed. 691), the court used this language:

"These proceedings for the escheat of the estate of a deceased person for want of heirs or devisees, like ordinary proceedings for the administration of his estate, presuppose that he is dead; if he is still alive, the court is without jurisdiction, and its proceedings are null and void, even in a collateral proceeding. Griffith v. Frazier, 8 Cranch, 9, 23, 3 L. Ed. 471; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Hall v. Claiborne,

27 Tex. 217; Withers v. Patterson, 27 Tex. 491, 497, 86 Am. Dec. 643; Martin v. Robinson, 67 Tex. 368, 375, 3 S. W. 550; Caplen v. Compton, 5 Tex. Civ. App. 410, 27 S. W. 24. And if the death of the former owner, intestate and without heirs, is not alleged in the petition, or is not proved at the trial, a judgment for the state is erroneous, and reversible by appeal or writ of error. Hughes v. State, 41 Tex. 10; Wiederanders v. State, 64 Tex. 133; Hanna v. State, 84 Tex. 664, 19 S. W. 1008."

At page 269 of 161 U. S., and page 590 of 16 Sup. Ct. (40 L. Ed. 691), the court quoted with approval what had been said by the Court of Appeals of Texas, as follows:

"The proceeding while not strictly a proceeding in rem, has many of its characteristics; yet the statute does not direct a seizure of the thing, which, in some cases, has been held necessary to support a judgment strictly in rem. It applies to personalty, as well as realty. The mere institution of the proceeding creates no presumption that there is no one capable of taking the estate under the rules regulating the descent of estates of deceased persons; the presumption is to the contrary; and the effect of the judgment, if rendered after all persons interested in the estate are notified of the pendency and purpose of the proceeding, in the only manner in which they can be, if unknown, is to destroy that presumption, and to make the title of the state clear."

And in Bouvier's Law Dictionary there is a discussion upon this subject of escheats, from which we extract this paragraph:

"In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction; 4 Kent, 424. See Matthews v. Ward, 10 Gill & J. 450; 3 Dana, Abr. 140. And it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office according to the law of the particular state; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 695; 3 Washb. R. P. (4th Ed.) 47, 48. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to an escheat is secured by statute; 4 Kent, 424; 1 Washb. R. P. 24, 27; (2d Ed.) 443."

These authorities inevitably lead to the conclusion that the national government is not in any case the parens patriæ to which ownerless property of any sort in any state of the Union reverts. We think that within the states respectively it is the state which exclusively is parens patriæ, and this result cannot be affected by the fact that the property might happen to be in the registry of a federal court. Though in the registry it is, nevertheless, a part of the general property in the state. The state, under the authorities cited, might with more plausibility be held to succeed to the title of such property, and might have the right through its escheator to apply to the court for it if any government be entitled to do so. In saying this we by no means intend to intimate that the state would, in fact, have the slightest right to an escheat of the money in court in this case. We only conclude, under the authorities cited, that if any government can claim to be parens patriæ it is that of the state, and not that of the nation.

It will also be remembered that the Constitution of the United States, which definitely fixes the rights surrendered by the states to the nation, makes no provision for escheats, and though article 3, § 3, gives Congress the power to declare the punishment of treason, yet, even as to

treason, it provides that no forfeiture of property shall be for more than "the life of the person attainted." Section 996, Rev. St., proposes much more, and that not for the high crime of treason, but for mere neglect or omission to claim what is one's own. Furthermore, escheats are always bottomed upon the fundamental proposition that an owner of property has died entirely without heirs. If any heirs are found, the escheat always fails. Section 996 does not proceed upon any notion that there are no heirs, nor does it make any provision for ascertaining the facts in the premises, but goes altogether upon a mere failure for 10 years to withdraw money from the court's registry, thus entirely ignoring the prime factor in escheats, namely, failure of heirs, and arbitrarily forfeits the money to the government. All that is necessary is the lapse of ten years. Now, there is nothing magical in the period of 10 years fixed in the statute. If that period may be fixed so may one of 5 years, or of 1 year, or of 1 month, and Congress might as well assume the judicial function, and, once for all, direct the court or the judge thereof to make any other order in a case; as one requiring money, under the control of the court, but payable ultimately to the persons entitled, to be paid over to the United States although the United States is not a party to the litigation, and shows no right to the money unless the statute ex proprio vigore confers it.

It is pointed out in the brief in support of the motion under consideration that in certain cases under the postal laws the government takes charge of property put into the mails and may sell it if, after, a long period, it is not claimed by any other person. But the Post Office Department is an executive branch of the government absolutely under congressional control, and whether provisions and regulations for such cases are valid or invalid as against the real owner of the property we are not called upon to decide, though it would seem, in the case before us, that Congress might quite as properly have required the judge or judges to make any specified order in a case in active litigation as to require them to turn over funds in the court's registries to the United States without any notice to persons in interest, and without any hearing or exercise of any judicial discretion in respect to the question, and only because Congress so required. We think that legislative and judicial functions under our form of government are something more separate and independent, each of the other, than such a contention would admit, but without going further into the discussion we conclude that the motion should be overruled, first, because it is made ex parte by one who is not a party to the suit, without any notice to those who have an interest in the fund sought to be taken for public uses, and without giving them, actually or constructively, any opportunity to be heard in opposition thereto; second, because the money sought to be thus escheated to the United States manifestly belongs either (a) to the unknown holders of the 842 mortgage bonds issued by the defendant, or (b) to those bondholders who have presented their bonds, and whose debts for the most part remain unpaid, or (c) to the general creditors, if any, or else (d) to the holders of the capital stock of the Grand Rivers Company; third, because to transfer the title to the money from the true owners to the United States without any process of law or

any compensation would violate the fifth amendment to the Constitution of the United States; fourth, because we greatly incline to think that as to the property in question the state of Kentucky, and not the United States, would be parens patriæ, differing in this respect from a case where the property is in one of the territories of the United States or in the District of Columbia, over each of which the powers of Congress are plenary; and, fifth, because we greatly doubt whether the courts should yield to the view that Congress, by legislation, can direct what order a court shall enter in respect either to money in its registry for other purposes or in respect to any matter involved in any suit—such matters being judicial rather than legislative in character.

Besides, it may be stated that in many instances claimants have appeared and got their money out of the court's registry much longer than 10 years after it had been put there. This they could not have done if the money had been transferred and paid over to the United States, as contemplated by the amendment to section 996. An act of Congress appropriating money for the purpose would then have been necessary to enable the person entitled to it to get it, and no one can say what Congress would have done or would do in such a case, nor the obstacles which any member might interpose. Money once in the Treasury is under the uncontrollable power of Congress, and what that body may do with it is matter of grace or discretion. Certainly Congress could not be controlled by the courts, once they had surrendered to the government money held in trust for litigants.

Doubtless many balances are left indefinitely in banks which have been designated as depositories, and in that way they get the use of this money as they do of their other deposits. The national Treasury might get that advantage (and it has been urged that it should) in preference to the banks were it not that the courts are warned by the very legislation we are considering that at some departmental suggestion Congress might pass an act which would prevent the Treasury from honoring the court's draft upon its own funds, in which event the court and the persons fairly entitled to those funds would be altogether powerless. But for this we have no doubt that every federal court would prefer, in its discretion, to place in the Treasury to the credit of the court and subject to its orders all old balances which apparently have been forgotten by those entitled to the money, thus making the Treasury the court's banker as to such funds. However, funds thus deposited would by no means become public property, and should not be regarded or treated as such by any officer or person. But this course the courts will probably hesitate to pursue until definitely assured that the danger referred to is altogether removed by specific legislation to that effect.

The motion will be overruled.

In re DURYEA POWER CO.

(District Court, E. D. Pennsylvania. January 8, 1908.)

No. 2,768.

1. BANKRUPTCY—TRUSTEES—ELECTION—RIGHT TO VOTE.
A creditor of a bankrupt who is also a debtor to the bankrupt's estate is not entitled to vote on the selection of a trustee where he has not made his indebtedness good.

2. CORPORATIONS—STOCKHOLDERS—FORMAL SUBSCRIPTION.
Where corporate stock was allotted to, issued, and received by a stockholder, but was not in fact fully paid though it so recited, it was no defense to his liability for the balance due thereon that he had not formally subscribed for such stock.

3. SAME—STATUTES—INCREASED STOCK.
Gen. Corp. Act Pa. 1874 (P. L. 81) § 17, as amended by P. L. 1876, 32, authorizes payment for corporate stock in property as well as cash, but declares that no corporation shall issue stock except for money, labor, or property actually received, and that all fictitious increase of stock or indebtedness in any form shall be void; that each corporation may provide for the issue of deferred stock in payment for real or personal property, and if so provided it shall be expressly stated in the charter or in a certificate to be made and recorded. *Held* that, where a corporation increased its stock, and neither the charter nor the proceedings for such increase disclosed that the stock was based on a patent, and did not show any valuation put thereon, the fact that the corporation's president recited that such additional stock was issued for cash or property did not relieve him from liability to pay the balance of the par value remaining unpaid on the stock allotted to and received by him so far as necessary to pay the claims of creditors.

4. BANKRUPTCY—ELECTION OF TRUSTEE—PROXIES—REPRESENTATIONS.
Where, in bankruptcy proceedings against a corporation, the attorney for petitioning creditors claimed that the president and certain other officers of the corporation were largely indebted to it for unpaid stock subscriptions, and that the president desired the election of a trust company as trustee which was identified with certain other interests represented by him it was not improper for such attorney to obtain proxies for use in the election of a different trustee by means of letters stating his claim as to the officers' liability, and that it would be to the interest of the unsecured creditors to select a trustee not identified with the president's interest, which letters contained no materially false statement of fact.

In Bankruptcy.

The facts shown by the referee's report with reference to the alleged objectionable communications written to creditors to obtain proxies to be voted in the election of a trustee were as follows:

Charles E. Duryea who had been an officer of a bankrupt corporation wrote a letter to the attorneys for certain creditors in which he asserted that his desire to have the affairs of the corporation wound up in bankruptcy was for the purpose of determining whether the stock originally subscribed by some of the officers of the company had been paid for, and that he was endeavoring to get enough of the creditors together to elect a trustee that would not be favorable to those who did not wish to be investigated; that the present receiver, the Pennsylvania Trust Company, had for its attorney one Cyrus Derr, who was also attorney for H. M. Sternbergh, president of the bankrupt corporation, who the writer claimed had not fully paid for his stock, and that the writer considered such relation too close for the best interest of the unsecured creditors; that he also believed that Sternbergh, as president of the corporation, forced it into the hands of the receiver in order to shake out

other stockholders and creditors and acquire the plant cheaply, and that a trustee should be elected who was not so closely connected with Sternbergh's interest. The representations in this letter that Derr was attorney for the trust company was incorrect, but this letter did not result in obtaining any proxies for Duryea or those interested in his behalf. Other letters, however, were written by Duryea and Geo. W. Wagner, who was the attorney for the petitioning creditors, setting out a history of the formation of the corporation and of the receivership, stating various ways that Sternbergh was indebted to the company to the amount of some $26,000 on his unpaid stock subscriptions, and soliciting proxies to be used in the election of the Berks County Trust Company as trustee, which was entirely independent of any interest identified with Sternbergh, so that it would be entirely free to prosecute claims against any of the officers of the company for the benefit of the unsecured creditors. None of the statements contained in these letters were shown to be false or fraudulent, and the referee therefrom found that the proxies procured thereby had not been obtained by fraud.

Geo. W. Wagner, for petitioning creditors and trustees.
Cyrus G. Derr, for Herbert M. Sternbergh.
Andrew A. Leiser, for creditors.

J. B. McPHERSON, District Judge. Of the two questions arising under this certificate, the first has to do with the refusal of the referee (Samuel E. Bertolet, Esq.) to permit Herbert M. Sternbergh to vote upon his claim in the election of a trustee. The claimant intended to vote for the Pennsylvania Trust Co., which received 76 votes, cast by creditors holding about $12,000 of claims, while the Berks County Trust Co., which was declared elected, received 77 votes, cast by creditors holding claims aggregating about $45,000. Since, therefore, it is evident that if the claimant had been permitted to vote there would have been no election by the creditors, and the present trustee could not have been declared their choice, it becomes important to determine whether the referee was right in rejecting the claimant's offer to vote. The correctness of this ruling will be found to depend upon the relation borne by the claimant to the bankrupt corporation at the time when the proceedings in this court were begun. Admittedly, he was then a creditor, but, if he were also a debtor, I do not understand his counsel to deny that he was properly excluded from the vote, the fact being also conceded that he has not made his indebtedness good. At all events, the action of the referee is in accord with the decision of this court in Re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949, and, for the present at least, the point must be regarded as settled. Was he, therefore, a debtor of the corporation? Or, to ask an equivalent question, may the creditors of the corporation treat him as a debtor? The answer is to be found in facts that are not in dispute, and may be summarized as follows:

On February 13, 1900, an agreement was entered into between Charles E. Duryea, Henry Millholland, Henry Crowther, and the claimant, of which the paragraphs now material are these:

"The said parties, in consideration of the mutual covenants hereafter set forth, agree to organize a corporation forthwith under the laws of Pennsylvania, for the manufacture and sale of automobiles, motors and propellers, to be called Duryea Power Company, with a paid up capital of $100,000, divided into 1,000 shares of $100 each, whereof said Herbert M. Sternbergh shall re-

ceive 510 shares, said Charles E. Duryea 300 shares, said Henry Millholland 95 shares, and said Henry Crowther 95 shares.

"Upon the incorporation of said company, in full consideration of said issue of stock to them, said Herbert M. Sternbergh shall contribute $10,000 cash and within sixty days thereafter $15,000 cash additional; and said Herbert M. Sternbergh, Henry Millholland and Henry Crowther shall contribute to said corporation the entire and absolute ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers or parts of either heretofore granted to or now or hereafter controlled by either of them, and all inventions of the description aforesaid heretofore made by either of them, or which either of them shall hereafter make, and all patents which may be granted therefor; said Charles E. Duryea, in consideration of the issue of stock to him and the sum of $10,000 to be paid as hereafter provided, shall contribute to said corporation licenses to use all patents and inventions now or hereafter controlled by him, or by the Duryea Manufacturing Company of Peoria, Illinois, pertaining to the manufacture or use of motors, propellers and light automobiles," etc.

Of these persons, Duryea alone, either then or afterwards, owned patents of the kind described, it being the intention of all the parties to form a corporation to put his inventions upon the market. Pursuant to this agreement, the bankrupt corporation—the Duryea Power Company—was incorporated on April 6th, under the corporation statutes of Pennsylvania, with a capital stock of $1,000, divided into 10 shares of $100 each, of which the claimant subscribed for 4 shares. He, with others, signed and acknowledged the certificate of incorporation, was named as a director therein, and was elected president on April 20th. Upon the last-named day a meeting of the stockholders was held to take action upon a proposed increase of stock from $1,000 to $100,000, and the claimant and two other persons were appointed judges to conduct the election. The formalities required by the Pennsylvania law relating to the increase of capital stock were duly complied with, and all the stockholders, including the claimant, voted for the increase. On the same day a second agreement was signed, of which the essential provisions are as follows:

"This agreement made the 20th day of April, 1900, between Herbert M. Sternbergh, of the city of Reading, in the county of Berks and state of Pennsylvania, of the one part, and the Duryea Power Company, a corporation of the state of Pennsylvania, of the other part, witnesseth:

"The said Herbert M. Sternbergh has paid to the said Duryea Power Company in cash the sum of $10,000 lawful money of the United States of America, the receipt whereof is hereby acknowledged, and agrees to pay the sum of $15,000 additional in like lawful money to the said Duryea Power Company on or before the 5th day of June, 1900, and hereby assigns and sets over to the said Duryea Power Company, its successors and assigns, the entire, absolute, full and exclusive ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers, or parts of either, heretofore granted to or now controlled by him," etc.

"In consideration whereof the said Duryea Power Company agrees to issue to said Herbert M. Sternbergh 510 full paid shares of the capital stock of the said Duryea Power Company upon the payment of the whole amount of $25,000 above mentioned, including, however, in the said 510 shares, 4 shares now standing in his name on the books of the said company."

This agreement was signed by the claimant individually, and also as president of the bankrupt corporation. On October 27th, as president of the company, he certified to the Secretary of the Commonwealth as follows:

"This is to certify that by virtue of the consent of the stockholders of the Duryea Power Company, authorizing an increase in the capital stock thereof from $1,000 to $100,000, given at an election duly held for that purpose on the 20th day of April, 1900, the capital stock of said company has been increased from $1,000 to $100,000; said additional stock being issued for cash and property."

On the same day a certificate of stock for 510 shares of the par value of $100 was issued to the claimant, and receipted for by him. He has carried out his agreement to pay $25,000 "in full consideration for said issue of stock," but he has neither paid nor contributed any other money or property therefor. The balance of the par value, $26,000, is said by the other creditors to be still owing, and this is the ground upon which the referee declared him to be a debtor and excluded him from voting. In my opinion, the exclusion was right. That he continues to be liable to the bankrupt's creditors for all, or for part, of this unpaid balance, seems to me scarcely a debatable question. It is of no importance that he did not formally subscribe for 510 shares of the stock; by virtue of his agreements they were to be allotted to him in consideration of $25,000 to be paid in cash, and they were actually so allotted, were issued and received. This is equivalent to a formal subscription, and carries with it the same obligation. Neither is it of importance that the stock was to be issued "full paid," and that it was so issued with the intention of all parties then interested that his acceptance should carry no further obligation. Although described as "full paid" the stock had only been partly paid for in cash, and no declaration or action by the corporation, or by the claimant, or by both, could take the place of the truth concering this matter, so far as to affect the rights of the corporation's creditors.

But, under the statutes of Pennsylvania, shares of stock may be paid for in property as well as in cash, and payment in one is usually as effective as payment in the other. Upon this point, section 17 of the general corporation act of 1874 (P. L. 81) as amended in 1876 (P. L.) 32, provides as follows:

"Every corporation created under the provisions of this act or accepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property, as is necessary for the purposes of its organizations and business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls or assessments; and in the charter and the certificates and statements to be made by the subscribers and officers of the corporation, such stock shall not be stated or certified as having been issued for cash paid into the company, but shall be stated or certified in this respect according to the fact; and the executors or administrators of any deceased tenant in common of lands, mines and mineral rights so proposed to be taken may, and they are hereby authorized, to convey the individual estate and interest of such decedent therein to such company, receiving therefor so much stock in such company as the said decedent would have been entitled to receive in his lifetime, to be held in the same manner as the lands: Provided, that no directions or limitations contained in any last will and testament of such decedent shall be in any manner interfered with: And provided, that before making such conveyance, such executors or administrators shall give sufficient security, to be approved by the orphans' court having jurisdiction of their accounts, for the faithful application of the stock received therefor; no such corporation shall issue either bonds or stock except for money, labor done or money or property actually received, and all fictitious

increase of stock or indebtedness in any form shall be void; every such corporation may provide for the issue of deferred stock in payment for such real or personal estate or mineral rights, and if so provided, it shall be expressly stated in the charter filed, or in a certificate to be made and recorded, or in the acceptance of this statute, to be filed by any corporation accepting its provisions, with the amount of such deferred stock, and the consideration of the same, and the terms on which the same shall be issued; and the said stock may be made to await payments of dividends thereon, until out of the net earnings at least five per centum has been declared and paid upon the other full paid stock of the corporation."

Moreover, it has been decided by the Supreme Court of the state that the parties interested in the formation of a corporation may value a patent or other property at whatever sum they please; and it is evident, I think, that no legal harm is done thereby, if due notice of such valuation is given in the proceedings for incorporation or for the subsequent increase of the capital stock. Speaking generally, and laying aside the question of a fraudulent valuation, if the parties interested in the corporation choose to base the capital stock largely upon property instead of upon cash, and notify the public that they have made such a choice, describing the property sufficiently and stating the sum at which it has been valued, the transaction is valid and the stock may issue "full paid" without being liable to objection on the ground that only part of the par value has been paid in cash. But, if this result is to be attained, notice is essential, and notice includes such a description and valuation of the property as will identify it, and will show also what sum in cash it is intended to represent. Upon principle there should be no difference in this respect between the original proceedings to obtain a charter and subsequent proceedings to increase the capital stock, and no difference is recognized by the Pennsylvania statutes. The act of February 9, 1901 (P. L. 3), relating to increase of capital stock, makes no specific provision on the subject, probably regarding it as already covered by section 17 of the act of 1874, (P. L. 81), but the approved forms in use before the state department show clearly that definite notice is necessary in both proceedings. Whitworth, Corporations in Pennsylvania, §§ 1365 and 1392; Eastman, Private Corporations in Pennsylvania, §§ 1500 and 1512. See, also, Shannon v. Stevenson, 173 Pa. 419, 34 Atl. 218; Cooke v. Marshall, 191 Pa. 315, 43 Atl. 314; Commonwealth v. Gray's Mineral Fountain Co., 20 Phila. 405, s. c. 8 Dauph. Co. Rep. 47.

Nothing of the kind was attempted in the present case. Neither in the original charter, nor in the proceedings to increase the capital stock, does it appear that the stock is based upon a patent at all, and in neither proceeding is a valuation put upon the right. It is true that the claimant, acting as president of the corporation, certified that "said additional stock (was) issued for cash and property," but such a vague and general statement does not give the necessary information to the public. It does not set forth how much cash was paid, and what kind of property was contributed in lieu of cash; and it gives no information concerning the quantity of the property, or the value that has been put upon it. I may point out, also, but without laying stress upon the fact, that the proceedings to increase nowhere state that the new stock is to be issued full paid and nonassessable, or that the property for which

it is issued is necessary for the purposes of the organization and business of the corporation. So far as creditors are concerned, therefore, the certificate of increase, although it speaks of "property," affords no protection to the claimant; for, in legal effect, the reference to property may be disregarded, and the certificate then amounts to no more than an untrue declaration that the increase was wholly based upon cash. Under these circumstances, the claimant cannot escape liability upon so much of the par value of his stock as he has not paid for in cash. To what extent he may be thus liable, is not now involved, and is not decided. It is enough to justify the ruling of the learned referee that a liability to some extent exists; and of this, at least, I entertain no doubt.

The second question is raised by the claimant's objections to certain communications that were made to creditors by counsel and by other persons interested in the choice of the Berks County Trust Co. as trustee. These communications are said to have influenced the election improperly, and a good deal of testimony was taken upon the subject. It is unnecessary to set out the facts in detail concerning this dispute; they will be found in the referee's report, and I shall only add concerning them that, after due consideration, I find nothing materially objectionable in the communications referred to.

The action of the referee upon each of the foregoing questions is therefore affirmed.

THE PERSIAN.

THE HESPERIDES.

(District Court, S. D. New York. March 5, 1908.)

COLLISION—MOVING AND ANCHORED VESSEL—FOG.

A collision off the Massachusetts coast, near Pollock Rip Slue, at night, in a dense fog, between the steamship Persian, going northward, and the steamship Hesperides, which had anchored in the open ocean on account of the fog, *held* due solely to the fault of the Persian, which, after stopping, on hearing the fog bell of the Hesperides and seeing one of her anchor lights, started ahead again at greater speed, in violation of article 16 of the international navigation rules [U. S. Comp. St. 1901, p. 2869], which required her under such circumstances to navigate with caution until danger of collision was over.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 101.

Collision rules—speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

In Admiralty. Suit and cross-libel for collision.

Convers & Kirlin (J. Parker Kirlin, of counsel), for the Hesperides.

Daniel H. Hayne and Wheeler, Cortis & Haight (Charles S. Haight, of counsel), for the Persian.

HOLT, District Judge. These are a libel and cross-libel filed to recover damages for a collision between two steamers, the Hesperides and the Persian. The collision occurred in a dense fog, about 11:36

p. m. on the night of June 27, 1907, about five miles off Monomoy Island, on the Massachusetts coast, above the Whistling Buoy No. 2, which lies on the eastern side of the northern entrance to Pollock Rip Slue. At the southern entrance to Pollock Rip Slue is stationed the Pollock Rip Light vessel. From this light vessel to the northward, at intervals about a mile and a half apart, are stationed, first, Bell Buoy No. 1, then Whistling Buoy No. 2, and then the Pollock Rip Shoals Light vessel. There are shoals on each side of the line between the Pollock Rip Light vessel and the Bell Buoy No. 1. Above Bell Buoy No. 1, on the course to the Pollock Rip Shoals Lightship, there are no shoals to the eastward. All the region to the eastward is open ocean. The Hesperides that night was bound from Boston to New York. Shortly after passing the Pollock Rip Shoals Light vessel the fog became so dense that her pilot decided to anchor. He testifies that he headed the steamer to the northeast, and proceeded in that direction for 22 minutes under a slow bell, and then anchored. Her exact situation at anchor, as afterwards ascertained, was about half a mile northwardly from the Whistling Buoy No. 2. Two anchor lights were properly set, indicating, under rule 11, a vessel more than 150 feet long at anchor, and a fog bell was regularly sounded, as required by rule 15, until the collision. There was a strong southeast wind blowing, so that the Hesperides lay heading generally towards the southeast. While so lying at anchor, the fog whistle of a steamer approaching from the south was heard, and about 11:36 p. m. the steamer Persian under way came into collision with the Hesperides, hitting her near the stem with the Persian's bow, and causing damage to both vessels.

The Persian that night was bound from Philadelphia to Boston. Her witnesses state, in substance, that she encountered thick fog before she reached the Pollock Rip Light vessel. She passed near that light vessel and Bell Buoy No. 1. Her captain testifies that shortly after passing the bell buoy she was put on a course N. E. by N. ½ N. This course would take her about half a mile east of the Pollock Rip Shoals Lightship. She was proceeding carefully, stopping several times, and then proceeding ahead slowly. She met and passed the steamer Whitney to the west of and before reaching the Whistling Buoy No. 2. After passing the Whitney, and while the Whistling Buoy was distinctly heard to the eastward on the starboard side of the Persian, a bell of a vessel was reported by the lookout. The engines were stopped. A white light was then reported on the starboard bow of the Persian. The engines were immediately started and her wheel starboarded; the captain testifying that he supposed the light was on a schooner or small vessel, and that he would pass the schooner on his starboard side. Immediately a white light was reported on the port bow. Perceiving that the two lights were anchor lights on a large vessel directly in front, the engines were ordered full speed astern; but almost immediately, perceiving that the Persian still forged ahead and that a collision was inevitable, the engines were ordered full speed ahead, and the wheel put hard aport. This swung the Persian around, so that with her port bow she struck the Hesperides a glancing blow near her stem.

The general rule is elementary that a vessel under way which collides with a vessel at anchor is presumably at fault. The evidence, also, in my opinion, shows affirmatively that the Persian was at fault. When the lookout reported the sound of the Hesperides' bell ahead, the engines were stopped. But it was not a complete compliance with rule 16 [U. S. Comp. St. 1901, p. 2869] to stop the engines only. The rule says that a steam vessel, hearing apparently forward of her beam a fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. The engines having been stopped, the lookout shortly reported a light on the starboard bow. The captain immediately assumed that it was an anchor light on a schooner or small vessel, and ordered the engines to go ahead and the helm put to starboard, intending to pass the supposed schooner on his starboard hand. But there was no reason for the captain to assume that the vessel was a small one, except the fact that he saw but one light. The southeast wind swung the Hesperides towards the northwest, so that the stern anchor light was further away than the bow light. The great density of the fog that night is shown by the fact that time enough elapsed, after the bow anchor light on the Hesperides was seen and before the stern anchor light was seen, to order the helm starboarded, the engines put in motion, and the steamer to get under stronger way than she already had while drifting under stopped engines. Under such circumstances, for the captain to have assumed, on seeing one anchor light, that the vessel was a small one, and to have instantly started ahead at increased speed under a starboard helm, only changing the course enough to pass a small vessel, was, in my opinion, not navigating with caution until danger of collision was over. When the two lights were seen, the engines were reversed; but it was immediately seen that the headway of the Persian was such that it could not be overcome by reversing the engines, and that a collision was inevitable.

I cannot see that the Hesperides was at fault. It is strenuously urged that she was anchored in a fairway where she had no right to anchor. It is claimed that she was anchored on the range from the Pollock Rip Light vessel to the Pollock Rip Shoals Light vessel. But, in the first place, the evidence shows that she was not. The evidence of the men on the Whitney that she passed close to the Hesperides while going down from the Pollock Rip Shoals Light vessel on the regular compass course to reach the Pollock Rip Light vessel is, I have no doubt, disinterested, and is difficult to explain. Perhaps by reason of the strong southeast wind, or from some other cause, the Whitney had gone over to the eastward of the range. At all events, the proof of the location of the Hesperides while at anchor, taken by range observation at daylight the next morning, is decisive that she was anchored at least half a mile to the eastward of that range. Indeed, the testimony of the captain of the Persian that shortly after passing the bell buoy he put the Persian on a course N. E. by N. ½ N. and kept that course until the collision, shows that he was not taking the range course from the Pollock Rip Light vessel to the Pollock Rip Shoals Light vessel, but was on a course which would

take him at least half a mile to the eastward of the Pollock Rip Shoals Light vessel. So that, in my opinion, the proof shows that the Persian was not taking a range course from one light vessel to the other, and that the Hesperides was not anchored on such range. The Hesperides was not anchored on any range, or in any fairway, but in the open ocean. If the slue between Pollock Rip Light vessel and the bell buoy may be regarded as a fairway, there is none above the bell buoy. The chart shows that a vessel of any size, going north, after passing the bell buoy, can go anywhere safely to the eastward, and at least a mile to the westward, of the range between the two light vessels. Even the slue itself has been held not to be such a fairway as to make it improper for a vessel to anchor there in a fog. In the case of the H. F. Dimock, that steamer was held liable for a collision in a fog with the yacht Alva anchored in the slue. The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

My conclusion is that there should be a decree for the libelant in the suit against the Persian, with a reference to fix the damages, and that the libel against the Hesperides should be dismissed, with costs.

OSBORNE et al. v. McDONALD et al.

(Circuit Court, W. D. Washington, N. D. February 21, 1908.)

No. 1,307.

1. BASTARDS—PROPERTY—INHERITANCE FROM BASTARD.
   Where a resident of Washington whose parents were not shown to have been married died in 1881, his property descended, according to Code Wash. 1881, § 3306, providing that, if any illegitimate child die intestate without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 257–262.]

2. SAME—PRESUMPTIONS.
   On an issue of heirship, there is no presumption that the alleged heirs are the legitimate descendants of the ancestor.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 4, 5.]

3. MARRIAGE—PROOF—EVIDENCE.
   A bare preponderance of evidence is not sufficient to establish the fact of marriage, where there are only meager scraps of testimony tending to prove the marriage consisting of mere uncontradicted surmises and vague rumors.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 79.]

4. SAME.
   While the law does not create a presumption of marriage of a particular couple, yet, when it is shown that they lived together as husband and wife, acknowledged themselves to be such, and they were so reputed among their relatives and friends, a natural presumption consistent only with a lawful marriage and good morals becomes a legal presumption that the parties were married, though such presumption will not be raised by a mere proof of cohabitation, nor from reputation without proof of cohabitation.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 58–69.]

5. SAME—DECLARATIONS.

On an issue of heirship, evidence of declarations made by deceased members of the family that O.'s father contracted a second marriage was incompetent to prove that O.'s mother ever became the second wife of his father; she being in no manner identified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 75.]

6. SAME.

On an issue of heirship, evidence *held* insufficient to establish that O.'s parents were married so as to entitle complainants to inherit from O. in the paternal line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 79-89.]

In Equity. Suit against trustees appointed by the will of James Osborne, deceased, to recover his estate, on the alleged grounds that the complainants are his legal heirs, and that the attempted disposition of the estate by the will contravenes the rule against the creation of estates in perpetuity and is unlawful. Hearing on the merits. Bill dismissed for failure of proof to establish the right of the complainants as heirs of the deceased to contest the will.

Jenner & Williams, for complainants.

Chas. F. Munday and Scott Calhoun, for defendants.

HANFORD, District Judge. James Osborne died testate at Seattle, and his will was admitted to probate in the year 1881. This suit by alleged heirs, attacking the will, was commenced in the year 1905. The value of the estate is large, the complainants are numerous, and their respective places of residence are in so many states that it was found necessary to dismiss some of them out of the case, for the reason that their presence as parties would defeat the jurisdiction of this court; the only ground for federal jurisdiction being diversity of citizenship of the parties. The will ignores all relatives and heirs, and devotes all the residue of the estate remaining after bequests to personal friends, not heirs, to the erection of an edifice for a public hall on property owned by the city of Seattle, to conform to plans to be approved by the trustees named in the will or their successors, and a committee representing the city government on which there should be an inscription, which presumably the vanity of the testator caused him to contemplate that it would perpetuate the memory of his name and virtues. In the consideration of the foregoing facts and dates, the mind is naturally and forcibly arrested by the query:—why, if the complainants have a meritorious claim, did they slumber upon their rights for a period of nearly 24 years? Their bill of complaint anticipates and attempts to answer this query by averments to the effect that until recently the complainants did not know anything concerning the death of James Osborne, or his will, or the existence of an estate, and most of them did not know that any such person as James Osborne ever existed. This is true, and for the purpose of this decision it will be assumed that the ignorance pleaded excuses the apparent laches, but it creates in the mind a natural involuntary prejudice, because it is so improbable that all the members of a family so numerous, and connected by various ties, with so many people in so many places, should remain thus ignorant

of the life and death of James Osborne, if, in fact, he was related to the family by inheritable blood. This improbability might be overcome if James Osborne had left any record of his life, or had been communicative with respect to his early life and surroundings, so that of those who knew him witnesses might be found able to prove from information furnished by him the important facts with respect to his parentage, but only two of those who knew him after he came to Seattle have testified and they are able to give only a few meager scraps of information to the effect that he came from Morrisania, N. Y.; that he had some half-brothers; that his mother died; that he went as a sailor to Havre, France; that he returned to Morrisania; that during the period of his absence his father had died; that he again went to sea on a voyage around Cape Horn to San Francisco, and after a time came to Port Gamble, and then to Seattle; and that he had no use for his relatives and they had no use for him. Another way of overcoming the improbabilities of the case would be by the production of correspondence or written communications between the testator and his relatives; but, if any letter was ever written by him to any person, relative, or friend, it has not been produced. In view of the circumstances and without proof of the character suggested, the uncertainty of any conclusion or inference which may be drawn from the testimony is so great that the due administration of justice requires the production of other convincing evidence of all the facts essential to establish the claims of the complainants that they are legal heirs of the testator. To avoid the necessity of a complete analysis of all the evidence, it will be assumed for the purpose of this decision that the following propositions set forth in the brief of the solicitors for the complainants are true:

"(1) That said James Osborne, deceased, was born in the county of Westchester, N. Y., about the year 1835.

"(2) That said James Osborne, deceased, lived at Morrisania, or the Bronx, Westchester county, N. Y., until he was about the age of 17 years, at which time he left his home and went to sea, along about the year 1852 or 1853, and this first voyage was foreign, to wit, to Havre, France.

"(3) That after an absence of about four years said James Osborne returned to Morrisania, his former home, and found that his father had died during his absence, and that, after remaining there a short time, he again left his said home and went to sea, and never returned to the state of New York after that time.

"(4) That the said James Osborne about the year 1860 left the state of California from the port of San Francisco, and went by water to Puget Sound, landing at Port Gamble about that year, and that he resided thereafter in the territory of Washington until the time of his death.

"(5) Subsequent to his last departure from Morrisania said James Osborne at no time communicated with his relatives in any manner, nor with any other person, so far as known, in the state of New York, with the exception of one letter written from California to William Cauldwell.

"(6) That said James Osborne left relatives in Westchester county, N. Y., upon his departure therefrom.

"(7) That said James Osborne left relatives, to wit, half-brothers and a half-sister in Westchester county, N. Y., at the time of his last departure therefrom.

"(8) That said James Osborne was the half-brother of Louis K. Osborne.

"(9) That said Louis K. Osborne was the father and grandfather of certain of the complainants as set forth in the amended bill of complaint, and that he was the brother of Caroline Doty, Horace Osborne, Solomon Enos

Osborne, and Clarke Osborne, the mother and fathers and ancestors of the other complainants named in said amended bill of complaint.

"(10) That the father of James Osborne, deceased, was one Abram or Abraham Osborne, who was one of the veterans of the War of 1812. * * *

"(11) That said Abraham Osborne, father of said James Osborne, deceased, ancestor of these complainants, abandoned his first family, namely, Louis K. Osborne, Horace Osborne, Caroline Osborne, Solomon Enos Osborne, and Clarke Osborne, * * * and that his said last-named children became estranged from him and were taken to North Salem, a place 40 or 50 miles north of Morrisania, Westchester county, N. Y., by a brother of said Abraham Osborne, to wit, Northrup Osborne, who raised said sons until they arrived at maturity.

"(12) That the children of said Abraham Osborne by his first wife considered their father as somewhat disreputable in character, and for that reason seldom, if ever, talked with their children about him.

"(13) That the mother of said James Osborne died some years prior to his first leaving home, about the year 1852, and many years prior to the death of his father, Abraham Osborne."

The lines of the tenth and eleventh propositions which are omitted from the above quotation assume as facts that Abraham Osborne contracted a second marriage, and that James Osborne was legitimate issue of that marriage. These facts essential to make a complete case for the complainants are not to be presumed, but must be established by convincing proof, before the complainants can be heard to assert their claims as owners of the estate in opposition to the trustees in possession by virtue of the testamentary disposition made of it by the man for whom they, their parents, and grandparents cared not during his lifetime. If the parents of James Osborne were not lawfully married, the descendants of his father are not his heirs. This is so for the reason that his property descended according to the laws of Washington Territory in force at the time, and by section 3306 of the Code of 1881 it is provided that:

"If any illegitimate child shall die intestate without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law."

This decision will not rest upon any presumption that James Osborne was not a legitimate son of his father, but on the ground of failure of proof, because there is no presumption that the complainants are his legal heirs, nor of any material fact essential to establish their rights as heirs. In the case of Blackburn v. Crawford, 3 Wall. 186, 18 L. Ed. 186, the Supreme Court assigned as one of the grounds for reversing a judgment that it was error to charge the jury that "the presumption of law was in favor of the legitimacy of children," and in that connection the court said:

"Under such circumstances, the law makes no presumption. The question to be determined was one of fact, and not of law."

In Arnold v. Chesebrough (C. C.) 46 Fed. 700, Judge Lacombe said:

"Whoever asserts a marriage as a basis of a claim at law or equity must satisfy the court, upon the whole case, by a fair preponderance of proof, not necessarily where and when such contract was made, but that at some time and place it was made."

That decision was affirmed on appeal. 58 Fed. 833, 7 C. C. A. 508.

I hold, further, that a bare preponderance of evidence is not sufficient to establish the fact of a marriage, where only meager scraps of testimony, tending to prove only surmises or vague rumors or traditions, are introduced on one side and left uncontradicted. There must be competent evidence sufficient to create a belief, if uncontradicted, that there was a marriage. In other words, until a prima facie case has been made, a defendant cannot be put upon his defense, and required to disprove an assertion not supported by evidence sufficient to justify a reasonable belief. The law is extremely liberal with respect to the mode of proving the fact of a marriage, and every variety of evidence direct and circumstantial is admissible in cases of difficulty. 19 Am. & Eng. Enc. of Law (2d Ed.) p. 1197. Whilst it is true, as above stated, that the law does not of itself create a presumption of marriage of a particular couple, a natural presumption arising from proved facts, consistent only with a lawful marriage and good morals, becomes a legal presumption. In general, where parties have "lived together as man and wife, acknowledging themselves to be such, and reputed to be such among their relatives and friends, the law will presume, in the absence of other evidence, that they have been legally married"; and a presumption based upon that state of facts is one of the strongest known to the law, but, in the absence of other evidence, marriage will not be presumed from mere cohabitation, nor from reputation without proof of cohabitation. 19 Am. & En. Enc. of Law (2d Ed.) pp. 1204, 1205.

After a painstaking study of all the evidence submitted in this case, I am obliged to say that I find not a scintilla of evidence tending to prove that the parents of James Osborne were married. His mother is not identified. No witness who has testified pretends to have known her, nor to ever have seen her, nor to have heard any other person make any statement or declaration concerning her who pretended to have known her. Her name cannot be discovered from all the evidence in this case, and it cannot be discovered from all the evidence when, if at any time, or where, if at any place, she cohabited with Abraham Osborne, nor that she was known at all to any member of the Osborne family. In their argument the solicitors for the complainants seem to rely upon testimony tending to prove declarations made by deceased members of the family which if shown to have been based upon actual knowledge might be competent to prove that Abraham Osborne contracted a second marriage, but all such declarations are incompetent to prove that the mother of James Osborne ever became the second wife of his father because she is not in any way identified. The only one of the declarations which refers to the person supposed to have become the second wife of Abraham Osborne is found in the deposition of Emma C. Osborne, a daughter of Clarke H. Osborne, one of the sons of Abraham Osborne. Her statement refers to her father, and is as follows:

"He told me his stepmother sent for him when dying, but he would not go."

According to the understanding of the witness, this occurrence was when her father was very young. He was born in the year 1819.

James Osborne was born in the year 1835, and, unless his mother died during his infancy, it is not probable that she is the stepmother who is supposed to have died at a time when the man who made the declaration was very young. It is unnecessary to make further comments on the testimony. It is enough to say that, considered in its entirety and in detail, it dispels rather than supports any reasonable inference that the parents of James Osborne were actually married, or that they cohabited together as husband and wife, and were reputed to be married.

For their failure to prove that they are the legal heirs of James Osborne, I direct that a decree be entered dismissing the suit, with costs.

LUDVIGH v. AMERICAN WOOLEN CO. et al.

(District Court, S. D. New York. December 6, 1907.)

BANKRUPTCY—SUIT BY TRUSTEE TO RECOVER PROPERTY—SUFFICIENCY OF BILL.

A trustee in bankruptcy filed a bill against the American Woolen Company and the Niagara Woolen Company, corporations, alleging that the bankrupts were wholesale dealers in silks and woolens, and bought the latter on credit from the American Company and others; that, pursuant to a fraudulent arrangement between them, the Niagara Company was organized as a selling agent for the American Company, practically all of its stock being issued to the bankrupts, and pledged by them to the American Company as a guaranty of the performance of its contract as agent; that the office and warehouse of the Niagara Company were in the bankrupts' place of business, and they controlled its operations, received the goods consigned to it by the American Company, mingled the same with their own goods, made the sales, and collected the proceeds which they deposited to their own account, making remittances for credit to the company; that, immediately preceding the bankruptcy, defendants took possession of and removed all consigned goods remaining in the bankrupts' stock. *Held*, that the bill stated a cause of action to recover the value of such goods, on the ground that the transactions set out were fraudulent as against other creditors, and that such goods were in the possession of the bankrupts under such circumstances as to estop defendants from asserting ownership as against complainant.

In Equity. On demurrer to bill.

The object of the bill was to recover money alleged to have been paid by the bankrupts to the defendant American Woolen Company and the value of woolens taken away by the American Woolen Company from the bankrupts' possession immediately prior to the filing of the petition. Both of the defendants were corporations organized under the laws of New York, and the complainant is the trustee in bankruptcy of Philip Horowitz & Son. The bill alleged that prior to October 26, 1904, Philip Horowitz & Son were doing business in silks and woolens in New York City. They purchased their goods from a number of different concerns on credit in the usual course of business, and continually possessed at their place of business a large stock of silks and woolens. In 1901 the American Woolen Company, upon its incorporation in that year, took over the business of a number of concerns which had previously supplied the bankrupts on credit, and commenced selling woolens to the bankrupts in the same manner, allowing them a line of credit of about $40,000. The bankrupts also continued purchasing woolens from the other concerns which had not transferred their business to the American Woolen Company, and thus kept up their stock in part from this source. They also continued their silk business on varying terms of credit as before. The American Woolen Company refused the bankrupts further credit about November 1, 1902, and the

bill then alleges the making of a fraudulent arrangement by the American Woolen Company and the bankrupts, pursuant to which the Niagara Woolen Company on November 11, 1902, was incorporated with an authorized capitalization of $20,000. The bill alleges the various steps in the organization of the Niagara Woolen Company, the result of which was that the bankrupt Philip Horowitz acquired all but two of the shares of the stock of the Niagara Woolen Company, the remaining two being held by employés of the American Woolen Company. A contract was then made between the American Woolen Company and the Niagara Woolen Company under which the latter agreed to act as the agent for the sale of woolens to be consigned to it by the American Woolen Company. Philip Horowitz guaranteed the performance by the Niagara Woolen Company of this contract, and hypothecated his stock in the Niagara Woolen Company as security for this guarantee. The contract stipulated that title to the goods consigned should in all cases remain in the American Woolen Company, but that the Niagara Woolen Company could sell the goods to such persons as it might elect for credit or cash, and remit the proceeds to the American Woolen Company, less the amount which would represent the profit which would have been derived had the goods been purchased direct from the American Woolen Company. The bankrupts were allowed to receive the dividends on the stock of the Niagara Woolen Company until default on the guarantee. The name of the Niagara Woolen Company was put up adjacent to the bankrupts' name over their place of business, and a space was partitioned off in the bankrupts' office for the Niagara Woolen Company. A separate set of books was opened as the books of the Niagara Woolen Company, and kept by an employé of the American Woolen Company. With each delivery of goods under this contract a writing would be also delivered to the effect that the goods were the property of the American Woolen Company, and were consigned to the Niagara Woolen Company for the purposes of sale. All of these facts were unknown to the public. The goods delivered were mingled with the other woolens of the bankrupts and with their stock of silk goods, the Niagara Woolen Company employing no salesmen, and no effort being made by any one to build up a good will for it. The proceeds of sales were generally treated by the bankrupts, with the defendants' acquiescence, as their own. These proceeds would be deposited in the bankrupts' own bank account, and remittances be made to the credit of the Niagara Woolen Company on the general account of the American Woolen Company. The bill alleges that, induced by the ostensible ownership of the goods by the bankrupts, the latter's creditors, represented by the complainant, extended credit to the bankrupts, and that they accordingly are entitled to the stock of woolens thus consigned remaining on hand at the time of the failure, together with money representing collections from sales made by them. The bill alleges that these goods were taken away from the bankrupts' place of business by the American Woolen Company on October 26, 1904, immediately prior to the filing of the petition.

Abram I. Elkus and Garrard Glenn, for complainant.
Daniel P. Hays, for defendants.

HOUGH, District Judge (after stating the facts as above). The draughtsman of the bill has evidently felt that the exact situation presented to him for description was new, and different views of the pleading might be taken by men of equal experience. To my mind the question presented is this: Assuming it to be true, as asserted, that the Niagara Woolen Company, though a different legal entity, was for business purposes but the alter ego of the American Woolen Company; that goods consigned to the Niagara Woolen Company were while in that company's possession intended to be held for the benefit of the American Woolen Company; that the affairs of the Niagara Woolen Company were by the procurement and consent of the American Woolen Company managed in large part by the bankrupt; that, being so

managed, the Niagara Woolen Company permitted the bankrupts to trade and use the consigned stock of goods as their own to this extent, viz., to sell the same to customers of their finding or selection, to sell in the bankrupts' own name, and to make collections likewise in their own name and deposit the proceeds of collection in whole or in great part to bankrupts' own credit—do these allegations, if true, set forth a cause of action in the trustee duly appointed, based upon an alleged scheme to hinder, delay, and defraud creditors? The answer to this question is to be found in my judgment by solving one or two questions of fact, to wit: (a) Were the goods in question at the time of the transaction complained of the goods of the bankrupts? (b) If they were not as between the parties to the agreement the goods of the bankrupts, were they in the possession of the bankrupts under such circumstances as to estop the American Woolen Company and the Niagara Woolen Company from asserting ownership therein as against a trustee in bankruptcy?

I think both of these questions are raised by the bill of complaint upon sufficient allegations of fact pleaded with sufficient artificiality. If this were a final hearing, and all the facts were admitted as pleaded, my answer to the question last propounded would be to direct judgment for complainant. Entertaining such view, the demurrer is overruled.

THE NEW HAVEN.

(District Court, D. Connecticut. March 19, 1908.)

No. 1,566.

SALVAGE—RIGHT TO COMPENSATION—BENEFICIAL RESULT OF SERVICE.

The action of libelants in fastening an overturned coal barge which had drifted ashore at high tide during a gale, which caused the tide to rise to an unusual height, by small lines attached to objects on shore, *held* not to amount to a salvage service which would sustain a libel for compensation, it appearing from the evidence that the barge was firmly imbedded in the sand, and held there by its oak bitts, and was in no danger of being moved by the elements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 12. Awards in federal courts, see notes to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

E. P. Arvine, for libelants.
James J. Macklin, for claimant.

PLATT, District Judge. It is elementary law that the right to salvage depends solely upon the consideration that property has been saved to the owner from maritime peril by the salvor. It must appear that, except for the voluntary services of the libelants, the property here in question would have been lost. It is a coal barge of the well-known type, and needs no detailed description.

It was shown at the hearing that on December 23, 1907, a heavy storm struck a tow of barges which included the one we have to do

with. The tow was broken up, several of the barges were sunk, and one barge, the John McCarthy, was overturned and drifted bottom up, close upon the shore, near Ames Point at Woodmont, Conn. It struck about 1 o'clock p. m., which was near high tide. The direction of the gale had caused the tide to rise at least a foot higher than the average, and therefore the barge was thrown considerably further upon the shore than would have been the case at the ordinary high tides. She had carried about 600 tons of soft coal, but, after being upset, substantially all the cargo had been shaken out into the waters of the Sound. When she struck she became thoroughly imbedded in the sand, and was firmly held there by oak bitts, which were oval in shape, 14 inches in diameter at the thickest part, and projected some 2 feet above the line of the deck. The libelants of course did not know this, and took what they deemed to be proper precautions to prevent the barge from drifting away upon the Sound during the night. These consisted of going out to the upturned barge about 3 o'clock in two 15-foot boats and screwing a ringbolt into one of the inshore corners of the barge, to which they attached a small rope less than an inch in diameter, and carrying the same to the shore, took a hitch around a rather frail looking apple tree trunk, and, 10 feet further along, around a barbed wire fence post. After dark two of them went out again to the barge, screwed another ringbolt into the other inshore corner, and fastened a little larger rope to the ringbolt and then around a boulder on the shore. If a severe offshore gale had sprung up during the night, and the barge at high water had been entirely free from the bottom, these ropes would not have prevented her from being driven out to sea, but the fact is that the night was of that calm and pleasant kind which usually follows a boisterous gale. The libelants tried to satisfy the court that the barge shifted her position during the night from 60 to 80 feet. The libel was filed on December 27th, and no hint at such an important fact can be found in its articles. The testimony is manifestly an afterthought introduced to save their case. They also say that the seaward end was afloat at a date, when, by the evidence, it is clear that her entire length was imbedded in the sand.

I am satisfied from the evidence that there was never a minute after the barge was set, by the unusually high tide, far up on the shore Monday afternoon, when there was the slightest danger of her being dashed upon the rocks or driven out to sea. This being so, the libelants, though meaning well, no doubt, did nothing whatever which benefited the claimant owner.

Let a decree be entered dismissing the libel, with costs to the claimant.

THE UCAYALI.

(District Court, E. D. New York. March 13, 1908.)

ADMIRALTY—JURISDICTION OF COURTS—SUIT BY ALIEN AGAINST FOREIGN VESSEL.

The right to object to the assumption of jurisdiction by a court of admiralty of the United States in a suit by a foreign subject against a vessel of his own country is waived by a general appearance and the filing of an answer by the claimant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, §§ 260–264.]

In Admiralty.

Robert W. Imbrie, for libelant.
Whitridge, Butler & Rice, for claimant.

CHATFIELD, District Judge. The right to object to an assumption of jurisdiction by this court seems to have been settled by the general appearance and answer on the part of the claimant. As to whether the court will exercise jurisdiction to the extent of granting any relief, or as to whether the matter, if disposed of upon the merits, can give any further relief to the libelant than what was given him by the British consul, is a question that cannot be determined upon affidavits. The statement is made that some depositions have been taken in the case, and the court sees no solution except to bring the matter up for trial. This can be done now in the near future.

DICKINSON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. February 12, 1908.)

No. 681.

1. BANKS AND BANKING—NATIONAL BANKS—OFFENSES—CONVERSION OF FUNDS—INDICTMENT—"CONVERT."

An indictment alleging that F., as cashier of a national bank, unlawfully "converted" certain "moneys, funds, credit and credits" to the use of D. sufficiently charged the manner in which the misapplication was effected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.

For other definitions, see Words and Phrases, vol. 2, p. 1570.]

2. CRIMINAL LAW—EVIDENCE—OBJECTIONS—REVIEW.

Where evidence of guilty knowledge was material and admissible under an assurance that it would be connected, its admissibilty could not be reviewed on a writ of error on objection taken at the trial that it was immaterial or remote, not sufficiently connected with defendants, or with the transactions complained of, etc., it being impossible to tell from the record whether it was connected or not.

3. BANKS AND BANKING—NATIONAL BANKS—OFFENSES—EVIDENCE.

In a prosecution for misappropriation of the funds of a national bank, a letter written by certain of the directors of the bank to the comptroller of the currency, after the misappropriation, was inadmissible either as showing the state of mind of the directors after the offense, or a ratification of the misappropriation.

4. JURY—RIGHT OF JURY TRIAL—NUMBER OF JURORS—WAIVER—MISDEMEANORS.

While a person accused of an infamous crime, though not a felony, may waive the disqualification of jurors, or even their impartiality, such person cannot waive his right to a trial by a jury of 12 by consenting, after a legal jury had been impaneled and two had been excused, to continue the trial and abide by the verdict of the remaining 10.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 197–203.]

Aldrich, District Judge, dissenting.

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

Henry W. Dunn (Powers & Hall, on the brief), for plaintiff in error.

Asa P. French, U. S. Atty. (Roscoe Walsworth, Special Asst. U. S. Atty., on the brief), and William H. Lewis, Asst. U. S. Atty.

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

PUTNAM, Circuit Judge. This was a joint indictment of Dickinson and one Foster, the latter of whom was cashier of the South Danvers National Bank, under section 5209 of the Revised Statutes. Foster and Dickinson were convicted on several counts, but not on the fourth and tenth. As Dickinson was entitled to do, he sued out this separate writ of error. The pith of the offense alleged against Dickinson was based on the fact that Foster, the cashier, was the principal offender, and that he, as such cashier, unlawfully "converted" certain "money, funds, credit and credits" to the use of Dickinson. The assets so converted were not otherwise described, except

that, in each count, the value was given in one round sum. Neither was there any further description of the method of conversion. Dickinson was indicted as aiding and abetting. Consequently, Dickinson could not be convicted under any count except as Foster was found guilty as principal.

The pith of the first error alleged is put in the following language:

"That each count of the indictment was vague and indefinite, and did not state with that reasonable certainty required by law the way in which the alleged misapplication was made."

We do not perceive that the general assertion that the various counts are vague is to be regarded by us except in that it is maintained that there is no description of the way in which the alleged misapplication was made. The plaintiff in error is misled by his own expression "alleged misapplication." If the word "misapplication" was all there was in the counts, they, of course, would be invalid in accordance with United States v. Britton, 107 U. S. 655, 669, 2 Sup. Ct. 512, 27 L. Ed. 520. There it was held that, in an indictment of this character, the words "willfully misapplied," without something to show the method of the misapplication, was insufficient. It did not need a decision of the Supreme Court to establish that proposition, because it represents a familiar rule in the criminal law. But, as we have said, it is alleged here that the assets were unlawfully converted to the use of Dickinson, so that the method of misapplication was shown. The word "convert" has such force at common law that, when used in an indictment, with a statement as to whose use the conversion was made, it needs no amplification, any more than the word "embezzle," or the words "steal, take and carry away." This we pointed out in Jewett v. United States, 100 Fed. 832, 837, 41 C. C. A. 88, 53 L. R. A. 568, decided by us on March 29, 1900.

The plaintiff in error relies on Batchelor v. United States, 156 U. S. 426, 427, 15 Sup. Ct. 446, 39 L. Ed. 478. That decision is not of much use as a precedent. The difficulty there was that there were long allegations of details, all connected by the words "in the manner following," and "in the manner aforesaid," and that the allegations taken as a whole the court could not understand. The only question was one of contradictory pleadings, arising from too much detail, rather than a lack of it as claimed by the plaintiff in error before us. It is quite likely that the pleadings in this case might have been criticised in some particulars not now urged, and that there might have been a variance shown at the trial. It is true that the word "converted" is also awkward in the place where we find it here; but no objection was attempted on that ground, and its use as used here has been accepted by the Supreme Court in a like connection and for the same purpose. Coffin v. United States, 156 U. S. 432, 435, 15 Sup. Ct. 394, 39 L. Ed. 481; 162 U. S. 666, 16 Sup. Ct. 943, 40 L. Ed. 1109. The word "convert," under the circumstances, must be accepted as intending exactly the same thing as when spoken in connection with the use of the person who was guilty of the conversion. So, also, the plaintiff in error has not relied on any variance, or any inadequacy of description of the assets which were misapplied, except with ref-

erence to the fourth and tenth counts, as to which he was acquitted. On the whole, the indictment, in the particular which we are now considering, is fully covered by our decision in Jewett v. United States, ubi supra.

As we have said, the plaintiff in error was charged with accepting the benefit of the misapplication of the assets of the bank by the cashier. This misapplication was by permitting overdrafts, and also by permitting the discount of various notes and the consequent drafts against the proceeds thereof, many of which notes ultimately involved the bank in serious loss. As the guilty intentions of Dickinson and Foster were involved, it would naturally be assumed that the United States would have sought to prove that they knew that some of these notes were worthless, or lacking sufficient assets behind them; but we are asked to consider objections to prove that Dickinson knew, or had reason to know, that such was the fact. The record shows that the court instructed the jury that the evidence of knowledge on the part of Dickinson would not affect Foster. The portion of the record thus referred to fails to observe whether the court charged that Dickinson's knowledge would not avail the United States unless the knowledge of Foster was also proven, as it should have done at some part of its charge. However, the following were the objections taken at the trial:

"The evidence in question had no sufficient legal bearing on the transactions complained of in the indictment or the issues properly involved in the trial thereof; the evidence was immaterial or remote; it was not sufficiently connected with the defendants; that it was not sufficiently connected with the transactions complained of in the indictment; it tended to complicate the issue, and to prejudice the jury."

These objections related to the testimony of numerous witnesses, in a sweeping form. We could have judged them more satisfactorily if exactly what occurred at the trial with reference to the particular evidence of any particular witness had been given us in a detailed, concrete form. The objection that the evidence had no sufficient legal bearing and was immaterial or remote, as a general proposition, certainly was not sound, because it was material to prove Dickinson's knowledge. That it tended to complicate the issue and prejudice the jury was, of course, ineffectual without explanation. All proofs may do those things. That it was not connected is not a proposition that we can consider on this record, where no statement was made to that effect. The proof was material and admissible under an assurance that it would be connected. If it was not connected, the plaintiff in error had his remedy, but not in the way in which it is now sought to be presented. For example, the topic might not be legitimate if it had appeared that the court had, on the subsequent application of the plaintiff in error, refused to instruct the jury as to the proper method of connecting the proof, or as to its ineffectiveness if not connected with Foster. As the record stands, the admission of the evidence may, or may not, have been error, and it is impossible for us to determine which was the fact.

We are also asked to pass on certain correspondence between the Comptroller of the Currency and some of the witnesses which occurred subsequently to the misapplication charged in the indictment. Some of the directors who were parties to the letter to the Comptroller thus offered in evidence testified for the United States. It is not necessary to detail this correspondence. If it was offered to contradict, it was admitted at our bar that the ground therefor had not been laid for its admission; if it was offered to show merely the state of mind of the directors after the offense had been committed, it was clearly of no consequence; and, if it was offered to show ratification and approval, the directors could neither ratify nor approve as against the United States what was an already completed criminal act. The truth is that, so far as appears, the correspondence was merely ex post facto, and, under the circumstances, immaterial; and it was properly ruled out.

The only remaining point is that, by the consent of both the United States and the plaintiff in error, the verdict was taken from 10 jurors, 2 having been excused. The facts were as follows:

The full jury of 12 was impaneled, and the trial commenced. While it was proceeding it appeared that one of the jurors, by reason of illness, was unable to sit further, whereupon the following agreement was filed of record:

"Whereas one of the jurors impaneled to try the above-entitled indictment is unable by reason of illness to further sit therein.

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.

"John W. Dickinson.
"George M. Foster.
"United States,
"By Boyd B. Jones,
"Special Assistant U. S. Attorney."

The court proceeded with the trial with the remaining 11 jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him. The trial proceeded with the remaining 10 jurors, who returned a verdict, subsequently to which a motion in arrest of judgment was filed as follows, and overruled:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

Powers & Hall,
"Attorneys for the said Defendant."

It will be noticed that the trial commenced with the constitutional tribunal; that is, a court organized under the Constitution and laws of the United States, with authority to try the offense in question, and a judge of that court duly appointed and commissioned, and

authorized to preside at the trial, and a constitutional jury. The difficulty arose subsequently. We refer to these facts so that it may be understood that we do not overlook them, although neither party has made any distinction between a case where the full jury is first impaneled and jurors are subsequently withdrawn with consent of one, and where, with like consent, the jury was from the beginning deficient in numbers. We are not aware that any court or text-writer has ever made any distinction on this score, and we will not attempt one. The following are the constitutional provisions in question:

The second section of article 3, of the Constitution, reads:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress by law may have directed."

Amendment article 5 reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except," etc.; and no one "shall be compelled in any case to be a witness against himself."

Amendment article 6 reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment article 7 reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It is settled that the offense in question before us is an infamous crime within the meaning of the Amendment article 5, though not a felony. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. It has also been repeatedly determined by the Supreme Court that, even when the phraseology of the Constitution is apparently unqualified, it may be construed with certain qualifications in the light of the principles of the common law, of which perhaps the most striking illustrations are Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, and Capital Traction Company v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. The latest is Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. ——. There is no question that it was settled law in England that, in a case of felony, the jury panel could not be weakened by waiver of the person prosecuted. Thompson v. Utah, 170 U. S. 343, 353, 354, 18 Sup. Ct. 620, 42 L. Ed. 1061; Queenan v. Oklahoma, 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175. But with regard to misdemeanors, we have made a very diligent search, and find no pronounced practice prior to the Constitution in the English courts or elsewhere with reference to like waivers.

It is no doubt true that, within the states of Maine, Massachusetts, and New Hampshire, there has been to a certain extent practical recognition of the power in cases of misdemeanors to waive a full jury as the same was waived here; but apparently this was never formally approved until Commonwealth v. Dailey, 12 Cush. (Mass.) 80, decided in 1853. This practice, whatever it was, is not of such antiquity or universality as to affect the construction of the Constitution of the United States. In the absence of any historical guide, other state courts have arrayed themselves on different sides of the topic in numerous decisions, and under somewhat different constitutional forms of expression, and to some extent without recognizing any distinction between felonies and such high crimes as are misdemeanors. This has gone so far that it will be of no avail for us to do more than cite two or three of the leading authorities, and explain our conclusions as briefly as we can. This is especially so in view of the fact that it is beyond our power to enter a judgment which involves finality, and it is also of little consequence what judicial results are reached until we have a determination of the Supreme Court directly on the issue, which determination we have never yet received.

It is plain that Amendments articles 5 and 6 are so expressed, and some of the elements to which they relate are of such a character that there may be waiver to a certain extent by an alleged criminal, at least with regard to misdemeanors; as, for example, the privilege as to criminating testimony, the right to a speedy trial, the right to compulsory process for witnesses, the right to the assistance of counsel for defense, and the right to be confronted by the witnesses. Others the accused cannot waive, as, for example, an indictment in the case of a capital or infamous crime, and a jury drawn from the district specified.

On the other hand, the provisions of section 2 of article 3 are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear prima facie that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.

The tribunal pointed out by article 3 consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be impaneled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, to consist of 12. With the aid of this determination, the third article points out perfectly the el-

ements of the tribunal authorized to proceed against persons accused of crimes like that before us, including equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative.

To be sure, while the Constitution and the amendments make no literal distinction between a jury for criminal proceedings and a jury for civil proceedings, yet, with reference to bills of exceptions, writs of error, and everything else, the Supreme Court has accepted in civil proceedings verdicts of 9, 10 or 11 jurors as verdicts of constitutional juries; and the right of parties to waive the presence of one or more of the 12 in ordinary suits at common law is conceded. This, however, may be assigned to the fact that at common law the power to waive in civil suits was also conceded; and the authorities which we have cited establish the proposition that the Constitution and its amendments are to be construed in the light of that fact. Again, it is urged, and it is true, that the hardships which may sometimes occur, arising from circumstances like those at bar, in the event of a constitutional inhibition of waiver, may be of the most serious character, sometimes even involving financial ruin of the accused in compelling him to abandon the first trial and go through a new one; yet, on the other hand, it is urged that it may well be presumed that a person charged with crime acts under duress, so that his consent to waive the advantages which may come to him from insisting on the unanimous concurrence of 12 jurors instead of 10 or 11 ought not to be lightly accepted. Consequently, neither of these considerations presses with so much weight as to enable us to reach a determination of the question before us.

However, as we have said, we do not deem it of value to pursue the discussion throughout. We will put on the one side Chief Justice Shaw and the Supreme Judicial Court of Massachusetts as stating the right to waive, under circumstances as in the case at bar, in Commonwealth v. Dailey, 12 Cush. 80. On the other side, as sound a writer on constitutional law as we have had, Chief Justice Cooley, declared as follows:

"The infirmity in case of a trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state." Cooley's Constitutional Limitations (7th Ed., 1903) 458, 459.

The learned jurist, in stating the direct proposition that a full panel could not be waived even by consent, adds: "At least in case of felony." But the principle he lays down covers every criminal proceeding where by the Constitution a common-law jury is required. What we have attributed to him is quoted from the seventh edition of his Constitutional Limitations, but the same will be found in the edition of

1896, which is the last published during his lifetime. Thus it appears that he reached the result stated at the end of 30 years' study and reflection. The reasoning which Chief Justice Cooley relied on as supporting the conclusion which we have attributed to him is undoubtedly found in Hill v. The People, 16 Mich. 351, 357, decided in 1868. There the opinion was given by Judge Christiancy, and was concurred in by all the other judges, including Chief Justice Cooley. The doctrine spoken of by Judge Christiancy would sustain the judgment in this case. He proceeded as follows:

"The doctrine rests upon assent; in other words, when reduced to its final analysis, upon contract. Under our Constitution, in civil cases, there can be no reasonable doubt of the competency of parties to waive such an objection, or to stipulate for a trial by jury of less than twelve, since they can waive the right of a jury trial altogether, and are held to have done so unless it is demanded. But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding in invitum, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the Constitution or the laws, the result of which trial might be to place him in the same penitentiary.

"The true theory, we think, is that the people, in their political or sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the constitution which secures his rights. The government, the officers of the law, bring the jurors into the box; he has no control over the matter, who shall be summoned or compose the panel, upon which he may exercise the right of challenge; and the prosecution must see that electors only are placed there, as the law requires." * * * "It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

The opinion of Chief Justice Shaw was based entirely on propositions initiated by himself, or by the court he represented. All the cases cited by him have been carefully examined, and they in no way meet the difficulty here; and he made no claim that they did. The conclusion he reached stood entirely on the force of his own reasoning, anl he halts when he reaches the following, on page 83 of 12 Cush. (Mass.):

"But it is asked, if consent will authorize a trial before eleven jurors, why not before ten or six, or one. It appears to us, that it is a good answer to say that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency."

We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sustained, the jury may not be made to consist of 1 man instead of 12. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but, while, necessarily the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind.

We have referred impliedly to the fact that the rule of the Supreme Court is that, ordinarily, the federal courts in any district may follow the settled practice in criminal cases in the state which includes the district in existence at the time the Constitution was adopted. While this rule may not go so far as to control directly the construction of the Constitution, nevertheless, it cannot be questioned that if, as shown historically, there had been, at the common law, or even in Massachusetts before the Constitution, a practice of excusing jurors in misdemeanors, this would have weight under Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, Capital Traction Company v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, and Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, already cited, as such ancient practices have with regard to waiving the disqualification of jurors, and even their impartiality, at least in trials for misdemeanors. For the traditional law of New England we look to Dane's Abridgment, where we are unable to find any trace of a practice supporting the proceedings now in review before us; and Chief Justice Shaw, who certainly would have known of such a practice if there had been any, in no degree rested Commonwealth v. Dailey on any assumption of that nature.

Of course, the fact to which we have referred is pressed on us, that the right to waive the disqualification of jurors, and even impartiality, is conceded, although the amendments guarantee an "impartial jury." This, however, is disposed of by the fact which we have explained, that the Constitution is construed in the light of the settled practice of the common law. At the common law it had always been held that such waivers, when permitted, did not constitute error. The precise distinction was made in Queenan v. Oklahoma, 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175. There the matter was directly in issue on an indictment for murder, and, as the case came from a territorial court, it involved the Constitution of the United States. It appeared that, in the course of the trial, the United States announced that, since an adjournment, it had been informed that one of the jurors had been convicted of an offense which, by the local law, was felony; and they gave full information in reference thereto. The opinion observes that

the territorial court assumed that, for the then purposes, this disqualified the juror from serving; and it continues as follows:

"The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that, if the objection were pressed, the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It is now argued that the defendant was deprived of a constitutional right which he could not waive. Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. The contrary plainly is the law, as well for the territories as for the states."

This statement that, if the juror had been excused, the trial would have had to be begun over again makes an authoritative determination of a distinction which applies as much to misdemeanors as to felonies, to the effect that it does not follow that, because objections to the qualifications of jurors can be waived, a reduction in their number can also be waived. Therefore, so far as this point is concerned, the United States can take no advantage.

Of course, it would yield no results for us to attempt to go over to any substantial extent the history of trial by jury, which so many learned writers have undertaken to explain with more or less success. Therefore, we will refer to only two evidences showing how rigid was the common law so far as applicable here. Lord Dacre's Case was explained in Kelyng's Reports, 56. Kelyng showed the authority for his statements. He said it was ruled unanimously by the judges who had been summoned in to the House of Lords, that Lord Dacre could not waive his trial by his peers and be tried by the country; and, also, that, although all the peers did not agree in their verdict, it would still be a good verdict "so that there be twelve or more." He added:

"Therefore, the use is never to have less than twenty-three peers for tryers, because that is the least number to be sure that twelve be of one mind."

So in Forsyth's History of Trial by Jury, 241, it is stated that it was decided in the reign of Edward the Third that "a verdict by less than twelve" was a nullity. Authorities for this are cited. Lord Dacre's Case was, of course, a felony, and perhaps neither of the citations are directly in point here; but they show that the common law sought to secure, not merely a jury of 12, but the concurrence of that number. Reasons for this of a very special character have been often suggested.

We fully appreciate the urgent arguments to the contrary of our propositions; but, in view of the insufficient status of judicial decisions, we do not feel that we are permitted to qualify the situation. Of course, this conclusion has no relation to minor offenses of the class covered by Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; but it applies to high misdemeanors of the character at bar.

The United States press on us that the Amendments articles 5 and 6 modify, on the question we are considering, article 3 of the Constitution as originally adopted. We find no authority in support of this proposition. The amendments, as we have said, touch some mat-

ters which, by their very nature, are of such a character that a person accused may waive them. They also include other matters which, by their very nature, cannot be waived; as, for example, the requirement of an investigation by a grand jury with regard to infamous crimes seems to be settled in Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223. This requirement, like those of article 3 directing a jury and fixing the place of trial, relates to the frame of government, and therefore it is not subject to the control of the parties. The only expressions we find in the decisions of the Supreme Court relating to this subtopic are in Schick v. United States, 195 U. S. 65, 68, 24 Sup. Ct. 826, 49 L. Ed. 99, and in Callan v. Wilson, at page 549 of 127 U. S., 8 Sup. Ct. 1301, 32 L. Ed. 223. Schick v. United States determines nothing, because it merely says that, "if there be any conflict" between the amendments to the Constitution as originally adopted, "the amendments must control" under the well-understood rule that "the last expression of the will of the lawmaker prevails." On the other hand, the opinion in Callan v. Wilson states definitively that "there is no necessary conflict."

The observations in the opinions of the Supreme Court seem to be in complete harmony with the generally accepted rule, to the effect that, while the original Constitution relates to the frame of government, the amendments are in the nature of a "Bill of Rights," which, of course, is understood to be in the interest of the citizen or subject, and, therefore, prima facie, more or less under his control and subject to waiver. The amendments are described in the first edition of Story's Commentaries on the Constitution, § 1776, and in the third edition of the same work at sections 303 and 1857, and in Cooley's Constitutional Limitations (7th Ed.) at page 365, as a "Bill of Rights." Story points out that the Constitution was not supposed to contain any bill of rights, and that no objection to it was proclaimed with more zeal, and pressed with more effect, than the want thereof. The Growth of the Constitution, by Meigs (1900), which, so far as we have examined it, appears to be correctly stated, and which is a convenient handbook with reference to the work of the Constitutional Convention, points out at pages 250 and 314 that the Constitution as originally adopted contained no bill of rights, and that the Convention being divided on the question, all attempts to frame one were dropped. Indeed we might dispose of this entire subtopic by reference to the opinion in Robertson v. Baldwin, 165 U. S., already referred to, according to what appears therein at page 281, 17 Sup. Ct. 329 (41 L. Ed. 715), as follows:

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

So far, therefore, from this proposition on the part of the United States impressing us, it indicates why it is that the constitution of a jury in criminal cases as to numbers as known to the common law

is a matter of governmental regulation, while several things which are secured by the amendments, and which may be waived by an accused person, are of a different character. It also assists in explaining the fact that, in accordance with the rules of the common law, some things may be waived, as, for example, the qualification of a particular juror or the right to a speedy trial, while it does not follow that, by analogy, a waiver may extend to any part of the provisions of article 3 of the original Constitution applicable hereto.

The judgment of the District Court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law.

ALDRICH, District Judge (dissenting). I concur in the majority opinion except that part which declares the trial invalid because the verdict was by 10 jurors rather than 12. The trial was constitutionally organized and had progressed at great length, in strict conformity with law, when a juror was discharged by order of court, by reason of sickness, and, near the close of a three months' trial, another juror was discharged by reason of death in the juror's family. This action was taken by the court, in both instances, upon full consent and agreement in writing of the accused and the proper representative of the government, and upon the further agreement that the trial should proceed with the same force and effect as if the jurors had not been discharged; and the trial was concluded with the remaining 10 jurors under the discretionary approval and order of court.

The doctrine of waiver, as applied to a trial which would be otherwise irregular, is of course not to be narrowly accepted as making an unconstitutional trial valid by contract, but is grounded more upon the idea that the agreement, consent, and conduct of the accused, with respect to a question not affecting the jurisdiction of the court, whereby he induces the court to go forward, and whereby he secures the chance of getting an acquittal, operate as a waiver of the right to raise the objection, in the event of an unfavorable result, that the course adopted was irregular.

The offense charged was statutory, the statute creating it declaring it to be a misdemeanor (section 5209), and the majority opinion seemingly concedes, what is true, that the books do not show any rule or practice in the English courts, prior to our Constitution, that a jury of 12 may not be weakened, in misdemeanor cases, upon waiver by the accused.

Our constitutional provision as to jury trial means the jury trial as used and practiced in England at the time of the adoption of the Constitution; and, under English history and authority, there is apparently no warrant whatever for the theory that, as jury trial was used and practiced in misdemeanor cases in England, an accused might not waive his right to object to irregularity due to the fact that his jury trial, once properly organized, had subsequently sustained a fractional loss.

While our Constitution does not expressly declare that a panel shall consist of 12 jurors, I do not take issue with the proposition that the

common-law number of 12 is required at the outset in cases of felony, or with the proposition that, in the higher grades of misdemeanors, trials should begin with that number.

Article 3, § 2, of the Constitution, which declares that the trial of all crimes, except impeachment, shall be by jury, and the sixth amendment, which provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury, were, in a very large sense, if not altogether, something established for the benefit and protection of accused parties; and there is great force in the position of the government, that a trial by a jury of 12 is a guaranty or a privilege which cannot be withheld from a person accused, but is one which he may waive.

This position is especially strong in a case like this where the constitutional common-law jury was vouchsafed to the accused, and where, in the course of a long trial, sickness and death made it certain that the fruits of the trial must be lost, or its benefits saved to the accused and the government by consent to proceed with a less number than 12.

As recently said by Mr. Justice Holmes, in Interstate Consolidated Street Railway Company v. Commonwealth of Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. ——, constitutional rights, like others, are matters of degree, and constitutional provisions are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses.

The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law, based upon the ground that he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial when he had petitioned the court for delay; or that his trial was not public when he had consented to, or silently acquiesced in, a trial in a courthouse with a capacity of holding only 12 members of the public rather than 1200.

Beyond question, the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any

incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent.

I quite agree with the majority opinion as to the constitutional and practical importance of the question under discussion.

In the lot of humanity men fall sick and die, and if the constitutional safeguard is so hard and fast that an accused, who has been subjected to a constitutional trial for three months, cannot waive a fractional part of the right which he has enjoyed in order to save his substantial right and get a result, but must be subjected to the burdens of another trial with perhaps the same dilemma, it will become an instrument of oppression rather than one of protection, and thus the preventive would become something worse than the apprehended danger.

I do not agree that the historical jury of England, in respect to the number of 12, or in respect to waiver, as the right of jury has been administered in English proceedings, is quite as hard and fast as the majority opinion assumes, and I incline to the belief that the English jurist of to-day would be greatly surprised to learn that a jury trial in a misdemeanor case is constitutionally and historically invalid because a juror had been removed from the panel by reason of sickness or death, occurring in the course of the trial, and where the defendant freely and intelligently exercised his right of waiver, and where the Crown and the accused, under the discretionary approval of the court, waived all objections and formally consented in writing that the trial should proceed, and where such a course was adopted as something in the just administration of the law in respect to the rights of the defendant, and the rights of the government as well.

The case to which Forsyth refers, at page 241, in his History of Trial by Jury (41 Assis. 11), as having decided in the reign of Edward the Third, that a verdict by less than 12 was a nullity, and upon which reliance is placed by the majority opinion, has not the remotest application here, because in that case the jury failed to agree, and without consent a verdict of 11 was taken notwithstanding the disagreement. Consequently, neither the element of consent nor of waiver was present. That the rule is different with respect to verdicts upon consent is shown by a note to the English text, which explains that "at the present day a verdict by less than twelve is sometimes taken by consent of both parties."

It is, indeed, strange that so little is found in the English text-books and cases upon questions arising in the course of trials for misdemeanors in respect to eliminations from the English jury of 12, originally constituted in strict compliance with the formalities and requirements of law.

It is, perhaps, unnecessary to inquire whether dearth of English reasoning upon such situations is explainable upon the ground that the right of waiver, under circumstances of misdemeanors, is so plain and palpable under the maxim, "Quilibet potest renunciare juri pro

se introducto," that it has gone without extended discussion. Broom, *699.

The case of The Queen v. Sullivan, 8 A. & E. 831, 1 P. & D. 96, would seem to give support to the theory that in England the right of waiver under circumstances of misdemeanor would be accepted as of course. In that case, which was one of conspiracy, and as such, an offense of a higher grade, a juror, after the trial had been opened, arose and stated that he was on the grand jury that presented the bill. The prosecution offered to consent to his withdrawal; but, the defendants not consenting, and, according to the report of the case in Perry & Davidson, objecting to his withdrawal, the trial proceeded. After verdict the defendants moved for a new trial upon the ground that the case had been mistried. The point was taken that the verdict was only by 11, and that "so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the King of any capital offense unless by the unanimous voice of 24 of his equals and neighbors; that is, by 12, at least, of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of 12 more, finding him guilty upon his trial," and that the books did not warrant a limitation of this rule to juries sitting on capital cases. But Lord Denman disposed of the point against the defendants, without discussion, upon the ground of waiver.

In King v. Sutton, 8 B. & C. 417, one juror was an alien, and the point was taken that the decision of the jury was therefore void. Rule was refused by Lord Tenterden with very little discussion, but with the suggestion, if a new trial were granted under such circumstances at the instance of a defendant, that it would also have to be done at the instance of a prosecutor.

I will pass from the English cases involving crimes less than capital with the thought (1) that a rule that the government would not be held to have waived the constitutional point under such circumstances in cases of misdemeanor, and which would, as a result, subject the accused to a second trial, would be intolerably oppressive to him; and (2) if the fundamental rights of an accused in respect to the original constitution of the jury may be held to be waived by his conduct or silence there is no apparent sufficient reason why an accused may not voluntarily waive rights, in respect to incidents of his trial, by free, independent, and intelligent consent and agreement in writing, under the protecting advice of counsel, through which the substance of his intended constitutional trial is saved to him.

Now, as to analogous situations of great weight upon the question under discussion, because they involve waiver of English fundamental rights of a higher grade than those involved in misdemeanors:

The great privilege secured to English subjects by the common law, that no person shall twice be put in jeopardy of life and limb for the same offense, while not always treated in the books as fundamental because it relates to practice and to the just course of criminal procedure rather than to an original right, is far more essential and of vastly greater importance as a practical safeguard to life and liber-

ty than the right which gives the accused 12 jurors, rather than 11, throughout the trial, if he wants them.

Under our Constitution the fundamental right of the accused is to have the jury of 12. That having been furnished to him, whether it shall remain intact throughout the trial is something in the nature of an incident of the right, and if some fractional or relatively small loss is unavoidably sustained in the course of the trial it is a loss which is as much the loss of the accused as the loss of the government, such is "the lot of humanity." The question of waiving the fractional or incidental loss under such circumstances, therefore, stands upon a different footing than would a question as to the right of an accused to waive the fundamental or original right altogether.

In Kinloch's Case, Fost. C. L. 16–36, after the trial had opened the jury was discharged at the request of the defendant in order that he might raise certain questions upon demurrer, and, after the demurrer was disposed of, the question was whether putting him upon a second trial would be against the rule in respect to twice in jeopardy. The question, as stated at page 31, was whether, in a capital case, the court may not discharge the jury upon motion of the prisoner's counsel and at his own request and with the consent of the Attorney General before evidence given, in order to let the prisoner into a defense which, in the opinion of the court, he could not otherwise have been let into.

Kinloch's Case was carefully considered upon the theory (page 38) that discharging the jury was not a strain in favor of prerogative; that it was not done to the prejudice of the prisoners, but, on the contrary, was intended as a favor to them. Enlarging upon this theory it was said:

"In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney General, with his usual candor, assented to it; and in that light I know of no objection in point of law or reason to it; and therefore I am of opinion that judgment ought not to be arrested."

Thus the course which the first trial took was held not to operate as a discharge of the prisoners from a future trial for the same offense.

While the decision was not expressly based upon waiver, it was in fact based upon the principles of waiver, because, as reasoned, the prisoner, being relieved from the first trial upon his own consent and request and for a supposed benefit, should not be permitted to interpose the first jeopardy as a bar to a future trial.

Under an ancient and fundamental rule of law an accessory could not be legally indicted and convicted as accessory until the principal had been convicted, yet according to Lord Coke, applying the maxim, "Quilibet potest renunciare juri pro se introducto," he might waive that right and go to trial before the principal was attainted. 2 Inst. c. 14, p. 183.

It would seem, according to Sir John Kelyng's report of the Lord Dacre Case, that it was more a question there whether Lord Dacre could, in his own right, select a tribunal other than that of his peers than a question of waiver; at least, the effect of the reasoning of Rex v. Knowles, 12 St. Tr. 1167, 1196, is that it is not the right of a

peer to select his tribunal, because of the King's right and interest in the dignity and official titles of nobility.

The rule that a peer cannot in his own right renounce his privilege of being tried by his peers, and thereby select another kind of a tribunal, is doubtless based upon political and state considerations, and upon the idea that his title is not personal but an honor of inheritance, and that conviction of treason, which was the charge in Lord Dacre's Case, would work corruption of blood and a forfeiture of title. It is true enough that, if a peer were put upon trial for treason before a jury, he might in his own right arbitrarily insist upon a trial before his peers. The converse, however, is not true. Where a peer is put upon the Magna Charta trial before peers, he can no more in his own right waive that trial and take a jury trial than could a judge or a president under impeachment waive the constitutional trial before our Senate, and elect a trial by jury. Such a question of waiver was the one considered in the Dacre Case, and it sustains no analogy whatever to the kind of waiver before us.

It is manifest that the principle involved in Lord Dacre's Case in no way touches the question here, because, under the law of England, as will be seen, if the peer consents to have, and is given, a different kind of a trial than the one before his peers, he has by his conduct waived the right to object that the trial he has had is not the one he was entitled to under fundamental law. It thus follows that a peer who has voluntarily elected to take the chances of a trial by a jury of commoners will not thereafter be permitted to have a second trial by his peers, upon the ground that he could not waive, and has not had, the trial contemplated and vouchsafed by Magna Charta.

"It is as much the law of the land, that a peer be tried by his peers as a commoner by commoners. Yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it hath been adjudged, that he cannot afterward suggest that he is a peer, and pray a trial by his peers." 4 Hawk. P. C. c. 44, § 19. Thus, under the doctrine of waiver, a peer loses his Magna Charta right of trial by his peers, which is at least as fundamental as the right of an accused in a misdemeanor case to have the exact number of 12 throughout his trial.

In respect to safeguards, distinction was made at an early time in England between the graver cases and cases of misdemeanors, and while the plea of guilty was discouraged in capital cases, it was received without hesitancy in other cases of felony and in misdemeanors, and while the trial of noblemen was by their peers in treason and felony, in misdemeanors, even of the higher grades, as libels, riots, perjury, and conspiracy, they were triable by a jury like a commoner. 1 Christian's Blackst. (12th Ed.) 401, note 7; 4 Christian's Blackst. (12th Ed.) 349, note 2; 3 Inst. 30; 4 Sharswood's Blackst. 259, and notes.

Under our law there is no express constitutional mandate that the jury shall consist of 12, though, without doubt, the right of the common-law number, as the right was administered in England, was in-

tended; there is no constitutional mandate that waiver shall not be made in proper cases, and, while considerations of public policy are against waiver in capital cases, such considerations are by no means absolute and controlling in respect to prosecutions for misdemeanors.

Without discussing the question whether there is any precise line of distinction upon exact legal principles between the higher and the lower grades of crimes in respect to waiver, there are unquestioned and cogent reasons of public policy requiring the rule of strict construction which renders waiver inadmissible in capital cases that do not exist in any broad and substantial sense in prosecutions for the lower grades of offenses, although the same considerations of public policy doubtless, in a measure, but in a less conclusive sense, enter into the original constitution of the jury in other felonies and the higher grades of misdemeanors. When, in prosecutions for the lower crimes, a loss, not expressly covered by constitutional mandate, comes to a constitutional jury trial in progress, the question whether waiver is admissible, in a given situation, is apparently not to be determined upon an abstract legal line drawn between felonies and misdemeanors, or between different kinds of felonies, or different kinds of misdemeanors, but upon sound discretion exercised with reference to the character and extent of the loss—whether the loss is so slight and fractional, and so far incidental, that its waiver would not offend public policy, or so vital and comprehensive as to dethrone the substance of the constitutional plan, thus presenting a situation which invokes the interposition of considerations of public policy against its waiver.

Whenever the progress of a constitutional jury trial is interrupted by a fractional and accidental loss from the panel, the practical question presented to the trial court always is whether the accused shall be allowed to waive the loss and enjoy the substance of his constitutional right and have the jury trial he wants, or whether public considerations are so strongly against it that waiver shall be denied to the end that he shall not enjoy the substance of his constitutional right and have the jury trial he wants.

There is no decision of the Supreme Court upon the precise point under consideration, and, while state decisions are numerous and involve diversity and conflict upon questions somewhat akin, though quite collateral in principle, there is very little discussion to be found in American text-books, or by state courts, upon the particular question with which we are dealing. The discussion along these lines is largely confined to questions of waiver in the course of trials in capital and other felony cases; to the right of waiver of the whole jury in cases involving misdemeanors; and to questions of right and of public policy as viewed in respect to questions raised against the jury tribunal as originally constituted; as, for instance, starting with a jury of less than 12, with jurors illegally drawn, with jurors absolutely disqualified, with jurors not sworn, and the like.

Commonwealth v. Dailey, 12 Cush. (Mass.) 80, is an authority in point in that one of the jurors was withdrawn, during the progress of the trial, from a panel properly constituted at the outset. This authority has not been followed in some jurisdictions where it was

sought to apply it in cases where the precise point which it covers was not involved. It will be found where it has been questioned by the courts in other jurisdictions and by text-writers that the doubt was evidently based upon the mistaken theory or supposition of a scope broader than the precise point decided, and as involving something beyond what was intended by the justly renowned jurist who pronounced the decision.

The doctrine of Commonwealth v. Dailey is not easily overturned or shaken. The decision was rendered in 1853, by a judge who, by common consent, stood next to Marshall as an American jurist, upon full consideration and careful reasoning, and upon self-imposed limitations, founded upon considerations of public policy, which renders it applicable only to cases of misdemeanors in which the jury, as originally constituted, consisted of 12 men, and for more than 50 years it has been generally accepted and followed, throughout the country, in the practical administration of criminal justice, in respect to incidents of misdemeanor trials in actual progress.

It is unmistakable that Chief Justice Shaw had in mind the very important distinction between cases starting with less than 12, and cases where there is a loss from that number upon trial. In the one instance there is some reason for treating the number as a fundamental essential, and there is no necessity for starting with less than 12, because the state has ample and ready means at hand for constituting a jury of that number, and nothing substantial is lost to the accused or the state by the slight necessary delay in doing it; while, in the other instance, the jurisdictional essential having been supplied, all the time, expense, and advantages, which attach to a properly constituted trial in progress, both as regards the rights of the accused and the interests of the state, are altogether lost, unless the accused party's constitutional right of jury is subject to waiver as to some possible fractional losses incident to contingencies and necessities resulting from sickness and death.

Moreover, the principle of Commonwealth v. Dailey was expressly recognized by the Supreme Court in Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, where, after saying, "When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy," and that "authorities in the state courts are in harmony with this thought," the opinion quotes approvingly the expression of Chief Justice Shaw, that "he may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court," and cites various state authorities sustaining the principle involved.

It would seem that Schick v. United States goes further in recognition of the right of waiver than Commonwealth v. Dailey, because it sustains the right of waiver of the entire panel in cases of misdemeanor.

It may, perhaps, be urged that the case at bar involves a graver misdemeanor than that in Schick v. United States; but does this furnish a sufficient reason for a distinction?

There is no constitutional or statutory mandate which draws a line in this respect between misdemeanors. Are there any considerations of public policy which interpose in one class of misdemeanors while not in another, and, if so, where is the line of cleavage to be drawn?

It is not important to inquire whether with us there is any offense answering strictly to the English felony, or whether there is any logical and general line of distinction between felonies and the higher misdemeanors, because not only was the offense, in the case at bar, created by statute, and declared to be a misdemeanor by the statute which created it, but it is, in its character, peculiarly one of misdemeanor, as it relates to demeanor and misconduct "in the business of one's office."

It may also be urged that the penalty prescribed for the offense charged in the case at bar—that of imprisonment—raises considerations of public policy not present in Schick v. United States. But is this a sufficient answer? Inability or failure to pay the fine prescribed in the oleomargarine case would result in imprisonment, and therefore the consequences of the danger supposed to lurk in a rule which would permit an accused to waive away his liberty are present in such a situation as much as in the other.

It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation "highly dangerous," it would, as said by Judge Seevers in State v. Kaufman, 51 Iowa, 578, 581, 2 N. W. 275, 277, 33 Am. Rep. 148, "have been much more convincing and satisfactory if we had been informed why it would be highly dangerous."

So far as practical consequences to the liberties of accused parties are concerned, a hard and fast rule of law which denies the right of an accused to waive the loss of a juror, stricken from the panel by sickness or death, during the progress of the trial, would be far more dangerous and intolerable than would a rule which accords to an accused, upon written application, joined by the government, and under the approval of the court, the right to waive the fractional loss whereby he may establish his right to liberty and save to himself the expense, the delay and the oppressive imprisonment incident to another trial.

Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that

in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

In every substantial sense our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited.

The constitutional provision as to a jury is not so absolute as a government regulation, nor is the idea of a jury of 12 so apostolic as not to safely permit of a little relaxation, in a proper case, at the request, or upon the prayer, of the party most interested, to the end that he may have a speedy and practical administration of justice in accordance with the spirit and substance of the constitutional plan.

An order of court permitting a trial in progress to be concluded upon request and consent of an accused is always intended as something for his benefit and reasonable protection; and, while the right of 12 jurors to the end of the trial would never be denied an accused if he claimed it, and, while a cause would never proceed without the number of 12, except upon consent of the accused, withholding from him the right of waiver, under the idea of supposed danger to his liberty, when he wants to exercise the right in order to save the trial and get his liberty, would be something more in the nature of an act of oppression than of an act for his reasonable protection and security. And, when discretionary action is taken by the court, upon the request of an accused under advice of counsel, approved by the proper representative of the government, which preserves the substance of the constitutional tribunal, and which permits his trial to go on for his benefit and to the end that he may take the chance of securing an acquittal, he should not be permitted to set up the invalidity or irregularity of such a course; and this is so upon reasonable grounds of general good faith as well as upon principles of waiver and estoppel. That, doubtless, is the English view in respect to the application of such principles to analogous situations, involving weightier consequences in cases of felonies; and there is no sufficient reason why it should not hold good here in misdemeanor cases.

The case of Edwards v. State, 45 N. J. Law, 419, deals with constitutional provisions with respect to jury trials, and, upon careful consideration, accepts them as safeguarding rights and privileges established for the benefit of accused parties and as something which cannot be withheld but which may be waived; and the Supreme Court of New Hampshire, in the concluding paragraphs of the Opinion of the Justices, 41 N. H. 550, 552, without discussion or question, deals with the constitutional guaranty as involving a right which may be waived. See, also, State v. Almy, 67 N. H. 274, 280, 28 Atl. 372, 22 L. R. A. 744.

Upon the exact point decided in Commonwealth v. Dailey there is apparently no conflict of authority; and it is quite sufficient for present purposes to say that, so far as known, there is no case, not of

felony, in any jurisdiction, involving the precise question of the case at bar, which holds that an accused may not waive the loss of a single juror in the progress of his trial, from a panel originally constituted according to the forms of law, and the case of State v. Kaufman, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148, extends the doctrine because that was a case of forgery, and though 1 juror was discharged and the trial resumed with 11, upon consent, the situation was accepted as not raising questions relating to the jurisdiction of the court, and it was held that the loss of a juror was something which might be waived by the accused. See, also, State v. Grossheim, 79 Iowa, 75, 44 N. W. 541.

To the same effect in misdemeanor cases are State v. Mansfield, 41 Mo. 470; State v. Sackett, 39 Minn. 69, 72, 38 N. W. 773; United States v. Shaw (D. C.) 59 Fed. 110, 114.

If the disqualification of a juror appears in the course of a murder trial, and the accused fails to object, he waives his objection, and a trial by 11 qualified jurors and 1 disqualified juror does not deprive him of a constitutional right which he may not waive. Queenan v. Oklahoma, 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175.

I do not look upon Queenan v. Oklahoma as meaning what the majority opinion claims for it. The question of waiver was in no sense rested upon the idea of 12 jurors, but upon the failure of the accused to press an objection which would have been fatal to the trial. It is unmistakable that the Oklahoma case recognized the idea of a proper application of the doctrine of waiver to matters of substance, as well as of form, in trials for the higher crimes. That case and the one at bar, under extreme logic, are not technically the same, in respect to the nature of the loss to the right of the accused; but it seems clear that the principle which renders the doctrine of waiver admissible in a case where the accused remains silent, and his trial for murder is concluded after he knows that one of his constitutional 12 is totally disqualified, would safely enough render it admissible in a trial for misdemeanor constitutionally begun, and concluded upon the express request of the accused after he knew that a juror had been discharged with his assent during the course of his trial. But, without regard to whether the two cases are precisely alike in principle, the plain meaning of the Oklahoma case is that the accused lost a substantial right through waiver. This is so because the tribunal was made up of 11 qualified jurors, and 1 disqualified juror who could not have been counted as a part of the constitutional 12 in the absence of the silent consent of the accused, and because the loss to his constitutional privilege of having 12 qualified jurors was so vital that the mere exercise of his right to object would have been fatal to the trial, yet by remaining silent he waived the right to object, and consequently the fractional loss which he had sustained. In short, he waived his right to have a full jury of 12 qualified men.

The authorities are numerous which go far beyond Commonwealth v. Dailey, and hold that an accused may waive a jury trial altogether in misdemeanor cases. Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301;

Logan v. State, 86 Ga. 266, 12 S. E. 406; State v. Woodling, 53 Minn. 142, 54 N. W. 1068; Ward v. People, 30 Mich. 116; Commonwealth v. Sweet (Quart. Sess.) 16 Pa. Co. Ct. R. 198; Id., 4 Pa. Dist. R. 136; State v. Alderton, 50 W. Va. 101, 40 S. E. 350; Morris Levi v. State, 4 Baxt. (Tenn.) 289, 292.

There are other cases holding that he may waive and go to trial with less than 12 in misdemeanor cases. State v. Van Matre, 49 Mo. 268; Murphy v. Commonwealth, 1 Metc. (Ky.) 365; Tyra v. Commonwealth, 2 Metc. (Ky.) 1; State v. Borowsky, 11 Nev. 119; State v. Cox, 8 Ark. 436; State v. Mansfield, 41 Mo. 470, 479.

Upon the extreme proposition that an accused, in cases involving certain grades of felony, may waive his constitutional right and go to trial with less than 12, as well as upon the less extreme proposition that he may waive the loss of a juror from a properly constituted tribunal, during the course of a felony trial, there is conflict, involving a field of discussion which we need not enter, because it is foreign to the question under consideration.

It is quite clear, from a careful reading of Commonwealth v. Dailey, supra, that Chief Justice Shaw had in mind a distinction between a case started with a deficient number of jurors upon consent and a case where a juror was withdrawn upon consent during the course of a trial.

It is likewise clearly manifest that Judge Cooley, Const. Lim. (7th Ed.) 458, 459, in presenting a view in the nature of a query and in speaking of the infirmity of a trial by a jury of less than 12 by consent as involving a trial in the nature of an arbitration, was directing his thought to the tribunal as organized at its inception, and even this view has the very significant qualification, "at least in case of felony."

So in Hill v. People, 16 Mich. 351, which was a case of murder, the question related to the original organization of the jury and to a defect which the accused did not know.

The question in Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, related not only to the proper organization of the trial at the outset, but to a substantial departure from the constitutional plan, in that the trial started with a jury of eight; and the case, moreover, involved a statute which was ex post facto in its application to the offense charged.

Likewise Chitty's Criminal Law, 505, refers to a petit jury when sworn rather than to an incidental loss in the progress of a trial.

The same is true of the irregularity in Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, which raised the question whether the jury was originally organized according to the requirements of the Constitution; and the case in no way involved a consideration of express waiver as applied to an incident of a trial, or of any question as to the binding effect of waiver in respect to a fractional loss from a constitutionally organized tribunal during the course of a trial.

Not speaking now of questions of good or bad faith to courts charged with the administration of justice, or of general public considerations, a construction of the constitutional provision—establishing the

right of trial by jury as something for the general benefit of society, but for the special benefit of those accused of crime—which would compel, or permit, the government to stop and send an accused to another trial, and perhaps to repeated trials, in a misdemeanor case, through a denial of the right, when he wants to exercise it, to waive a fractional loss from a constitutional trial once entered upon, would often render the provision an instrument of oppression and, as a result, in many instances, "trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare."

TUBULAR RIVET & STUD CO. v. EXETER BOOT & SHOE CO.

(Circuit Court of Appeals, First Circuit. February 12, 1908.)

No. 692.

1. WRIT OF ERROR—OBJECTIONS IN TRIAL COURT—PLEADING—VARIANCE.

Where, in an action for damages for inducing another to break a contract between plaintiff and W. & Co., the complaint throughout alleged that W. & Co. were the principals, and were induced by defendant not to furnish certain machines to plaintiff, while the proof showed that W. & Co. in selling the machines acted as agents for the H. Co., and that the latter was the person induced not to fill plaintiff's order, such variance could have been corrected by amendment; and where the variance was not taken advantage of at a long trial, except by defendant's requests for instructions, there was ground on which the court in its discretion might have held that the variance had been waived at the time such requests were made, and the court's action in disregarding it will not be reviewed on a writ of error.

2. TORTS—PLEADING—ISSUES.

Where a declaration was expressly limited to plaintiff's right to recover damages sustained by defendant's act in inducing the seller of certain machines to refuse to deliver the same to plaintiff, in accordance with the contract, the complaint did not present any issue under the Sherman trust act, though there was evidence of an agreement between manufacturers of such machines, including defendant and the seller, to protect each other, and for each to notify the other if a man did not pay his bills, the person notified being then at liberty to sell him goods or not, according to his own judgment.

3. SAME—INDUCING BREACH OF CONTRACT.

Where defendant corporation induced another to break a contract to furnish certain machines, plaintiff was entitled to recover from defendant damages sustained thereby, without proof that defendant was actuated by actual malice or ill will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, § 13.]

4. CORPORATIONS—ACTS OF OFFICERS—RATIFICATION—QUESTION FOR JURY.

In an action against a corporation for inducing another to break a contract to furnish plaintiff certain machines, evidence *held* to require submission to the jury of the question whether defendant corporation approved, acquiesced in, and adopted its officer's construction of a letter written to the seller which was claimed to have induced a violation of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1738.]

5. COURTS—FEDERAL PRACTICE—BILL OF EXCEPTIONS—SETTING FORTH EXCEPTIONS.

A bill of exceptions referred to alleged errors in refusing to comply with certain requests to charge, by stating "the court refused to give the instruction requested, except so far as the instructions contained in the extract from the charge set out totidem verbis in connection with a request numbered," etc., included it. One of such references contained an extract from the charge, covering more than two printed pages. *Held*, that the practice in the federal courts did not permit the setting out of exceptions in such manner.

6. DAMAGES—INDUCING BREACH OF CONTRACT—DAMAGES AVOIDABLE.

In an action to recover damages for inducing a third person not to comply with a contract to furnish plaintiff certain machines, an instruction that defendant was not liable for damages that would have been avoided by plaintiff's using defendant's machines was properly refused, defendant having no right to shut plaintiff out of every other market, and force it to purchase machines from defendant.

7. WRIT OF ERROR—REVIEW.

Where on a writ of error there were numerous requests for instructions, and many alleged errors assigned, the Court of Appeals will not develop topics not specially brought to its attention at the bar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256–4261.]

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

Louis D. Brandeis (William H. Dunbar, Brandeis, Dunbar & Nutter, and Streeter & Hollis, on the brief), for plaintiff in error.

Henry F. Hollis (Edwin G. Eastman, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. This was a suit at common law in the Circuit Court for the District of New Hampshire, in which there were a verdict and judgment for the plaintiff in that court; whereupon the defendant sued out this writ of error. It is convenient to speak throughout of the plaintiff below as the plaintiff and of the defendant below as the defendant. After various amendments the plaintiff's cause of action settled down to what appears by the following amended count:

"In a plea of the case for that the said plaintiffs at said Exeter before and at the time of the committing of the several grievances by the defendants as hereinafter mentioned were and from thence hitherto have been engaged in the manufacture and sale of boots and shoes and have hitherto made and ought and would have continued to make large profits in their said business, but for the said several grievances committed by the said defendants, and they further say that in the prosecution of their said business it was necessary for them to affix and attach certain hooks to and upon the boots and shoes so manufactured by them as aforesaid, and also to have and use certain machines for affixing and attaching said hooks to said boots and shoes, and the said plaintiffs further say, that on the ninth day of May, 1900, they purchased of Frank W. Whitcher & Company one hundred thousand of said hooks for the sum of sixty-seven dollars, said sum to be therefor paid by the plaintiffs to the said Frank W. Whitcher & Company, and the said Frank W. Whitcher

& Company then and there, and in consideration of the purchase by and upon the part of the plaintiffs as aforesaid, promised the plaintiffs to immediately deliver to them at said Exeter said hooks, and as a part of the agreement and consideration aforesaid to loan and deliver to the plaintiffs at the same time and place, together with said hooks, two of the aforesaid machines for use in affixing and fastening said hooks to and upon boots and shoes manufactured and to be manufactured by the plaintiffs at Exeter aforesaid, and the plaintiffs aver that they always from the said ninth day of May hitherto were ready and willing to accept and pay for the said hooks upon delivery of the same together with said machines according to the contract and agreement aforesaid and that the said Frank W. Whitcher & Company were ready and willing to deliver said hooks and machines in accordance with their said contract and agreement and did deliver the said hooks, all which the said defendants then and there well knew. Yet the said defendants on said ninth day of May at Exeter aforesaid contriving to injure the plaintiffs did unlawfully, fraudulently, maliciously and without justifiable cause induce and cause the said Frank W. Whitcher & Company not to deliver said machines to the plaintiffs in accordance with their said agreement so to do, by means whereof they, the said defendants, then and there intended to and did unlawfully, fraudulently, maliciously, and without justifiable cause molest, hinder and obstruct the said plaintiffs in their said business and trade relations, and by reason of the said molestation, hindrance and obstruction by and on the part of the said defendants in the manner and by the means aforesaid the said plaintiffs were deprived of the use and profit of their said business and their plant and factory employed in their said business, and the product of their said business was greatly reduced, so that they lost large profits that would have accrued to them from their said business, plant and factory, and from the manufacture and sale of boots and shoes, and were put to great expense and trouble in attempting to procure other machines for use in fastening hooks to and upon boots and shoes."

There is no question that the plaintiff was engaged in the manufacture and sale of boots and shoes as shown in the declaration, and that it was necessary in its business for it to purchase hooks to be attached for the purposes and in the manner stated therein, and to have and use certain machines in attaching the hooks. Neither is there any question that the plaintiff, on May 9th, purchased hooks of Frank W. Whitcher & Co., as further stated, nor that Frank W. Whitcher & Co., as a part of the trade and in consideration of the purchase, negotiated with the plaintiff for the loan and delivery with the hooks of two machines for use in affixing them, nor that the plaintiff was always ready to perform on its part, and needed the machines as well as the hooks. Frank W. Whitcher & Co. did not own machines, and did not contract in their own behalf to furnish them, but, as to this part of the transaction, Whitcher testified that he took orders subject to acceptance by the Halkyard Manufacturing Company. Whitcher shipped the hooks, and sent the order for the machines to that concern. The Halkyard Manufacturing Company accepted the order, because it immediately shipped one machine; although, for reasons which will appear, it never reached the plaintiff. However, there can be no question that the Halkyard Manufacturing Company went so far as to ratify the contract of Frank W. Whitcher & Co., nor that there was a complete contract, binding on all three parties, namely, the plaintiff, Frank W. Whitcher & Co. and the Halkyard Manufacturing Company, valid from the standpoint of the statute of frauds, and from all other standpoints.

Neither is there any doubt that the contract would have been carried out except for the act of the defendant, that is, the Tubular Rivet & Stud Company, in that it had sent the following letter to the Halkyard Manufacturing Company on April 25, 1900, thus before the trade was made between Whitcher and the plaintiff:

"Apr. 25, 1900.

"Messrs. Halkyard Mfg. Co.,
"Providence, R. I.

"Gentlemen: In case you should receive an order from the Exeter Boot & Shoe Co., or Gale Bros., will you kindly let us know before making shipment? A question has arisen regarding a deduction for freight on one case of hooks, and we have been trying for the past two or three weeks to have the matter adjusted.

"Yours very truly, Tubular Rivet & Stud Co."

To this reply came as follows:

"Providence, R. I., April 26, 1900.

"Tubular Rivet & Stud Co.,

"Gentlemen: Yours of April 25th at hand. We will notify you at once should we receive an order from the Exeter Boot & Shoe Co. or Gale Bros.

"Yours truly, Halkyard Mfg. Co."

After the trade was made between Frank W. Whitcher & Co. and the plaintiff, these letters were apparently brought to the attention of the manager of the Halkyard Manufacturing Company, and the machine which had been shipped was immediately recalled by him, as already stated. Notwithstanding this, the letter did not in terms ask the breach of any contract, and it might not have been the causa causans of the violation of the trade within the meaning of the law, but only the sine qua non (Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 409, 73 C. C. A. 502); and the main question is whether such was the fact.

In speaking in positive terms with reference to some matters we have stated, we do not intend to be understood as saying that the court would be authorized to conclusively draw the facts from the record; and we mean only that, so far as this writ of error is concerned, the question on the main proposition submitted to us is whether the plaintiff was entitled to go to the jury, so that we necessarily speak for the most part from its standpoint.

The defendant urges on us a question of variance. It will be observed that the declaration takes no notice of the Halkyard Manufacturing Company. On the other hand, it throughout alleges by implication of law that Frank W. Whitcher & Co. were the principals, and that they, Frank W. Whitcher & Co., were induced by the defendant not to deliver the machine; but, while this variance, if promptly availed of, might have been fatal at strict law, it was very far from reaching any question touching the merits, and, if that point had been seasonably raised at the trial, it could have been met by amendment. A variance of this kind is, of course, easily waived. The trial evidently was a long one, and, if the defendant relied on a variance of this character, it would naturally have brought it to the attention of the court promptly. We find no indication of any attempt of that character during the trial. It would have come in very naturally,

by an objection to the proof, on the first attempt to show that a trade for the machines was made by Whitcher in behalf of the Halkyard Manufacturing Company. It is possible that the point was intended to be covered by the defendant's requests for instructions; but this is not clear. Even if the requests did cover it, it is quite apparent that the Circuit Court, from its observation of the proceedings through a long trial, may have had sufficient reason to decide that the variance was impliedly waived, even if not expressly so, with the result that in its discretion, it had a right to refuse a request, or, in its further discretion, to permit the plaintiff to amend. Therefore, under the circumstances, we cannot properly revise the action of that court for this account.

The plaintiff, previous to April 25, 1900, had been the customer of the defendant, purchasing hooks from the latter, and using the latter's machines. A dispute arose between them in regard to a question of 25 cents freight, the same referred to in the letter of April 25th; and it was in consequence of this dispute that the plaintiff applied to Frank W. Whitcher & Co. as we have stated. We are not aware whether or not the record shows the number of manufacturers of hooks, but it appears that there were only three from whom the machines required to set the hooks could have been obtained. In Halkyard's testimony he made the following statement, in which the word "they" refers to the defendant here:

"They being manufacturers of the same line of goods, we had a verbal agreement that we would protect each other as far as our trade was concerned; that if a man did not pay his bills, we would notify each other, and then we were at liberty to use our own judgment whether we would sell him goods or not."

That is followed immediately by the following:

"Q. Then you were notified by the Tubular Rivet & Stud Company that there was an unpaid bill due them from the Exeter Boot & Shoe Company, and in consequence of that you declined to deliver the machine to the company; is that correct? A. Yes, sir."

The parties have submitted to us some propositions with reference to trade relations and the Sherman trust act. Clearly, under the pleadings, the Sherman trust act has nothing whatever to do with the case; and, also, the same is true with reference to any question of general trade relations. The declaration is narrow, and expressly limited to a complaint that the defendant induced Whitcher, or Halkyard, whichever it should be, not to deliver the machines in accordance with the trade made with the plaintiff. There is a sequence in the declaration referring to trade relations; but this is simply in the way of stating a conclusion of law, and the expression is not only limited by what precedes it, but by what follows it, to the effect that the molestation, and so forth, was "in the manner and by the means aforesaid," which has regard, of course, to the limited statement to which we have referred. There is no doubt that, under some circumstances, and clearly so with reference to a libel, any stranger interfering with the trade relations of others, as the expression is commonly understood, may be liable in damages, although

there is no legal obligation to continue such relations; but we are compelled to hold that the plaintiff's case, rests entirely on the claim that it had made a certain contract with a third party for certain hooks and machines, binding in law, and that the defendant interfered, and induced the third party not to perform it.

The common law is very vigorous in protecting from interference the accomplishment of the relations which it favors, whether those of husband and wife, parent and child, guardian and ward, the manufacturer and persons employed by him, the relations of domestic service, and generally all the relations which have pecuniary value. It begins with authorizing the recovery of damages for the publication of libelous statements affecting pecuniarily a man's trade or profession, and it covers the entire field from that point to a case like the present, where a third person is charged with attempting, gratuitously or for a purpose, to induce one party or the other to withdraw from a binding contract. It also goes so far that it punishes interference with relations of pecuniary value though subject to be terminated at will by either party, having, however, regard to peculiar circumstances and motives which may justify or excuse the interference; among others, the desire of justifiable gain as the result thereof. Such was the case in McGuire v. Gerstley, 204 U. S. 489, 503, 27 Sup. Ct. 332, 51 L. Ed. 581, relied on by the defendant, where the purpose was to induce one of the parties to a partnership, terminable at will, to enter the employment of the person interfering. But where there is either a binding contract for employment for a specific time or a valid contract for the sale and delivery of goods, or other valid executory contract, the interference of a third party lays a direct basis for a suit, precisely as with any other direct blow knowingly struck against any property interest which the law protects. There are exceptions of an extreme character. For example, the parent may undoubtedly, under some circumstances, interfere for the protection of his child, even with regard to an existing binding agreement. Also, in the present case, assuming that there was an honorable arrangement between the defendant and other manufacturers or dealers in the same line for mutual protection against insolvent customers, and assuming that the defendant had had knowledge of the insolvency of the plaintiff, if there had been insolvency the knowledge of which the Halkyard Manufacturing Company did not possess, it would probably have been justifiable for the defendant to have given such prompt information as would have enabled a stoppage of the machines in transitu, as the law permits. Here, however, there was no such condition. The solvency of the plaintiff was not questioned, and the issue between it and the defendant was about a matter so puerile that the law would not take notice of it in this connection, or, if it did take notice, it would do so only for the purpose of establishing an angry and inexcusable purpose on the part of the defendant, if it had been necessary to have established any special purpose whatever.

To state more fully our propositions of law, we regard them as correctly set forth in Pollock's Law of Torts (6th Ed.) 316, and se-

quence. The conclusion which the author reaches, that, in order to sustain an action like this at bar, it is not necessary to prove malice or ill will as those words are commonly understood, and the illustrative exceptions of the class to which we have referred appearing on page 319, are undoubtedly in accordance with the law. He discusses, beginning at page 319, a question whether the intervention of an independent actor, namely, one of the contracting parties, which necessarily exists under circumstances like those at bar, does not sever the line of causation as known to the common law. But the authorities are all to the effect that it does not; and there is no difficulty on this point, because, as with reference to misdemeanors in the criminal law, whoever violates his contract and all who assist him or instigate him so to do, are principals, and may be jointly sued with him. Among strikingly illustrative cases of the general principle is Dr. Miles Medical Co. v. Jaynes Drug Co. (C. C.) 149 Fed. 838, 841, where Judge Colt applied the rule, now thoroughly established by the authorities, that an injunction will lie in behalf of a manufacturer against one endeavoring to induce purchasers from him to violate the terms on which the sales were made. No exception was made on account of any question of malice or ill will, as those words are ordinarily understood. On the other hand, the persons against whom the injunction was granted had what would ordinarily be regarded as a meritorious purpose; that is, a desire to deal themselves with the public. So in Bowen v. Hall, 6 Q. B. D. 333, decided by the Court of Appeal in 1881, a case much commented on, it was held that an action lies against one who induces another to break a contract of exclusive personal service with a manufacturer, notwithstanding it was said that the case was not that peculiar one of domestic service which the common law so thoroughly protected. Some doubt has been expressed about the scope of Bowen v. Hall, but there can be none since the various expressions found in Allen v. Flood, [1898] A. C. 1. The language of Lord Herschell, at page 123, applies specifically to Lumley v. Gye, 2 E. B. & B. 216, a case as much discussed as Bowen v. Hall; but it is an interpretation as late as 1897 to the effect that if, instead of the word "maliciously," the words "willfully and with notice of the contract" had been found in a declaration, the result would have been the same.

However, a thoroughly authoritative illustration is Bitterman v. Louisville & Nashville Railroad Company, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. ——, decided by the Supreme Court on December 2, 1907. This was a bill in equity to restrain "scalpers" from dealing in limited railroad tickets contrary to the stipulations appearing on the face of the tickets, and an injunction was approved. The opinion, at pages 222, 223, of 207 U. S., at pages 91, 97, of 28 Sup. Ct. (52 L. Ed. ——), refers to Angle v. Chicago, etc., Railway Co., 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55, where the word "maliciously" appears, and it continues as follows:

"It is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the Angle Case. The wanton disregard of the rights of a carrier causing injury

to it, which the business of purchasing and selling non-transferable reduced rate tickets of necessity involved, constitute legal malice within the doctrine of the Angle Case."

Therefore, we think it clear that an action lies in this case if there was a direct interference in the manner alleged by the plaintiff with a contract already made between the other concerns, or if there was an interference which, under the circumstances, was so sweeping in its aspects that it was efficient to reach future contracts.

There has been much said in the case about malice and motive, which, for the reasons we have stated, need not be further regarded by us. It is sufficient that the defendant, without any exception of the rare character of those we have suggested, interfered knowingly with the contract set out in the pleadings, or that it knowingly issued a letter which set in motion a train of circumstances effective as to future contracts. The plaintiff's case, however, meets a difficulty at this point, because the letter of April 25th was not of itself, on its face alone, effective, and it could be so only in the light of other facts outside of it. The main question is whether it did thus become effective.

The plaintiff sued Whitcher & Co. for alleged refusal to ship the machines, on which a judgment was recovered, raising a serious question; but that is not before us. Also, many elements entering into the topic of damages were raised by the requests for instructions, but only one of them has been argued here. We come first to the main question which we have explained. So far as that is concerned, many propositions were submitted to the Circuit Court and carried into the assignment of errors, and now urged in a series of propositions which, all together, amount to a sharp claim that we, as a court of law, should hold that a verdict should have been directed for the defendant. Perhaps, on a showing of only such facts as we have stated, a request for such a verdict should have been granted; but it appears that Crocker, the secretary of the defendant corporation, being called in its behalf, testified as follows:

"In the forenoon of May 10 had a telephone conference with Mr. Halkyard; up to that time had no knowledge that Gale had given any order to Whitcher. Halkyard called witness on telephone; had not up to that time on May 10 had any talk whatever with Whitcher & Company. At the telephone Mr. Halkyard said that when he returned he had found that an order had been received for a machine for the Exeter Boot & Shoe Company, and that he had taken means to stop it. Does not recall making any reply, and this was substantially all the conversation."

Gale, spoken of in this extract, was the representative of the plaintiff who made the bargain with Whitcher. Plaintiff claims that there were circumstances outside of the letter of April 25th which properly went to the jury in connection with the topic we have explained. Of course, with the rest was the conversation between Crocker and Halkyard testified to according to the extract we have made. Could the Circuit Court have properly taken from the jury the right to determine whether or not, under all the circumstances, the stoppage of the machine by Halkyard was understood by Halkyard to be within the terms of the letter of April 25th, and this with the silent ac-

quiescence and approval of the principal officer of the defendant? In view of Crocker's testimony, could the court have taken from the jury the right to determine whether or not the principal officer of the defendant corporation approved, ratified, acquiesced in, and adopted Halkyard's construction of that letter in connection with the agreement for mutual protection testified to by Halkyard, and his act in stopping the machine in violation of the contract with the plaintiff? As sometimes silence is as effective as spoken words, and as whether or not in this case the silence of Secretary Crocker was thus effective depended on circumstances, and on the impression which he may have made when testifying, with all which the court is less capable of dealing than the jury, we think the learned judge who presided at the trial could not rightly have answered the questions we have stated without the aid of the jury; and we think, therefore, that it is not for us to decide them.

With this apparently simple case the defendant submitted to the court 41 requests for instructions, covering 15 printed pages, and it assigned 30 errors. It is not necessary to reiterate the practice in the federal courts, to the effect that, where there are so many requests, the appellate tribunal under ordinary circumstances scrutinizes the condition sharply. The presentation of this case by the plaintiff with reference to the main issue we have discussed has been very elaborate, but the requests were brought to our attention only briefly; so that it is only with a difficult search of the record which cannot be required of us that we can weigh them accurately. Some seem to be entirely covered by the requests we have discussed to direct a verdict for the defendant. Some relate to the doctrine of causa causans, which we have sufficiently dwelt on. Some ask instructions that there was no evidence of a legal obligation on the part of the Halkyard Manufacturing Company to deliver the machines; and as to these, in the light of what we have already said, the Circuit Court was clearly right in refusing to comply with them. Some are followed in the bill of exceptions by expressions like the following: "The court refused to give the instruction requested, except so far as the instructions contained in the extract from the charge set out totidem verbis in connection with a request numbered" so and so included it. One of such references contained a solid extract from the charge of more than two printed pages. Such exceptions are not permitted by the practice in the federal courts; and, while we sometimes examine them in order to avoid so far as practicable the danger of absolute injustice, we do so with difficulty, and subject to misapprehension in making the examination. So far as we have examined we find that the rules to which these requests relate were correctly and sufficiently stated. We do not perceive that we are required to pursue the requests further.

As we have said, there seems to have been a considerable discussion as to the rules of damages, especially with regard to such as might have been described as consequential. We observe only one exception relating to this topic brought to our attention, and that was as follows:

"The court erred in refusing to charge that the defendant was not liable for damages that would have been avoided by using defendant's machines."

This, properly interpreted and applied to the circumstances, is equivalent to maintaining that the defendant had a right to shut the plaintiff out from every other market, and to force it to purchase of itself. The law does not countenance a proposition so unreasonable and unjust.

We have referred to the fact that the judgment recovered by the plaintiff against Frank W. Whitcher & Co. might, if brought to our attention, raise some questions of importance. We may add that it is possible that the record, on careful examination, would be found to present other serious questions which we have not discussed because, where there are so many requests for instructions as we find here, and so many alleged errors assigned, we do not consider ourselves called on to develop any topics which have not been specially brought to our attention at the bar. We make this observation in order that it may be clear that we are not prejudiced with reference to the topics to which we refer, or with regard to any other litigation whatsoever.

The judgment of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

MUTUAL RESERVE FUND LIFE ASS'N v. TUCHFELD.

(Circuit Court of Appeals, Sixth Circuit. March 23, 1908.)

No. 1,731.

1. WRIT OF ERROR—RECORD—JURISDICTION—REVIEW.

Where the state court in which an action against an insurance company was brought would have had jurisdiction under the service made, if defendant was an insurance company not on the assessment plan, and the record on a writ of error did not show that it was made to appear on the hearing of a plea of abatement raising an objection to the jurisdiction that the insurance company did business on the assessment plan, error in overruling the plea was not shown.

2. INSURANCE—FOREIGN INSURANCE COMPANY—SERVICE ON INSURANCE COMMISSIONER—ACCEPTANCE OF SERVICE.

Under Acts Tennessee 1895, p. 322, c. 160, providing that any process issued by any court of record in the state against a foreign insurance company may be served on the insurance commissioner, such commissioner need not require that the process be served on him, but he may accept service.

3. SAME—POWER TO ACCEPT SERVICE—REVOCATION—WITHDRAWAL FROM STATE.

Where a foreign insurance company, doing business in Tennessee, filed a power of attorney authorizing the insurance commissioner to accept service for it, under Acts Tennessee 1895, p. 322, c. 160, requiring the power to authorize such service, so long as any liability remains outstanding against the insurance company within the state, the company's withdrawal from the state did not revoke the insurance company's power to bind it by an acceptance of service in an action on an outstanding policy within the state.

4. SAME—PREMIUMS.

Though a policy provides that premiums shall be paid at the insurer's home office by a certain time, if, after issuance of the policy, the insurer authorizes or acquiesces in the sending of the premiums by mail, a deposit thereof in the mail, in time to reach the home office by the time the premium is due, will prevent forfeiture, though the premium does not in fact reach such office until after the due date.

5. SAME—FAILURE TO PAY PREMIUMS AT MATURITY—FORFEITURE—WAIVER.
Where a policy provided that premiums should be paid at the insurer's home office, and if any payment was not made on or before the date of maturity the policy should expire and become void, and all payments forfeited, if insured failed to mail a draft for the premium until after the date on which it fell due, the policy was forfeited in accordance with its terms, but if, notwithstanding such forfeiture, the insurer on receipt of the draft applied the proceeds to the premium due, without more, such action would constitute a waiver of the forfeiture and reinstatement of the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1041–1045.]

6. SAME—CONDITIONAL RECEIPT.
Where a draft to pay a premium on a policy was not mailed until after the premium matured, insurer, not being bound to accept the draft and waive the forfeiture was entitled to impose such terms on its consent to waive the forfeiture as it might dictate, and if it accepted the premium on condition that insured was then in good health, etc., a breach of such conditions, nothing else appearing, would constitute a defense to an action on the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1041–1045.]

7. SAME—WAIVER—SUBSEQUENT PREMIUMS—ACCEPTANCE.
Where a forfeiture of a policy was incurred by nonpayment of premium at maturity, which forfeiture the insured waived, on conditions that the insured was then in good health, etc., which were broken when made, the conditions were not waived by the insurer's subsequent acceptance of premiums under the policy, unless such acceptance was with notice of the breach of the conditions.

8. SAME—INSTRUCTIONS.
Insured having failed to pay a premium in time, the premium was accepted subject to the condition that insured was then alive, of temperate habits, and in good health, etc., which condition insured was not then able to fulfill. *Held*, that an instruction that the insurer's acceptance of subsequent premiums, notwithstanding the conditional acceptance of the premium paid after due estopped insurer from saying that the policy had lapsed, was erroneous.

9. SAME—PENALTY—DEMAND.
Acts Tennessee 1901, p. 248, c. 141, provides that an insurance company refusing to pay a loss within 60 days after a demand by the policy holder shall be liable for a penalty not exceeding 25 per cent. of the liability, provided it shall appear that the refusal to pay was not in good faith, and inflicted additional expense on the plaintiff. *Held*, that no penalty could be recovered under such section in the absence of a formal demand for payment of the loss under the policy, in addition to the commencement of a suit thereon.

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

C. G. Bond and T. B. Turley, for plaintiff in error.

W. H. Biggs, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is an action by the defendant in error against the plaintiff in error on a life insurance policy issued by the latter upon the life of the former's intestate. The policy was issued September 9, 1890, and was for the sum of $10,000, but was

reduced September 9, 1901, to the sum of $5,000. The insured died on October 14, 1905, and the action was brought September 11, 1906. It was brought in the Circuit Court of Madison county, Tenn., and thence removed to the lower court, where judgment was recovered not only for the face of the policy and interest thereon, but for 20 per cent. penalty under the act of April, 1901 (Acts 1901, p. 141, c. 141), the whole amount recovered being the sum of $6,354.15.

Several errors are assigned for reversal. One is that the court erred in overruling the defendant's plea in abatement to its jurisdiction. The claim was that it was without jurisdiction because the state court did not have jurisdiction thereof. The defendant entered the state of Tennessee prior to or in the year 1889, and continued to do business therein until November 15, 1901, when it withdrew therefrom. At the time the action was brought, and for several years prior thereto it had no voluntary agent in the state. In 1887 and in 1892 and again on May 11, 1897, it filed a written instrument in the office of the Insurance Commissioner at Nashville in Davidson county, constituting, in case of the 1887 writing, the Secretary of State, and in case of the other two, the Insurance Commissioner, its agent for service of process, and containing an agreement that process might be served on him so long as any liability remained outstanding against it in the state. The first writing was filed under the act of 1875 which related to insurance companies generally. Acts 1875, p. 79, c. 66.

Our attention has been called to no legislation under which it can be said that the writing of 1892 was filed. It could not have been under the act of 1875 as that provided for constituting the Secretary of State as agent for service of process. Prior to the filing of the last writing, two acts were passed, each of which provided for constituting the Insurance Commissioner as such agent. The act of 1895 related to insurance companies other than those engaged in life and casualty insurance on the assessment plan. Acts 1895, p. 322, c. 160. The act of 1897, which took effect April 3, 1897, related to insurance companies engaged in such insurance on the assessment plan. Acts 1897, p. 300, c. 127. The act then under which the last writing may be said to have been filed depends on whether it did business on the assessment plan or not. The execution thereof was required as a condition of its continuing to do business in the state. In the act of 1895 there was a provision in these words:

"Any process issued by any courts of record in this state and served upon such commissioner (Insurance Commissioner) by the proper officer of the county in which the said commissioner may have his office, shall be deemed a sufficient process on said company."

The act of 1897 contains no such provision. The process by which the defendant was attempted to be brought before the state court was a summons directed to said Davidson county in which the Insurance Commissioner had his office and there accepted by him, and also by the Secretary of State. It is claimed that the acceptance by the Secretary of State was of no validity as the act of 1875 had been repealed entirely, if not by the act of 1895, by it and that of 1897 together. We do not find it necessary to determine this question.

The principal ground upon which it is urged here that the state court did not acquire jurisdiction by the acceptance of said summons by the Insurance Commissioner is that said process could not legally be directed to Davidson county, a county other than that in which the action was brought. It is claimed that it is a cardinal principle that the process of a court cannot extend beyond the territorial jurisdiction thereof, unless authorized by statute—that the plaintiff in error did business on the assessment plan, and hence was covered by the act of 1897 and not by that of 1895—and that as the act of 1897 did not contain any such provision as that above quoted there was no statute of Tennessee authorizing the issuance of process against it from the Madison circuit court directed to Davidson county. Whether, if that statutory provision has no application to this case, jurisdiction of the action on the part of the state court can be worked out, we do not find it necessary to determine. As bearing thereon these cases have been cited, to wit: People v. Justices of City Court, 25 Abb. N. C. (N.Y.) 403, 11 N. Y. Supp. 773; Fink v. Lancaster Ins. Co., 60 Mo. App. 673.

It is sufficient to say that, so far as the record before us goes, it was not made to appear on the hearing of the plea in abatement that the defendant was a life insurance company on the assessment plan. The sole allegation concerning its character in the plea was that it was a New York corporation. The declaration went further than this, and alleged that it was a New York insurance corporation. The plea was heard by the court, and it made findings of fact and law. The finding as to the character of the defendant was simply that it was a New York insurance corporation. The evidence heard upon the plea was not preserved by a bill of exceptions, and it cannot, therefore, be said that it established that defendant was a life insurance company on the assessment plan. Indeed, inasmuch as there was no finding as to the plan on which the defendant did business, it is not likely that any evidence was introduced bearing on this subject. As then, by concession, the state court would have had jurisdiction if defendant was an insurance company not on the assessment plan, and the record does not show that it was made to appear on the hearing of the plea of abatement that it was such on that plan, it cannot be said that the lower court was in error in not sustaining the plea on this ground. In the case of Patton v. Continental Casualty Co. (Tenn.) 104 S. W. 305, jurisdiction of the circuit court of Washington county, Tenn., of a suit against a foreign accident insurance company was upheld upon summons issued therefrom to Davidson county, and there accepted by the Insurance Commissioner.

It is urged, further, that said statutory provision authorized the service of process issued thereunder, and not the acceptance of service thereof, and as the summons here was not served, but service thereof was accepted, the state court was without jurisdiction. The writing itself authorized the Insurance Commissioner, not simply to receive service, but to accept it. This, however, is not important. In the Patton Case, Judge Neil said:

"In the present case, the service of process was acknowledged by the Insurance Commissioner, and, on the principles already stated, we are of the opinion that this service was properly made, and the company was brought before the court."

Neither of those two grounds of lack of jurisdiction in the state court seems to have been relied on in the lower court. The theory of the plea seems to have been that lack thereof was due to the fact that defendant had no voluntary agent in the state, and the officers who had accepted service were without authority so to do by reason of defendant's withdrawal from the state in 1901. This position is feebly urged here and these cases, to wit, Swann v. Mutual R. F. L. Association (C. C.) 100 Fed. 922, Friedman v. Insurance Co. (C. C.) 101 Fed. 535, are cited in support of it. But these cases were overthrown by that of Mutual R. F. L. Association v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987. To the same effect are Youmans v. Minn. Life Insurance Co. (C. C.) 67 Fed. 282; Collier v. Mutual R. F. L. Association (C. C.) 119 Fed. 617; Magoffin v. Mutual R. F. L. Association, 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699; Biggs v. Mutual R. F. L. Association, 128 N. C. 5, 37 S. E. 955; Moore v. Mutual R. F. L. Association, 129 N. C. 31, 39 S. E. 637; Woodward v. Mutual R. F. L. Association, 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519. This assignment of error, therefore, is not well taken.

The other assignments of error, with one exception, relate to certain portions of the charge to the jury, and the refusal of certain requests made by defendant. Before referring to any of these assignments, a preliminary statement of certain facts should be made. The policy called for the payment of bimonthly mortuary premiums. They were payable within 30 days from the first week day of the months of December, February, April, June, August, and October. It was provided that, if any of said payments were not made on or before the date when due at the home office of the association in the city of New York, the policy should expire and become null and void, and all payments thereon should be forfeited to the association. In the course of time the mortuary premium due within 30 days after the first week day of December, 1904—i. e., by December 31, 1904—for $24.45, known as "Call 137," had to be met. According to evidence introduced by plaintiff, on December 24, 1904, the insured at Jackson, Tenn., where he lived, purchased a New York draft for the sum of $24.45 of that date, and deposited in the mail an envelope containing it addressed to defendant at its home office. For eight or ten years previous thereto the insured had been making payments of the mortuary premiums in this way and in each call therefor this instruction was contained:

"Remittances must be by valid draft, check, post office or express money order, and when made by mail are at the sender's risk. Any credit made or receipt given is conditioned on payment of such draft, check, post office or express money order on presentation, and, if not so paid, such receipt shall be null and void."

The draft was received by defendant, but, there was evidence tending to show not until January 16, 1905, and then in an envelope postmarked at Jackson, Tenn., January 12, 1905, which envelope was put

in evidence. The draft so received bore date December 24, 1904. There was evidence tending to show that the insured, not hearing from the draft in due course, shortly afterwards wrote a letter of inquiry in regard to it. There was evidence tending to show that on January 17, 1905, defendant deposited in the mail at New York an envelope addressed to the insured, containing a red slip on which it acknowledged receipt of said sum of money from the insured, and stated:

"The above payment is offered and the same received by the company, subject to the conditions on the back hereof, which are hereby made a part of this receipt."

The conditions on the back thereof were as follows:

"The conditions on which the within payment (for which this receipt is given) is accepted are as follows:

"First. The said member is now living and of temperate habits and is now and has been, during the past twelve months, in continuous good health and free from all disease, infirmity, illness, indisposition or weakness, and has not during said period consulted or been prescribed for or attended by any physician for any cause whatever, otherwise said payment, and this receipt and said policy shall be null and void, and the sum paid herein shall be subject to the order of the within named person.

"Second. The receipt and acceptance of the within named sum by the company shall be not held to waive forfeiture or expiration of membership, or to reinstate membership, or to create any liability of the company under said policy except upon fulfillment of the first condition of this receipt.

"Third. The acceptance of the within sum after the same became due, shall not establish a precedent for acceptance of future payments to the company, nor shall any subsequent payment upon said policy impair, waive, alter or change any of the conditions of this receipt or of said policy, or of any agreements or conditions relating thereto."

There was evidence which it may be claimed tends to show that this red slip was never received by the insured. Thereafter, the February, April, June, August, and October, 1905, mortuary premiums matured, and they were duly paid by the insured. Receipts were given therefor, and in each one it was stated that the receipt was "subject to the terms and conditions indorsed hereon and of said policy contract, and to all agreements and conditions relating thereto," and on the back was indorsed:

"Terms and Conditions. The acceptance of the premium hereon shall not be held to waive forfeiture caused by nonpayment of any previous sum when due or otherwise."

In June, 1904, the insured was attended by a physician once for indigestion or some kind of colic, and in November or December, 1904, he was likewise attended four times for la grippe. On this latter occasion, he seems to have been confined to his house for about two weeks. This statement puts us in position to appreciate and to dispose of the assignments of error relating to the charge to the jury, and the refusal to give defendant's requests. The jury were told, in substance, that if said draft for $24.45 dated December 24, 1904, was mailed at Jackson on that date, or in time to have reached the defendant at its New York office by December 31, 1904, the policy was not forfeited, and plaintiff was entitled to recover, whether in fact the

draft reached defendant by or after that date. This portion of the charge is assigned as error. This assignment is not well taken. It is well settled that, notwithstanding a policy of insurance provides that payment of the premium shall be made at the insurer's home office by a time certain, if, after its issuance, the insurer requests or authorizes or acquiesces in the sending of the premiums by mail a deposit thereof in the mail in time to reach that office by the time it is due will save a forfeiture even though it does not in fact reach there until afterwards. Kenyon v. Knights Templar & M. Mut. Aid Association, 122 N. Y. 247, 25 N. E. 299; Primeau v. National Life Association, 144 N. Y. 716, 39 N. E. 858, affirming Primeau v. National Life Association, 77 Hun, 418, 28 N. Y. Supp. 794; McCluskey v. National Life Association, 77 Hun, 556, 28 N. Y. Supp. 931; Hollowell v. Virginia Life Insurance Co., 126 N. C. 398, 35 S. E. 616.

In the Primeau and McCluskey Cases it was held that if the premium is mailed within the time it is due, though not in time to reach the home office by that time, it will save a forfeiture. There, the insurer had requested that the premium be sent by mail, and because of this it was held that the receipt of the premium was at the insurer's risk. But the question does not depend on at whose risk the premium is so sent. In the Hollowell Case Judge Clark said:

"It will be observed that in the case in New York (Kenyon Case, 122 N. Y. 247, 25 N. E. 299) the premium was not received at all, but the court held that the company could not, after its course of dealings, forfeit the policy. By this it is not meant that if the money is lost in the mail, or if the drawee becomes insolvent before presentation of the check or draft, the insured is discharged from making good the loss on notice, but simply that it is so far a payment that it prevents a forfeiture."

That mailing the premium in such a case in time to reach the home office before it is due is sufficient may well be based on the ground that such is the reasonable interpretation to be put on the conduct of the insurer in requesting, authorizing, or acquiescing in its being so sent, and that the insured has a right to act upon it. It may be that this ground is sufficient to uphold a mailing before the time it is due, but not in time to reach the home office by that time. But we do not find it necessary to determine this question here. Here, by the instructions on the calls made, the insured was authorized to remit by mail, and by its course of dealing it acquiesced in the premiums being so sent. That said instructions stated that the remittance was at the sender's risk does not affect the matter. The thing at risk was not its reaching the home office before the expiration of the time in which it was due, but was its not reaching there at all. The case, therefore, of State v. Insurance Co., 106 Tenn. 283, 61 S. W. 75, cited in behalf of plaintiff, in which it was held that delivery of a letter or package containing several premiums on a life policy to a post office or commissioner within the state of Tennessee addressed to the company at a point outside of the state did not constitute delivery or payment to the insurance company within the state, and that such delivery and payment did not become complete and effective until its receipt by the company at its office, and that this money remained in the meantime at the risk of the sender, in no way affects the question we have here.

The jury were told further as follows:

"If you find from the proof that this assessment No. 137 was legally made, and that the insured, Mr. Solomon Tuchfeld, received notice of the assessment, but that he failed from some cause to make the remittance within the time contracted for in the policy, or that he bought this exchange and mailed his letter after the 1st of January and that it was not received by the company until the 16th of January, and when they did receive it they placed it as a credit upon the assessment, and that then they sent to the insured this notice on this red slip and that he received that notice—nothing else appearing that would work under the terms of the policy a forfeiture of the policy, and the plaintiff would not be entitled to recover. But if you find this last state of facts—that is, that this letter was not mailed until after the 1st of January, and that it reached New York some time after that date, and defendant placed it to the credit of this assessment against Mr. Solomon Tuchfeld, and then if you should find they mailed the insured this red notice, and you further find from this testimony that they continued to assess him as the assessment period rolled around four, five, six, or seven times, and each time they gave him notice of his assessment and notice of payment, and that he continued to pay each assessment within the time fixed by the contract, and they accepted it and placed it to the credit of his assessment, and they continued to do so up to the time of the death of Mr. Solomon Tuchfeld—then I instruct you that that would be such a waiver of the letter of the contract as would estop these defendants from now saying this policy lapsed and is now void."

This portion of the charge, in substance, was that if the draft was not deposited in the mail until after January 1st and was received January 16, 1905, was placed by the defendant as a credit upon the assessment, and defendant thereupon sent the insured the "red slip," then the policy was forfeited, and plaintiff was not entitled to recover, but that if, notwithstanding this, thereafter the defendant made other calls upon the insured before his death, and he paid them, then the forfeiture of the policy was waived, and plaintiff was entitled, to recover. It is true that in this latter contingency the jury were told simply that the forfeiture was waived, and it was not expressly said that plaintiff was entitled to recover. But this was implied. In the former contingency they were told in so many words, not only that the policy was forfeited, but that the plaintiff was not entitled to recover. In the latter contingency it was intended to be conveyed to the jury not only that forfeiture had been waived, but that the plaintiff was entitled to recover, and the jury could not have failed to so understand. Inasmuch as there was no dispute in the evidence that the defendant had, subsequent to the mailing of the red slip, made other calls on the insured, and he had paid them, this portion of the charge in effect amounted to a peremptory instruction to the jury to find for plaintiff.

One of the assignments of error relates to this portion of the charge. The question as to whether it is well taken should be considered in the light of several positions as to which there can be no doubt. One is that if, in fact, the insured failed to mail said draft until after December 31, 1904, the policy thereupon expired and became null and void, in accordance with its terms. Another is that, though the policy did thus become forfeited, yet if the defendant upon receipt of the draft had done nothing more than to apply it on the December call and acknowledge receipt thereof, such action on its part would have been a waiver of the forfeiture, and would have reinstated the policy. No authorities need be cited in support of these two positions. Still

another one is that as the defendant was not bound in such case to accept said draft, and waive the forfeiture, it had a right so to do on such terms as it might dictate, and if it so did on the terms named on the red slip a breach thereof was a defense to the action, nothing else appearing. This so clearly follows from the preceding positions that no authorities ought to be required to support it. Yet it will be helpful to take notice of some of them. In the following cases, to wit, French v. Mutual R. F. L. Association, 111 N. C. 391, 16 S. E. 427, 32 Am. St. Rep. 803, Teeter v. United Life Insurance Association, 159 N. Y. 411, 54 N. E. 72, McQuillan v. Mutual R. F. L. Association, 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 56 L. R. A. 233, 88 Am. St. Rep. 986, the principle embodied in this position was presupposed. In each case there had been a forfeiture of the policy in suit by nonpayment of premium at the time stipulated, and in the French and Teeter Cases a conditional waiver thereof. In the French Case the insurer was the same as here. On payment of the back premium it gave the insured a receipt stating that the condition upon which it was accepted was that he was then and for 12 months past had been in continuous good health and free from all disease, infirmity, or weakness. This receipt was given January 30, 1891, and the insured died July 13, 1891. It was held that this condition meant no more than that if there had been such illness or impairment of health that the insured would not have been received, if he had been an original applicant for insurance, the reinstatement was void, and as the jury had found that there had been no such illness or impairment of health that the plaintiff was entitled to recover. In the Teeter Case the insurer advised the insured that before it could give him credit for the payment he would have to execute a health certificate, by which he certified that he was then in good health. This he did, and thereupon he was reinstated, and thereafter he continued to pay his premiums until his death some four years and eight months after the date of reinstatement. It was held that the plaintiff was entitled to recover notwithstanding the statement of said certificate was untrue, because of an incontestable clause in the policy, which, it was further held, began to run as to said statement from the date of reinstatement, and the limit of that clause had expired. In the McQuillan Case the insurer was the same as here. It was held there that the plaintiff was entitled to recover on the ground that there had been no conditional waiver. There, the insured had assigned the policy, and, after forfeiture, on receipt from the assignee of the back premium, the insurer sent the assignor a conditional receipt the same as here, retaining the premium. It was held that it should have been sent to the assignee. In the following cases, to wit. Unsell v. Hartford Life & Annuity Insurance Co. (C. C.) 32 Fed. 443, Ronald v. Mutual R. F. L. Association, 132 N. Y. 378, 30 N. E. 739, Bottomly v. Metropolitan Life Insurance Co., 170 Mass. 274, 49 N. E. 438, Ash v. Fidelity Mutual Life Association, 26 Tex. Civ. App. 501, 63 S. W. 944, Pacific Mutual Life Insurance Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. Rep. 862, the principle so embodied was applied to the facts thereof. In the Unsell Case, the question was whether the insured had so often and under such circumstances received premiums, after they were due previous to the one in question

as to waive its nonpayment at maturity. Amongst the receipts given for the previous premiums were certain of them which were conditional on the insured being then alive and in good health. Judge Thayer, in charging the jury, said, speaking of such receipts:

"A receipt of that kind, even though it be for dues paid after they were due (and it purports to be for such dues), does not tend to show an absolute waiver by the company of its right of forfeiture, and these receipts were not admitted by the court on that theory. Receipts in this form only tend to show that the company would accept payments after due, and after a right of forfeiture had accrued to it, in the event that the member was alive and in good health."

The case was affirmed by the Supreme Court in 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496.

In the Ronald Case the insurer was the same as here. On payment of the back premium it gave the insured a receipt containing the statement that it was accepted on condition that the insured was then in as good health as when received. This was not true as he then had fatty degeneration of the heart, and died the next day. It was held that the plaintiff could not recover. In the Bottomly Case the policy had lapsed for nonpayment of the premium. The insurer made application for reinstatement in which certain declarations and warranties were made, and it was granted in accordance with and subject to said declarations and warranties. It appearing that one of them was not true, it was held that plaintiff could not recover. In the Ash Case the policy was issued in 1891. In August 1894 or 1895 the premium was not paid when due, and the policy was forfeited. In a renewal contract the insured stated that he had not had any sickness or ailment or received any medical treatment since the date of his original application. He had had pains in his stomach for two or three years, and in 1894 had pneumonia. It was held that plaintiff was not entitled to recover. Judge Fly said:

"After the forfeiture of the policy for such nonpayment, it would again be subject to forfeiture on account of false statements made by the insured to obtain a reinstatement."

In the Galbraith Case, the policy was issued January 1, 1902, and the insured died February 14, 1904. On January 1, 1903, he failed to pay the second annual premium when due. Thereafter, he applied for reinstatement of the policy and it was granted upon his furnishing a certificate containing a warranty of present good health. The warranty was false in that he was then suffering with consumption complicated with Bright's disease. It was held that the plaintiff could not recover. It was so held, notwithstanding the policy contained a two years incontestable clause—this, on the ground that on the reinstatement the two years began to run anew from the date thereof, and had not therefore expired at the time of death. These authorities are sufficient if any were needed, to make good this position.

A final position is that the acceptance by the plaintiff in error of the bimonthly premiums thereafter—i. e., in February, April, June, August, and October, 1905—maturing did not amount to a waiver of the conditions of the red slip. In the French Case, supra, it is quite likely the policy was a bimonthly premium one. If so, three premiums

had matured and been paid after the conditional waiver. And in the Teeter Case, supra, the policy ran four years and eight months after the conditional waiver. In none of the other cases, supra, does it appear that any premiums matured and were paid after the reinstatement of the policy, subject to the conditions stated. Upon the reinstatement of the policy here the plaintiff became liable thereunder the same as before, except that new conditions were imported into its liability, to wit, those contained in the red slip, and to continue that liability the insured was bound to pay, and the plaintiff in error was entitled to receive, the bimonthly premiums as they thereafter matured. As the payment of those premiums did not amount to a waiver of the original conditions it did not so affect the new conditions added at the reinstatement. It amounted no more to a waiver thereof than it would had not the old policy been reinstated, but a new one containing them had been issued in its stead. Besides, in each of the receipts given for the subsequent payments, it was stated that the receipt thereof was subject to the terms and conditions indorsed thereon and of said policy contract, "and to all agreements and conditions relating thereto." Of course, if, after the reinstatement, the plaintiff in error had become aware of the breach of the condition upon which it was made, and thereafter it called for and accepted any of said subsequent payments, a different question would arise. But we have no such case here, as it does not appear that the breach thereof, if such there was, became known to the plaintiff in error until after the death of the insured.

This brings us to the assignment of error now under consideration. The portion of the charge covered by it contains two branches. In the first branch thereof, it is said that two things worked a forfeiture of the policy and interfered with plaintiff's right to recover. One was the failure to mail the draft until after January 1st; and the other was defendant's placing this draft as a credit upon the insured's assessment and sending him the red slip. We find nothing in the evidence as to defendant's placing the assessment to the insured's credit. All that appears is that the draft was received by the defendant January 16, 1905, and on the next day it mailed the red slip to him. When the amount of the draft was placed to his credit does not appear. Undoubtedly, the failure to mail the draft until after January 1st worked a forfeiture of the policy, and cut off plaintiff's right to recover. But the placing of the draft to the insured's credit and the mailing of the red slip to him had no such effect. This had the effect of waiving conditionally the forfeiture caused by the failure to mail the draft in time. In so far, however, as there was error here, it was not prejudicial to the plaintiff in error.

The other branch of this portion of the charge contained what we have said in effect amounted to a peremptory instruction to find for plaintiff. It was that the acceptance by defendant of the subsequent payment of the bimonthly premium notwithstanding the mailing of the red slip estopped defendant from saying the policy had lapsed and was void. To a certain extent, the mailing of said red slip so estopped—using this word here in a loose sense—the defendant from so saying, i. e., except for breach of the conditions contained on the red slip. But, in view of the positions heretofore advanced, said subsequent pay-

ments did not estop defendant from so saying because of the breach of said conditions. The lower court seems to have thought that the case of Beatty v. Mutual R. F. L. Ass'n, 75 Fed. 65, 21 C. C. A. 227; same case, 93 Fed. 747, 35 C. C. A. 573—was an authority for this portion of the charge, and it is urgently insisted here that it is in point. We do not think that it is. The insurer there was the same as here. The policy contained a forfeiture clause for nonpayment of any premium when due. Calls 15 to 42 had been paid. On March 27, 1889, call 43 was made, and it was due May 1, 1889. Payment thereof was tendered on May 3, and the insurer refused to accept it except on condition that the insured furnish the usual health certificate. This he did not do. The sole question in the case was whether or not the insurer had waived a forfeiture of the policy for the delay as to call 43 by reason of previous course of dealing and of subsequently making call 44. The previous course of dealing relied on as working the estoppel was that the insurer had previously accepted payment of calls 16, 17, 20, 25, 26, and 42 after they were due. Conditional receipts were given for payment of calls 16, 17, and 25, and regular receipts for payment of calls 20, 26, and 42. It was held that it was a question for the jury as to whether the insurer had waived the forfeiture. There was no question in the case as to whether, if the insured had furnished the health certificate required for acceptance of call 43 after it was due, and the insurer had given a conditional receipt therefor, the insurer could not have defeated an action thereon for breach of such condition, even though subsequent thereto and up to the time of the insured's death it had made and received payment of calls for premiums as they matured, which is the question we have here. The question there was whether there had been a forfeiture of the policy by nonpayment of the premium when due. The question here is whether the insurer can rely on a breach of the condition on which it accepted payment of an overdue premium, thereby waiving the forfeiture caused by its nonpayment in time, as a defense to an action on the policy. In other words, by the acceptance of the premium after it was due, the insurer obtained a waiver of the forfeiture by reason of its nonpayment when due, and the question is whether the plaintiff can avail himself of this waiver without regard to the terms on which he obtained it, simply because defendant accepted payment of subsequently maturing premiums, when it had no choice as to their acceptance, and in the receipts given therefor, it was expressly provided that they were still in force. We think not, and that, therefore, this portion of the charge was erroneous.

It is to be noted that it is provided in the red slip that in case of breach of the first condition the sum paid should be subject to the order of the insured. There is nothing in the fact that by virtue of this provision the plaintiff may have been entitled to a return of all premiums then and thereafter paid on the policy if his right to recover thereon was defeated by such breach, and that same may not have been returned to him to affect the correctness of said portion of the charge. Goorberg v. Western Assurance Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876.

Another portion of the charge duly excepted to, and assigned as error, embraces the same error as that first considered. Omitting a preliminary abstract statement it is in these words:

"If, therefore, you find from the evidence that, subsequent to the call 137, assessments were imposed on plaintiff's intestate on account of the policy sued on in this action, and notice of such assessments were sent to plaintiff's intestate, that would be treating the policy as in full force by the company at the date of sending assessments, and you will find that there was no forfeiture of the policy on account of the nonpayment of mortuary call No. 137, and the plaintiff would be entitled to recover, if thereafter and within the time allowed by the policy plaintiff's intestate paid the defendant, or its authorized agent, the amount of such subsequent assessments or calls."

Here, again, the jury are told that the making and payment of the subsequent calls entitled plaintiff to recover irrespective of the question whether there had been a forfeiture of the policy by nonpayment of call 137 when due; a conditional reinstatement thereof when said call was paid and accepted, and a breach of that condition, which was relied on as a defense to the action, and as to which there was evidence tending to support it. If said policy had been reinstated, even though conditionally, the insurer had a right to pay, and the insured was bound to accept payment of the subsequently maturing calls. The making and payment of such calls could not, therefore, amount to a waiver of such condition, particularly when it was expressly recognized in each receipt given for such subsequent payment as still in force.

We do not find it necessary to consider in detail the other portions of the charge assigned as error, except that portion relating to the penalty, which will be referred to further on, nor to any of the requests which were refused. It will prolong this opinion too much to do so. It is sufficient to say that we do not see that the court erred in any of its rulings involved therein.

The two requests asked by defendant covering its position as to nonliability for breach of the condition as to the insured's health and medical attention were not proper, because therein the jury were told absolutely that plaintiff could not recover if there had been a conditional waiver, and the condition had been breached. This was not the law. Though this may have been so, yet, if the draft was mailed in time, plaintiff was entitled to recover. As we view it, the law of the case on its merits was that, if the draft had been mailed in time, the plaintiff was entitled to recover, irrespective of any other question. Again, though it had not been mailed in time, yet if there was an absolute and not a conditional waiver of the forfeiture caused by the failure to mail the draft in time, then plaintiff was entitled to recover. And, further, if there was a conditional waiver the plaintiff still was entitled to recover unless there was a breach of the condition. If there was a conditional waiver of such forfeiture, the making and payment of the subsequent calls have no bearing on the case unless any of them were made or paid after knowledge of a breach of the condition came home to the defendant, of which there is no evidence in the record.

The final assignment of error is the instruction in relation to the penalty. No question is made as to its conforming to the statute except in one particular. The statute is in these words:

"That the several insurance companies of the state and foreign insurance companies and other corporations, firms or persons doing an insurance business in this state, in all cases where a loss occurs and they refuse to pay the same within 60 days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy in addition to the loss and interest thereon, a sum not exceeding 25 per cent. on the liability for said loss; provided, that it shall be made to appear to the court and jury, trying the case, that the refusal to pay said loss was not in good faith and that such failure to pay inflicted additional expense."

The liability to pay the penalty depends on a refusal to pay after a demand. The instruction complained of did not put the question of demand to the jury. They were told that if defendant's refusal to pay was not in good faith, and caused additional expense to plaintiff, they might allow the penalty. A refusal may be said to imply a demand. But the matter should have been directly put. Back of this, however, there was no evidence of a demand before suit was brought. That a formal demand is essential in order to render the insurer liable to the penalty, notwithstanding its apparent futility, and the bringing of the suit itself is not such a demand, was held under a similar statute in the case of Northwestern Life Assur. Co. v. Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61. This construction of said statute was adopted by the Supreme Court in the case of Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204. Other grounds are urged why the instruction should not have been given. It is claimed that it would be unconstitutional to apply the statute to the policy in suit. That policy was issued long before the enactment of the statute. To so apply the statute, it is claimed, would be repugnant to section 10, art. 1, of the United States Constitution, prohibiting a state from passing any law impairing the obligation of contracts. It is claimed, on the other hand, that the matter is affected by the consideration that after the enactment of the statute—that is, from April 18, 1901, until November 15, 1901—the defendant continued to do business in the state. Again, it is urged that the statute has no application to insurance companies on the assessment plan, and it was made to appear on the trial of the case that defendant did business on such plan. And, still further, it is urged that there was no evidence of want of good faith on defendant's part.

We do not find it necessary to pass on these other grounds. It is sufficient to say that the lack of evidence that a formal demand had been made requires that it be held that this assignment is well taken.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

VAN SCHAICK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 61.

1. CRIMINAL LAW—WRIT OF ERROR—FINDINGS—REVIEW.
In a prosecution of the master of a vessel for criminal negligence and inattention to duty, it is not the duty of the Circuit Court of Appeals on a writ of error to examine and decide questions of fact on which the evidence is conflicting, but the verdict on such questions will be sustained if there is any substantial evidence in support thereof.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074–3083.]

2. SHIPPING—CARRIAGE OF PASSENGERS—NEGLIGENCE OF MASTER—OFFENSES—STATUTES.
Rev. St. § 5344 (U. S. Comp. St. 1901, p. 3629), provides that every captain on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, etc., shall be guilty of manslaughter. *Held*, that intent or malice was not an element of such offense, and proof that accused was the captain of the vessel; that he was guilty of misconduct, negligence, or inattention to his duties thereon; and that by reason thereof human life was destroyed—was sufficient to sustain a conviction.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 563.]

3. SAME—DEFENSES—INSPECTION.
In a prosecution of the captain of a vessel for manslaughter, due to his negligence, misconduct, and inattention to duty in the performance of certain duties imposed on him by law, it was no defense that the government inspectors had failed in their duty to properly inspect the vessel and its safety appliances, and had wrongfully issued a certificate of inspection.

4. SAME—DUTY OF MASTER.
Rev. St. § 4471 (U. S. Comp. St. 1901, p. 3049), provides for the maintenance of a steam fire pump and two hand pumps with pipes, one on each side of the vessel, to convey water to the upper decks to which suitable hose shall be attached and kept in good order at all times and ready for immediate use. United States Inspectors' rule 5, § 15, provides for a fire drill at least once a week, and section 4482 (U. S. Comp. St. 1901, p. 3054) requires good life-preservers in sufficient numbers, kept in accessible places for immediate use. *Held*, that it is the statutory duty of the captain to maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire is provided and maintained in proper order, and to exercise ordinary care to see that the life-preservers are in fit condition for use.

5. SAME—BURNING OF VESSEL—INEVITABLE ACCIDENT—NEGLIGENCE.
Where an excursion steamboat was burned while plying quiet inland waters on a pleasant day with no vis major or unusual disturbance of the elements, and within half an hour after the fire broke out, 90 per cent. of the passengers had been drowned or burned to death, such catastrophe was not the result of inevitable accident, but was itself evidence of negligence and inattention to duty on the part of the master and crew.

6. SAME—STATION BILLS—NUMBERING CREW.
Where a station bill posted on a vessel assigning the crew to quarters in case of fire referred to the crew by number instead of names, but the members of the crew were not numbered, the posting of the bill did not constitute a compliance with the law requiring the posting of a station bill assigning the crew to quarters in case of fire.

7. SAME—FIRE DRILLS—FAILURE TO HOLD—EXCUSE.
Where an excursion steamer in New York Harbor had been inspected early in May, 1904, and was ready for navigation about May 15th, she

having been out but nine times prior to June 15th, when she was lost by fire, it was no excuse for the captain's failure to maintain fire drills as required by Inspectors' rule 5, § 15, that he had had no time or opportunity therefor, or that his crew was composed of raw material, and was constantly changing.

8. SAME—FIRE APPLIANCES—LIFE-PRESERVERS.

In a prosecution of the captain of a vessel for misconduct and inattention to duty, resulting in loss of life from a fire started in the forward hold of the vessel, evidence *held* to justify a finding that the captain was negligent in failing to provide, preserve, and inspect necessary fire appliances and life-preservers.

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

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon the verdict of a jury finding the defendant guilty under the third count of the indictment which charges him with misconduct, negligence and inattention to duty under section 5344 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3629), while acting as master of the steamer General Slocum. The opinion of the Circuit Court overruling demurrer to indictment is reported in 134 Fed. 592.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and Dudley F. Phelps, Jr., of counsel), for plaintiff in error.

Henry L. Stimson, U. S. Atty. (Henry L. Stimson, Goldthwaite H. Dorr, and Felix Frankfurter, of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The statute under which the indictment was drawn, in so far as it is necessary to consider it here, provides that every captain on any steamboat by whose misconduct, negligence or inattention to his duties on such vessel, the life of any person is destroyed, shall be deemed guilty of manslaughter. The defendant was convicted under the third count of the indictment which charges that from May 6, 1904, to and including June 15, 1904, he was master of steamboat General Slocum, a vessel authorized to navigate the bay and harbor of New York, rivers tributary thereto, Long Island Sound, etc. That as such master it was his duty to cause a station bill for his own and the engineers' department to be prepared, in which every person employed on said vessel should be assigned a post of duty in case of fire. That these station bills were required to be posted in the most conspicuous places on said vessel for the observation of the crew. That it was the duty of the defendant, at least once a week, to exercise the crew in the discipline and in unlashing and swinging out the lifeboats and in the use of the fire pumps and all other apparatus for the safety of life, in case of fire or other emergency and to see that all the equipments required by law were in complete working order and ready for immediate use. The third count further alleges that it was defendant's duty to see that the said vessel was provided with a double-acting steam pump or other equivalent apparatus for throwing water, equipped with at least two pipes, one on each side of said vessel for carrying water to the upper decks and that it should be kept in work-

ing order and ready for immediate use. That it was the defendant's duty to see that to these pipes, both between decks and on the upper deck, was attached by means of stopcocks or valves, good and suitable hose of sufficient strength to stand a pressure of not less than 100 pounds to the square inch, long enough to reach to all parts of the vessel and ready for immediate use. That it was also the duty of the defendant to see that two hand pumps, with suitable hose, ready for immediate use, were provided for the purpose of extinguishing fire on the said vessel. That it was also his duty to see that the life-preservers on the vessel were of the regulation buoyancy and equipment and were in good order and ready for immediate use. The indictment charges that the defendant wholly neglected to perform any of the duties or discharge any of the obligations required by law, as enumerated above. That he failed to prepare and post station bills, assign the crew to positions, or exercise them in their respective duties. That the hose provided for the pumps was weak, unfit, unserviceable and unable to withstand the strain required by law, no hose of any kind being provided for the hurricane and promenade decks or for use on the hand pumps. That the life-preservers were unsafe and unserviceable, being decayed, without the necessary buoyancy and fastening straps and useless for saving human life. The indictment further charges that on June 15, 1904, the General Slocum with not less than 1,200 passengers was navigating the East river when she was destroyed by fire and a large number of passengers, not less than 900, were drowned or burned to death. That by reason of the negligence and misconduct of the defendant there was an entire lack of discipline on said vessel after she caught fire, causing panic and confusion on board and, there being no adequate means for extinguishing the flames, no attempt to do so was made. That lifeboats were not launched or made ready for launching, that the life-preservers were useless and those who attempted to use them sank instantly and were drowned while others who remained on board sank into the flames and instantly died. In brief the indictment charges that the misconduct of the defendant, while master of the General Slocum, in failing to drill and discipline his crew and in failing to provide suitable life-preservers, hose and apparatus for fighting fire, caused the death of a large number of persons.

The General Slocum was built in 1891 and was a wooden, side-wheel, excursion steamboat, her length, over all, was about 250 feet, she had two stacks and three decks and was licensed to carry 2,500 passengers. The defendant had been her master since she was built. On the morning of June 15, 1904, between half-past 9 and a quarter of 10 the Slocum left her dock at the foot of Eighth street with a Sunday School excursion of between 1,000 and 1,100 persons, composed of men, women and a large number of children, the women predominating. She proceeded up the river by the North Channel. The point when the fire was first discovered is in dispute. This was a question of fact for the jury. It is argued here, as are many similar questions, as if it were the duty of this court to examine and decide it and base the final decision upon the conclusion reached. There is unquestionably a marked conflict in the testimony as to the point on the river where the fire was first discovered. The defendant contends that it was off the

spindle at the sunken meadows, the government that it was below the meadows and when the boat was opposite Ninetieth street in the vicinity of the Astoria Ferry. The jury may well have been convinced beyond a reasonable doubt that it occurred at the latter point. Certainly we cannot say that there was no evidence to support such a finding. Crumpton v. U. S., 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958.

As will be seen later, irrespective of the place where the fire was discovered, there was time to have extinguished or checked the flames had not every effort in that direction been frustrated by lack of discipline or failure of equipment. The fire originated in the forward hold which was directly aft of the quarters of the crew and forward of the hold containing the boilers. It was about under the center of the pilot house and was reached by a companion way on the starboard side of the vessel, the entrance being by a large door. The stairs ran athwart ships. This hold was used as a storeroom and for filling lamps, it contained oil barrels filled and partially filled, old rope, paint pots, straw, life-preservers and old junk generally. Upon discovering the fire the defendant ordered the boat full speed ahead, directing his course for the shelving beach at North Brother Island. Assuming that this order was given in the vicinity of Ninetieth street it would require from eight to twelve minutes to make the distance, about two miles, to North Brother Island where she was beached. The bow of the vessel after beaching was directly on shore so that one could jump from there onto dry land but from the paddle boxes aft there was a depth of water of from 10 to 15 feet. In order to avoid the flames the passengers were crowded together in the rear portion of the vessel. The flames spread with great rapidity soon after beaching, the decks fell in, many were drowned, some were burned, and in all over 1,000 persons lost their lives. The testimony indicates that the officers and crew were all saved and the truth of this statement was not challenged at the argument by the counsel for the defendant.

The offense of which the defendant has been convicted is statutory in character. Under the statute it was necessary for the United States to prove three propositions: First, that the defendant was captain of the Slocum. Second: that he was guilty of misconduct, negligence or inattention to his duties on the Slocum. Third: that by reason of such misconduct, negligence or inattention human life was destroyed. Intent is not an element of the offense, malice need not be proved and it is unnecessary to show that the acts or omissions which caused the loss of life were willful or intentional. U. S. v. Keller (C. C.) 19 Fed. 633; U. S. v. Holmes (C. C.) 104 Fed. 884.

The fact that a certificate signed by United States inspectors was filed certifying that the Slocum had been duly inspected and was permitted to navigate for one year from May 6, 1904, has little relevancy to the present issue. The law imposed certain duties upon the defendant, it also imposed duties upon the inspectors, but the fact that the inspectors failed in their duty is no reason why the defendant should be exculpated if he failed in his. The law placed upon him personally the obligation of seeing that this vessel had sufficient protection against fire, he could not delegate that duty, he had no right to rely solely upon

the statements of the inspectors, his duty was not discharged until he personally had seen to it that the required protection was furnished.

Section 4471 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3049) provides for a steam fire pump and two hand pumps with pipes, one on each side of the vessel, to convey water to the upper decks to which hose suitable in strength and length shall be attached, the hose and apparatus to be kept in good order at all times, and ready for immediate use.

Section 4405 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3017) provides that the Board of Inspectors shall establish necessary rules for carrying out the provisions of title 52 which shall have the force of law.

Rule 5, § 15, of these rules provides for a fire drill at least once a week, when the master shall "call all hands to quarters and exercise them in the discipline and in the unlashing and swinging out of the lifeboats, weather permitting, and in the use of the fire pumps and all other apparatus for the safety of life on board such vessel, and to see that all the equipments required by law are in complete working order, for immediate use."

Section 4482 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3054) provides for good life-preservers made of suitable material sufficient in number to accommodate all persons on the vessel, kept in accessible places and ready for immediate use.

Section 18 of Inspectors' rule 3 provides at length as to the character, construction and location of the life-preservers required to be carried by law. We have not quoted these provisions of law in extenso for the reason that the sections of the Revised Statutes and the inspectors' rules applicable to this controversy are quoted in full in the opinion of Judge Thomas overruling the demurrer. United States v. Van Schaick (C. C.) 134 Fed. 592.

Speaking generally, we think that the law required the defendant to maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire was provided and maintained in efficient order and ready for immediate use and to exercise at least ordinary care in seeing that the life-preservers were in a fit condition for use. The jury found him guilty upon all three propositions and the question here is, was their verdict so plainly against the weight of evidence as to justify this court in setting it aside?

On a pleasant morning in June, on quiet inland waters with no vis major or unusual disturbance of the elements a fire breaks out upon an excursion steamboat and in half an hour afterwards 90 per cent. of the people on board have been drowned or burned to death. That such an appalling calamity could not have occurred without fault somewhere is manifest. Human skill and care could have prevented or mitigated the disaster. In other words it was not an inevitable accident. The defendant was in supreme command of the Slocum and was given almost unlimited authority from the owners to purchase the necessary equipment for safeguarding her against fire. Anything which he actually needed he received. In large matters he consulted with the so-called commodore of the line, but in ordinary matters, like the securing of additional life-preservers and hose, his requisition was honored by

the owners. He lived on the Slocum the year around and had been her master from the time she went into commission in July, 1891, a period of 13 years. During all that time he went over the vessel and knew her from stem to stern. He often visited the forward hold and was there quite frequently in May and June, preceding the fire. He knew, or should have known, of the oil, paint, junk, straw and other inflammable material there which might be ignited by the carelessness of passengers or crew or by a spark blown from a passing steamer through the open port holes. Counsel unites in describing the Slocum as "a tinder box." These facts are mentioned for the purpose of showing the high degree of care necessary to guard from danger the hundreds of helpless women and children who were constantly being carried by her. One who has charge of an ancient wooden building must be held to a higher degree of vigilance in guarding against fire than if the building were built of steel, concrete and stone. So the master of a wooden vessel filled with combustible materials and thronged with hundreds of irresponsible human beings is required to exercise a greater degree of watchfulness than is the commander of a steel vessel carrying the ordinary load of comparatively experienced and intelligent passengers.

The action of the defendant in beaching the vessel at North Brother Island is not in question here, assuming this maneuver to have been wise and proper. We are unable with this exception to discover a single act of the master or crew which prevented the spread of the flames or mitigated materially the consequences of the conflagration. In these particulars the jury may well have been convinced that there was an entire lack of discipline on the part of the crew and an insufficiency and inadequacy of apparatus for fighting the fire. The station bills were posted, indeed they had been on the vessel since 1892, but did not give information by which all the members of the crew could learn the places assigned to them in case of disaster. They were assigned not by name but by number and, of course, the bill was meaningless unless the crew were numbered and knew what their numbers were, respectively. The station bill might, for instance, assign No. 5 to duty at the starboard standpipe on the promenade deck and No. 8 to the port standpipe, but if no one in the crew had been given these numbers it is manifest that these positions would remain unoccupied when the moment of danger arrived. It is not pretended that any member of the crew had been assigned a number for use in case of fire and, therefore, so far as being of assistance in emergency, is concerned the station bill might as well have been a copy of the decalogue. In posting the station bills and omitting to assign numbers to the crew, the defendant utterly neglected the spirit of the law. The master at no time after May 6th called the crew to quarters and drilled them as to the duties of firemen, never exercised them in swinging out the lifeboats or in using the pumps and testing the hose, except that the deck hose was used at night for washing the decks. It is hardly pretended on the part of the defendant that any efficient drills took place in the season of 1904 but he seeks to avoid the consequences of his neglect by the contention that there was no time or opportunity therefor. He insists that even if the crew had been instructed as the law directs it

would have availed nothing in averting the disaster. The Slocum had been inspected early in May and was ready for navigation about the 15th day of May. She had been out but nine times with excursions and the remaining time before the busy season began was peculiarly adapted for drilling the crew and molding it into shape.

The proposition that defendant was not responsible for the conduct of his crew because it was composed of raw material and was constantly changing, cannot be maintained, to hold otherwise would be to sanction the proposition that the more ignorant the crew the less was the obligation to instruct them. The direct converse of the proposition is true, the greater their inexperience the stronger was the obligation of the defendant to instruct them; not only so, but he should not have attempted to navigate the Slocum at all unless she was in such a condition, both as to equipment and crew, that he could navigate her safely. In proportion as the crew became listless and inefficient, the watchfulness of the commander should have increased. If it be true, as the defendant testifies, that there were but seven effective men in the crew and that it requires six men to lower a lifeboat properly, it will be seen at a glance how utterly inadequate were the means provided for meeting the emergency in case of fire.

We cannot say that if the defendant had systematically instructed the crew in their duties, assigned each man to his post and required him to take it immediately on hearing the fire signal and had exercised them in stretching out the hose and getting a stream of water immediately on a given point, that it would not have arrested or stayed the progress of the flames. Such a drill, conducted once a week, might have resulted in producing order where confusion reigned supreme, and might have discovered the defective hose which proved useless at the vital moment. Assuredly we cannot say, upon testimony which indicates that there was no systematic effort to comply with the provision of the law as to drills, that the jury could not, properly, have found the defendant guilty in this regard.

Regarding the hose and pipes, there was evidence tending to show that the port standpipe had been used for filling the boilers, was connected with the Croton pipes and had not thereafter been connected with the fire pump. The chief engineer testified that it would have taken him over five minutes to divert the water pressure from the standpipe. He says:

"I didn't go to any valves connected with that pipe at the time of the fire and turn on any pressure. It never was used for that purpose and hadn't any connection with the actual pump. It had a connection down with the feed line, but went a roundabout way to do it. It went around, but we could have got water through it, if we had had plenty of time and no emergency."

This pipe, which might have aided in checking the fire, was, with the knowledge of the defendant, eliminated from the fire fighting equipment. Again, the jury would have been justified in finding that there was no fire hose attached to the standpipe on the promenade and hurricane decks connected up and ready for immediate use.

The second engineer says:

"During the season of 1904, I never saw any fire hose connected with the standpipe on the hurricane deck. No fire hose, or any other kind of hose, was attached to any valve on the promenade deck."

On the promenade deck there was hose coiled up but not connected with the standpipe. The jury might well have found that the hand pumps were useless for the reason that no hose was attached to them. As one of the witnesses testifies, "There was no hose on them; the pumps were ready for use." If these pumps had been fitted with the hose required by law and had been worked by men of intelligence and skill, who can say that it would have made no impression upon the fire?

The neglect which the jury may well have considered inexcusable has to do with the linen hose connected with the forward starboard standpipe on the main deck. If this had been available a stream could have been thrown immediately upon the fire. It is admitted on all sides, "that the fire did not burn through the main deck and that the marks of the fire in the hold after it was over were quite superficial, the main deck was hardly more than scorched." That a fire so ephemeral in character could have been smothered by a steady stream of water is not an unwarranted assumption. It was this hose, required by law to stand a pressure of 100 pounds to the square inch, which burst with a pressure of between 45 and 50 pounds. It is unnecessary to refer to all the testimony tending to show the defendant's negligence regarding this hose, a few references to the record will suffice. The defendant testified that it was on the Slocum continuously since 1891 and during the entire 13 years he never caused water to be put through it, or gave any instructions to test it, or saw water put through it. It was what is known as an "inside hose" intended to be hung in a dry place, but instead of this, while the boat was in commission it was hung where it was exposed to fog and dampness which causes such hose to weaken and deteriorate. We are unable to find even a plausible excuse for this palpable neglect of duty. The answer appears to be one of confession and avoidance, namely, the disaster would have occurred even if all the precautions required by law had been taken. It is said that the crew who were endeavoring to uncoil this hose were interfered with by excited passengers causing it to kink and burst. The answer is that there is nothing to show that the kinking produced the bursting, but even if it did, a well drilled crew, sufficient in number and intelligence, would have known enough to stretch 100 feet of hose without kinking or the interference of passengers. The unexcused negligence of the defendant in leaving this hose without use or testing for 13 years in connection with the fact that it burst the moment the water was turned on, is, in our judgment, alone sufficient to sustain the verdict of the jury.

On the subject of life-preservers the court charged the jury that they must assume that the life-preservers originally furnished were sufficient, that there was no pretense that the whole line had deteriorated to any appreciable extent between May 15th and June 15th, that it was for the jury to say whether they were out of condition and, if so, whether it was due to any fault of the defendant who was required to exercise only reasonable care regarding them. The court further charged the jury, that if through defendant's negligence any persons

wearing life-preservers were forced by the fire into the water where they were drowned, then the jury must find that the life-preservers were so insufficient, through defendant's neglect, that they contributed nothing to the efforts of such persons to keep their heads above the surface of the water. This was certainly as fair a statement of the question as the defendant could ask. The life-preservers had been on the Slocum from 9 to 13 years and only the most superficial tests had been made during this period. That many of them were useless on the day of the fire cannot be disputed successfully. Many could not be put on as they went to pieces as soon as taken from the racks and others which were adjusted proved inadequate, as persons wearing life-preservers were seen going down below the surface of the water and when brought up were found to be dead. The testimony is not so convincing as upon the other branches of the case, but was sufficient, we think, to warrant its submission to the jury.

To pass upon all the questions discussed would extend this opinion beyond all reasonable length. It is sufficient to say that we have examined all the exceptions argued and find no reversible error. The charge was clear and impartial and the verdict of the jury was fully justified by the proof. The excuses advanced on behalf of the defendant and so ably presented by his counsel, if sustained by this court, will place a premium upon misconduct, negligence, and neglect of duty. Owners and masters of vessels, who daily have the lives of thousands of helpless human beings in their keeping, should be held to the strictest accountability and required to exercise the highest degree of skill and care. In this way alone can human life be safeguarded and such appalling disasters, as that which befell the General Slocum, be effectually prevented.

The judgment is affirmed.

KIRKPATRICK et al. v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1908.)

No. 2,612.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

Plaintiffs' intestate and another were employed by defendant as leadsmen in operating a pile driver mounted on the end of a flat car, their duty being to fasten the end of a rope by means of a hook around the large end of a pile lying beside the railroad track and guide it into its place between the leads as the rope was drawn up over a pulley at their top by an engine, and to fix it in position to be driven. On one occasion, when the hammer was raised alongside of the pile, which had been drawn up, it slipped the rope over the top, and the pile fell and struck and killed plaintiffs' intestate, who was in front of it. The deceased was a young, intelligent, and active man, with all of his faculties, who had worked with the pile driver in the same capacity for several months, and knew of the danger that a pile might fall. The apparatus was the same and was used in the same manner as usual. *Held*, that such danger was one of the risks of the occupation which he assumed.

[Ed. Note—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.

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

2. SAME—CONTRIBUTORY NEGLIGENCE.

Deceased had been warned of the danger that a pile might fall, and had been cautioned to keep watch of it, and not to turn his back to it, and places for the leadsmen to stand had been provided on the car at the sides of the leads, where there was no danger. A pile had actually fallen in a similar manner a few days before. At the time he was killed deceased was not in his proper place, but was walking on the track ahead of the car, with his back toward it. *Held*, that he was guilty of such contributory negligence as precluded a recovery for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709.]

3. SAME—PLEADING.

In an action against a master to recover for the death of a servant, an allegation in the answer that, if the deceased received the injuries alleged, the same were sustained as a direct result of his own negligence and want of care, and not of the negligence of defendant, is a sufficient pleading of the defense of contributory negligence, after verdict and judgment, where its sufficiency was not attacked by demurrer or motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 859.]

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

This was an action by the next of kin of Sanford C. Kirkpatrick, instituted in one of the courts of the state of Kansas to recover damages from the defendant railroad company for negligent acts committed in the state of Arkansas which resulted in his death. At the time in question Kirkpatrick was one of the crew engaged in the work of driving piles in the construction of a railroad bridge. The crew was using an apparatus constructed on a flat car, consisting of a small engine in the rear and two upright leads in front, between which operated a hammer of about 3,000 pounds weight. This hammer was drawn up by a rope passing over a pulley at the top of the leads and controlled by the engine. The work to be accomplished was to pick up one by one piles or logs of about 22 feet in length and 18 inches in diameter at the big end, deposited before that time along the railroad right of way, draw them up into a vertical position, make them fast between the leads, move the apparatus forward over the railroad track about 100 feet, and there drive them in the construction of a bridge. The operation of drawing the pile up from the side of the track into position in front of the leads was for one of the crew to draw the slack rope operating over a pulley at the top of the leads down to the ground beside the track, fasten it about the end of the pile, and then by a reverse action of the engine haul it up to the required position. This was done by two men called "leadsmen." Their post of duty was at the foot of the leads, and their particular service was to guide the piles, when raised by the block and tackle, into position between the leads by the use of canting hooks or other convenient tools, and there to make them fast, ready for the drop of the hammer which was ultimately to drive them into position at the bridge. The crew worked under the general direction of a foreman by the name of Seivert. Kirkpatrick and one Van Zant were the two leadsmen.

The petition specified defendant's negligence to consist (1) in employing the rope with a hook at its end, instead of a chain and a hook at the end of the rope, to make the hitch about the end of a pile; (2) in causing the hammer to be raised to the top of the leads and the apparatus to be moved while a pile was hanging by the rope in front of the leads, thereby permitting the hammer, while rising, to rub against the rope encircling the pile and stripping it off over the end of the pile, so as to leave it without support and permit it to fall; (3) in not notching the pile where the rope encircled it, so as to permit the rope to sink into the body of the pile, and thereby prevent the hammer rubbing against it as it arose; (4) in not rolling or canting the pile to one side while the hammer was being raised, thereby preventing it

from striking the rope as it passed up; (5) in not raising the hammer to the top of the leads before placing the pile between the leads, thereby to prevent collision between the encircling rope and the hammer as it was raised. As a result of these acts of negligence plaintiffs charge that a pile fell and killed Kirkpatrick while he was on the track in front of the advancing pile driver. The defendant denied the negligence charged, and pleaded assumption of risk and contributory negligence by the decedent. The case was tried to a jury, resulted in a verdict in favor of the defendant by direction of the court at the close of plaintiffs' case, and is now here on writ of error for review of the proceedings below.

W. P. Campbell (Kos Harris, Verne Harris, A. M. Sturdevant, and Lafe Sturdevant, on the brief), for plaintiffs in error.

H. C. Sluss and W. J. Orr (L. F. Parker and W. F. Evans, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the case as above). An act in force in Arkansas, where the casualty in question occurred, subjected the company to liability for the negligent acts of any of its employés resulting in injury or death to another employé. Thereby the fellow servant doctrine, which might otherwise have been applicable to some phases of this case, is rendered inapplicable. Sand. & H. Dig. § 6248. For the purposes of this case, therefore, the acts of the foreman, if negligent, are imputable to the defendant itself. He was a vice principal.

In view of the proof it is doubtful if any negligence can be imputed to the defendant in either of the particulars specified in the petition. The evidence tends to show that the device employed was the one generally employed by others engaged in the same business, the method of operating it was one generally practiced by others, and that there was nothing unusual or uncustomary in the hitch of the pile, the elevation or operation of the hammer, or the movement of the apparatus; but, as the court is not unanimous in its opinion on this primary issue, we will not dwell upon it, but proceed to some other and decisive issues upon which we are in full accord.

The decedent, as alleged by plaintiffs and in substance proved by the evidence, was 27 years old, strong and able-bodied, skillful, industrious, and temperate, of a good degree of intelligence, and with unimpaired senses of sight and hearing. He had worked for defendant in the performance of the same duties for 14 months before his death. The process of drawing up the pile, raising the hammer, and moving the machine forward was the same on the occasion in question as it had been during the 14 months of his past service. The heavy hammer had habitually been left at the bottom of the leads until the pile had been raised and action upon it had become necessary, in order to prevent an obvious overweighting of the top and probable upsetting of the machine. The rope and hook had been used interchangeably with the chain and hook for making the hitch, and during the last three weeks prior to the accident it had been used exclusively. The logs had never been notched for sinking the encircling rope or chain. The hammer had generally been drawn up after the piles had been elevated, and at a time when the rope or chain was liable to be stripped

off by its ascent. Decedent had worked about this machine for a long time. He sharpened the end of the piles as they lay on the right of way for a while, but most of the time he was a leadsman. His post of duty and his duties brought him into immediate view of and contact with the operation of the machine. His post was on a footboard provided especially for leadsmen at the bottom of the leads and in front of the machine. His duties and those of his fellow leadsman were to handle the piles, take the end of the rope or chain suspended laxly from the pulley at the top of the leads out to the pile beside the track, hitch it to the big end of the pile, watch and guard the latter from contact with obstacles on its way up, ultimately place it between the leads, put the toggles or supports in place, and make everything ready for final action.

The proof given by plaintiffs' own witnesses unmistakably shows that decedent was familiar with all the details of construction and operation of this machine. He usually made the hitch himself, and attended to raising 40 or 50 piles a day. He knew that the rope or chain might be stripped off the pile by the hammer as it was drawn up, and that the pile might fall as a consequence thereof. Of this he had been frequently warned, and within the last 10 or 15 days had witnessed an instance of the falling of such a pile from the leads. If the risks and dangers which caused his death were the usual and ordinary risks and dangers of the employment, he assumed them, provided they were known to and appreciated by him. St. Louis Cordage Co. v. Miller, 126 Fed. 495, 511, 61 C. C. A. 477, and cases cited. If, on the other hand, they were not the usual and ordinary risks and dangers, but arose from negligent defects in appliances, or a negligent method of operating them required by the master, then he assumed all risks and dangers arising from such defects and such operation, if they were known to him, or if they were plainly observable by him. Texas & Pacific Railway v. Archibald, 170 U. S. 665, 673, 18 Sup. Ct. 777, 42 L. Ed. 1188; Choctaw, Oklahoma, etc., R. R. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 126 Fed. 141, 144, 61 C. C. A. 207; Chicago, Burlington & Quincy Railway Co. v. Griffin (C. C. A.) 157 Fed. 912; Chicago, Milwaukee & St. Paul Ry. Co. v. Donovan (C. C. A.) 160 Fed. 826, just decided by this court; Mexican Cent. Ry. Co. v. Murray, 102 Fed. 264, 272, 42 C. C. A. 334; Volk v. Sturtevant Co., 104 Fed. 276, 277, 43 C. C. A. 527; Lindsay v. New York, N. H. & H. R. Co., 112 Fed. 384, 385, 50 C. C. A. 298. The decedent was killed as a result of risks and dangers of one kind or the other just mentioned. Of this, under the proof, there can be, and is, in our opinion, no doubt; and under the rule just mentioned in one or the other of its aspects there can be no escape from the conclusion that decedent, with all his knowledge of the details of the machinery and of their operation, voluntarily assumed the risk and danger which caused his death.

But it is contended that there is no proof that the decedent knew or appreciated the danger incident to the operation of the machine

in question. In King v. Morgan, 109 Fed. 446, 448, 48 C. C. A. 507, we took occasion to say that:

"An intelligent man, with full knowledge of the character and quality of the implement furnished him for use, and of all the facts and physical laws which render its use dangerous, after having voluntarily accepted employment in a hazardous business involving the use of such implements, will not be heard to say he did not know it was dangerous."

This is a rational rule, and one which, when properly applied, produces no unjust results. It has been recognized and applied in the following subsequent cases: Moon-Anchor Consol. Gold Mines v. Hopkins, 111 Fed. 298, 305, 49 C. C. A. 347; Johnson v. Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 513, 61 C. C. A. 477; Tower Lumber Co. v. Brandvold, 141 Fed. 919, 922, 73 C. C. A. 153. The decedent was an intelligent man in the prime of life, with his senses unimpaired, and it would be an unwarrantable and impossible inference to indulge that he, with his extensive experience and familiarity with the machine in question and its operation, did not know or appreciate the danger involved in its use.

We are also unanimously of opinion that the decedent was guilty of such contributory negligence as precludes recovery in this case by his next of kin. The facts, which have already been sufficiently detailed, disclose that a pile was liable to drop at any time; that one actually fell ten days or two weeks before the accident in question. The proof shows that one could fall only in front of the machine carrying it. The foreman in charge of the work for the defendant company had shortly before the accident in question warned the decedent and all the men working with him to look out while raising piles, and not to turn their backs to it. On account of the danger thus warned against, a place of absolute safety had been provided for the leadsmen while discharging their duty, and while the machine was being propelled to the bridge with its hanging and threatening load. On the occasion in question decedent was not at his post of duty when the pile was drawn up in front of the leads. He appears to have been out in front of the machine on the track near the bridge. His partner, Van Zant, alone remained at his post on actual duty. He had given attention to drawing up the pile which caused the accident in question. Decedent observed that the upper end of the rising pile came in contact with a projecting part of the machine, and started back toward the machine, probably to aid his partner in releasing it; but the difficulty was soon over, and decedent turned about and started to walk towards the bridge, with his back to the pile then dangling in front of the leads; and did this without looking back or otherwise heeding the peril behind him, or the warning against so doing recently given by the foreman. When about 20 feet in front of the machine the pile fell, hit, and instantly killed him. He not only paid no heed to the threatening peril and ignored the warning of his foreman, but left a place of safety, where his duty required him to be, and needlessly and voluntarily exposed himself to the danger which directly and without the intervention of any other adequate cause produced his death. These facts, which are established beyond question, amount

to contributory negligence which is fatal to plaintiffs' recovery. Gilbert v. Burlington, etc., Ry. Co., 128 Fed. 529, 63 C. C. A. 27; Crookston Lumber Co. v. Boutin, 149 Fed. 680, 79 C. C. A. 368.

The defense of contributory negligence is sought to be avoided because it was not sufficiently pleaded by defendant. The answer alleges that:

"If Sanford C. Kirkpatrick sustained the injuries alleged in the petition, the same were sustained as a direct result of negligence and want of care of the said Kirkpatrick, and not as the result of the want of care on the part of the defendant."

It is contended that these averments are not specific enough; that defendant should have specified the particular acts of negligence constituting the want of care on the part of the decedent. Without admitting that the answer was at all insufficient, it is enough for our present purpose to say that no objection was taken to it below, either by special demurrer or appropriate motion. After verdict, judgment, and appeal it is quite too late to make such formal objections. If the defects existed, they were cured.

There was some evidence that Kirkpatrick and Van Zant, the two leadsmen, had adopted a practice by which one of them sometimes remained about the bridge after driving a pile, without returning to help pick up and bring forward the next one, and that this practice was known to and tolerated by the foreman. The evidence on this subject is not clear; but, conceding to it all that is claimed by plaintiffs' counsel, it plainly does not affect the defense of assumption of risk. Neither, in our opinion, does it palliate or excuse the contributory negligence of the decedent. If the foreman had known of the arrangement between the two leadsmen, which seems to amount to something like a labor-saving compact, and if he had assented to one of them occasionally remaining at the bridge for a trip, it does not appear how that fact would justify Kirkpatrick in getting near to the dangling pile and in heedlessly ignoring its threatening danger. No positive direction of the foreman, if that were shown, to Kirkpatrick to do so, would have justified the reckless action involved in doing it. Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Tower Lumber Co. v. Brandvold, supra, and cases cited. Certainly, then, no passive toleration justified it.

Certain expert witnesses were called by plaintiffs, and their opinions asked concerning proper appliances to prevent the hammer from striking the rope or chain in its ascent. They were also asked as to the advisability of notching the end of the piles before making the hitch around them, and as to the propriety and safety of raising the hammer while the pile was hanging in front of the leads, and other like questions. These questions were excluded by the court upon the objection of defendant's counsel. The action of the court in so doing is assigned for error. We have for the purposes of this opinion assumed, without admitting it, that defendant was guilty of negligence in the particulars charged in the complaint, and have disposed of the case on other grounds. If the rejected testimony had been admitted, it could not have accomplished more than we have assumed to be true.

For that reason we find no occasion to consider the assignment of error just mentioned.

The verdict as ordered by the court was for the right party, and judgment rendered thereon must be affirmed. It is so ordered.

LAFFOON et al. v. IVES et al.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1908.)

No. 1,480.

1. BANKRUPTCY—CLAIMS—DISALLOWANCE—EVIDENCE—SUFFICIENCY.
   Evidence *held* to sustain an order disallowing and expunging claims of stockholders of a bankrupt corporation for money alleged to have been advanced and expended for the corporation.

2. SAME—REHEARING.
   Where, after claims of stockholders of a bankrupt corporation for money alleged to have been advanced to and expended for the corporation had been disallowed and expunged, a rehearing was granted upon the assurance of one of them, as attorney for the other, that the other, the principal claimant, would be present and submit to examination, and he did not appear, though ample notice of the rehearing was given, and his absence was not satisfactorily explained, the former order rejecting and expunging the claims was properly reaffirmed.

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

Upon Petition for Revision under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].

Edward E. Cushman, for appellants and petitioners.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellants and petitioners complain of an order of the District Court rejecting and expunging certain claims filed by them against the Greek Boys Mining Company, a corporation, bankrupt. The Greek Boys Mining Company was organized in the state of Washington in May, 1902, with a capital stock of $1,000,000, divided into 200,000 shares, of the par value of $5 each. The incorporators and trustees were W. J. Sutherland, M. L. Clifford, R. F. Laffoon, H. B. Brokaw, and R. C. Callahan. W. J. Sutherland was elected president, M. L. Clifford vice president, and R. F. Laffoon secretary. Each of the trustees subscribed for 1 share of the capital stock of the corporation and paid for the same at par value. At a meeting of the trustees of the corporation held in June, 1902, Sutherland offered to sell to the company certain mining properties situated in the Berner's Bay mining district in Alaska for 199,995 shares of the capital stock of the corporation. The offer was accepted; Sutherland, as a member of the board of trustees, not voting on the proposition. Charles H. Pearce, one of the appellees herein, was appointed resident agent at Juneau, Alaska, and subsequently superintendent of the company's property in Alaska. The work of developing the property of the company was continued during the working seasons of each year until the year 1905, when Pearce, after a service of three years, left

the company's employment and brought suit in the state of Washington against the company for salary as superintendent, and recovered a judgment in the sum of $3,532 and costs. The recovery of this judgment resulted in the commencement of involuntary proceedings in bankruptcy against the said corporation on May 9, 1906, and an adjudication of bankruptcy on June 13, 1906. The case was referred to Warren A. Warden, a referee in bankruptcy, to take further proceedings therein as required by the acts of Congress relating to bankruptcy. Among the claims filed against the bankrupt corporation was one by R. F. Laffoon, claiming to be a creditor in the sum of $668.94, for money advanced and expended by him in behalf of the bankrupt corporation. Another claim filed was by W. J. Sutherland, claiming to be a creditor in the sum of $10,000 for money expended by him in behalf of the bankrupt corporation. Objections were made to these claims on the grounds, among other things, that the proofs were defective, and that the subject-matter of the claims was vague and defective to such an extent that the trustee could not determine whether they consisted of legal or equitable claims against the estate; that the claim of Sutherland was based upon expenditures made in his own behalf, and not in behalf of the corporation; that it did not appear that Sutherland was authorized to make expenditures in behalf of the corporation bankrupt, or incur any indebtedness in its behalf; that Sutherland was president and Laffoon secretary, and both directors and trustees, of the corporation; that in accordance with the laws of Alaska the trustees of the corporation did, in February, 1905, file with the clerk of the United States District Court for Division No. 1 in Alaska an annual statement under oath as to its then existing condition; that said statement set forth that the said corporation had no debts or other obligations, except salaries unpaid, amounting to about $3,000; that by reason of such statement both claimants were estopped to assert the claim of indebtedness which they had attempted to prove in the proceeding.

At the first meeting of the creditors held by the referee on July 10, 1906, and continued on July 17th and September 18th, testimony was taken with respect to the claims against the bankrupt. It appears that W. J. Sutherland was notified by R. F. Laffoon, Sutherland's attorney in fact, of the meeting of July 17th and requested to be present. He received this notice at Vancouver, British Columbia, on July 16th, and on the same day wrote a letter to the referee in which he said:

"I have not been served with any notice or order of any kind, and will not be able to appear in person in your court on said date, nor, in all probability, at any future date; but I write to assure you that I am ready to submit to any examination touching the matters in said bankruptcy proceedings in the city of New York or in London. My address will be at 68 William street, New York, and at 39 Lombard street, London, E. C., England. Should you consider it necessary to appoint a commission to take my testimony, and you notify me of the appointment, I will present myself for examination. When I return to New York and London I will look up such documents and papers that I may have touching the affairs of the Greek Boys Company, and I will deliver the same if required. Before that time I would be unable to render you much assistance in the proceedings, as my papers are in one or the other of those places. Mr. Laffoon can explain to you the reasons why I cannot appear to you at the present time."

The objections to the claims of Sutherland and Laffoon were sustained by the referee. The claims were accordingly disallowed, and ordered expunged from the trustee's records. Upon petitions of Sutherland and Laffoon the rulings, decisions, and orders of the referee respecting the claims were certified to the District Court for review. Upon a hearing before the court a memorandum decision was made by the court that the rulings, decisions, and orders of the referee with respect to these claims should be affirmed, on the ground that the claims were for money advanced to the company or expended for its benefit, and there was no clear or satisfactory evidence that any money was expended; that with respect to the Sutherland claim, while he claimed to be a creditor of the company to the amount of $10,000, his individual conduct justified a strong inference that he was not a bona fide creditor. The court also referred to the fact that while the contest for his claim was pending before the referee he took the pains to write a letter from Vancouver, British Columbia, saying that he had been notified of the time and place for investigating his claim; that he could not make the journey from Vancouver to Tacoma, but would arrange to be in attendance for the purpose of giving information upon the subject at the city of New York or London, England. The court was of opinion that this treatment of the referee's notice indicated that, for reasons of his own, he was keeping beyond the reach of judicial process. The court was also of opinion that, assuming that all or some part of the amount claimed was in fact expended, the bankrupt company was under no obligation therefor, because the expenditures, if made, were for the purpose of perfecting the title to mining claims which Sutherland was obliged to convey to the company clear of liens in consideration of stock that was issued or to be issued to him.

Petitions were thereupon filed for a rehearing and for leave to file amended claims, and that the same be referred to Warren A. Warden, a special master, to take testimony therein and report the same to the court, together with his findings thereon. An amended claim of W. J. Sutherland, with items in detail in the sum of $7,000, and an amended claim of R. F. Laffoon, also with items in detail in the sum of $668.74, were thereupon filed. The hearing of the claim coming up before the special master, the special master announced that there were no funds of the bankrupt in the hands of the trustee to meet any expenses or costs that might be incurred in the matter of taking testimony before him or for the services of the special master or the stenographer. The special master thereupon required that a deposit of $200 should be made to cover all possible expenses. Claimants offered to deposit $50, and additional amounts from day to day. The referee inquired if Mr. Sutherland was present and ready to submit himself for examination. The referee was informed that Mr. Sutherland was not within the jurisdiction of the court; but it was stated, and not denied, that at the time the motion for a rehearing was granted, the attorney for petitioners stated in open court that, if the petition were granted and the rehearing allowed, he was authorized by Laffoon, the attorney for Sutherland, to say that Sutherland would be present and submit himself for examination. Thereupon the special master announced that he would refer the entire matter back to the District Court for such

further determination as the district judge might make. The referee accordingly reported the proceedings to the court and asked for instructions. A hearing was had upon the report of the special master, and on March 26, 1907, it was ordered that the former order of the court rejecting and expunging the claims of Laffoon and Sutherland be affirmed, and the referee directed to expunge the claims from the list of creditors in the cause.

We find no error in the proceedings. The opinion of the court upon the first hearing, affirming the order of the referee disallowing the claims of Sutherland and Laffoon, and expunging them from the record, was fully justified by the evidence. The rehearing was granted, and the reference to the special master made, upon the assurance of Laffoon that his principal, Sutherland, would be present and submit to examination. The reference was made on September 18, 1906. The special master gave notice of the rehearing February 15, 1907, and fixed the date of the rehearing for March 1, 1907, thus giving the petitioners abundant time to appear and present their proofs. The rehearing was called before the special master on March 1st; but Sutherland was not present, and no satisfactory explanation made of his absence. There was here evidence of a lack of good faith on the part of the petitioners, and we think that under such circumstances the court was justified in directing that the former order of the court, rejecting and expunging the claims, should be reaffirmed.

POWELL v. WISCONSIN CENT. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1908.)

No. 2,656.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ASSUMED RISK.
Intestate at the time he was killed was foreman in defendant's switching yard, and was engaged in cutting out and transferring the cars to different tracks. While the train was moving he walked along the side thereof, and, desiring to detach two of the cars, took hold of the lever of the safety appliance brake to uncouple them, but discovering that the brake was not in working order, stepped between the cars while in motion to disengage the pin, when the heel of one of his shoes caught in the frog of the rails, and he was run over and killed. He was well acquainted with the condition of the frog and track, and acted in violation of a known rule forbidding coupling by hand. There was no emergency requiring him to go between the cars, and he could have uncoupled the cars in safety either by signaling the engineer to stop and then passing to the other side and reaching the brake lever on the other car, or he could have waited until the cars had passed him and gone to the opposite side without passing between the cars, both of which were equipped with automatic couplers. *Held*, that intestate, in undertaking to uncouple the cars by hand with knowledge of the situation, was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.

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

2. SAME—CONTRIBUTORY NEGLIGENCE.
Intestate was also grossly negligent precluding a recovery for his death.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 701–709.]

3. SAME—CUSTOM—EVIDENCE.
Where intestate was killed while attempting to uncouple certain cars by hand, evidence of a witness of very limited experience, and only a short time in defendant's service, that he had known brakemen to go between the cars to couple or uncouple when safety brakes were out of order, without any proof of knowledge or acquiescence on the part of the managers of the railroad company of such conduct, was inadmissible.

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

C. D. O'Brien, for plaintiff in error.
Walter D. Corrigan, for defendant in error.

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

PHILIPS, District Judge. This is a writ of error to have reviewed the action of the Circuit Court in directing a verdict for the defendant. The plaintiff's intestate, John J. Powell, was in the employ of the defendant railroad company as foreman, superintending the switching of cars of the company in its yards at Minneapolis, Minn. At the time of his injury, he was engaged in directing the movement of a train of freight cars in the yards, for the purpose of cutting out and transferring the cars to different tracks. This was being done by what is known as "kicking" the cars down through a switch where they were turned on to the desired track. While the train was moving, Powell, who was walking along the side thereof, desiring to detach two of the cars, took hold of the lever of the safety appliance brake, which works on the outside of the end of the car, to uncouple them. Discovering that the brake was not in working order, he stepped in between the cars while in motion to disengage the link pin, when the heel of the shoe of his left foot caught in a frog of the rails, and, before he could disengage it, he was run over by the wheels of the car and killed.

The responsibility of the defendant company for this accident is alleged in the petition to be its negligent failure to properly block the frog of the rails or to securely guard it, and without any warning or notice to the deceased "of either the existence or the dangerous character of the same." To support the charge, the petition pleads the following statute of the state of Minnesota (section 2681, Gen. St. 1894), as follows:

"Any person or persons, railroad companies, or corporations owning or operating any railroad or railroads in this state shall be and are hereby required on or before the first day of June, 1887, to so adjust, fill, block and securely guard the frogs, switches and guard rails on their railroads in all yards, etc., so as to thoroughly protect and prevent the feet of employés and other persons from being caught therein."

The switch in question was "the throat of the yard," over which practically all the switching was done in distributing cars and making up trains. It was about three feet from the bridge over which "the drag" of the cars was being drawn backward and forward. This

switch was what is known as a "Three-Throw Split Switch." The frogs were blocked with iron of the manufacture of the Ajax Manufacturing Company of Chicago, which the evidence tended to show was an approved means for properly blocking such frog. The evidence on behalf of the defendant, which was not contradicted, tended to show that, because of the necessity of operating the rails at the point of junction, it was impracticable to block them out further than was done at said switch. Be this as it may, the deceased, who had worked as such foreman in the said switchyards for nearly two years, was presumptively quite familiar with the frog and blocking in question. The evidence was that he threw this switch almost daily two hundred times, with this frog almost beneath his eyes. So, when he stepped in between the cars on to the rail, he knew where the frog was, and how it was blocked. In addition to this, the act of going in between the cars to effect the uncoupling was entirely voluntary and unnecessary on his part, as there was no exigency demanding such method. In so doing, he acted in direct violation of the known rule of the master. The evidence was that the cars were equipped with the automatic safety appliance brakes, designed to obviate the necessity and danger of the employé going between the cars to couple or uncouple them.

When the deceased applied to take service in this company, there was given him, for which he receipted, the book of rules of the company, one of which enjoined as follows:

"Inasmuch as the coupling apparatus or engines cannot be uniform, in style, size, or strength, and is liable to be broken, and as for various causes it is dangerous to expose between the same, the hands, arms, or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines, to examine so as to know the kind and condition of the draw-heads, draw-bars, lengths and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yard master or conductor. Sufficient time is allowed and must be taken by employés in all cases to make the examination required. Coupling by hand is strictly prohibited. * * * All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that in accepting or retaining employment, they must assume the ordinary risks attending and all risks of which, by the exercise of care and caution, they could learn."

The force of the injunction that "coupling by hand is strictly prohibited" becomes manifest, in view of the fact that the defendant company, to comply with the safety appliance act of Congress, had equipped its cars with a safety brake, designed and intended to avoid the danger to employés going between the cars to effect coupling and uncoupling by hand while the cars are in motion. The deceased knew of the safety appliance equipment. On the opposite side of the cars from where he entered between them, the end of the next car was provided with the safety appliance, and by means of the lever on the outside the uncoupling in question could have been safely accomplished. As the movement of this train at the time was subject to his control, when he discovered that the safety brake on his side was out of order, he had, open and apparent to him, two courses: (1) To signal the engineer to stop the engine and then pass to the other side in safety to reach the opposite brake; or (2) to have waited until the

cars passed him, and then have gone on to the opposite side to effect the uncoupling without passing at all between the cars. If he chose, for his own convenience, with his knowledge of the situation, to undertake to effect the uncoupling by hand, when there was an apparently safer method to accomplish the work, with his knowledge of the rule in question, he not only assumed the risk, but was guilty of an act of gross negligence, without which his life would not have been forfeited. The law is that the master is not responsible for an injury thus invited by the employé. Kansas & T. Coal Co. v. Reid, 85 Fed. 914, 29 C. C. A. 475; Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Tower Lumber Co. v. Brandvold, 141 Fed. 919, 73 C. C. A. 153; Chicago & Northwestern Ry. Co. v. Davis, 53 Fed. 61, 63, 3 C. C. A. 429; Morris v. Duluth, etc., Ry. Co., 108 Fed. 747, 749, 47 C. C. A. 661; Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 536, 63 C. C. A. 27, 34. The attempt to justify the deceased's conduct in going between the cars as he did by the testimony of a witness, of very limited experience, and only a short time in the defendant's service, that he had known brakemen to so go in between the cars to couple or uncouple when the safety brakes were out of order, without any proof of knowledge or acquiescence on the part of the managers of the company of such conduct, was inadmissible and ineffective. Dawson v. C., R. I. & P. Ry. Co., 114 Fed. 870, 52 C. C. A. 286; St. Louis, K. C. & Col. R. Co. v. Conway (C. C. A.) 156 Fed. 234, 240.

As the case is submitted to this court, the contributory negligence of the deceased is practically conceded. In submitting the case to the court below on request by defendant for a directed verdict, it was conceded that but for what is known as the "Employer's Liability Act." of June 11, 1906, c. 3073, 34 Stat. 232 (U. S. Comp. St. Supp. 1907, p. 891), apportioning the liability for negligence between the employer and employés, the plaintiff under the settled rules of this court could not recover. So, in passing on the request for a directed verdict, the judge said that he "would feel obliged, under the decisions of our Court of Appeals, to declare as a matter of law that the deceased was guilty of contributory negligence, and plaintiff could not therefore recover." He placed his ruling in directing the verdict for the defendant on the ground of assumption of risk by the deceased. As presented to this court in the brief of counsel for the plaintiff in error, the effect of the contributory negligence of the deceased as a question of law as it stood at common law is sought to be avoided alone by said act of Congress. Since the case was tried, and before it was submitted on this writ of error, the Supreme Court has held that said act of Congress is invalid, being in contravention of the federal Constitution. Howard, Adm'r, v. Illinois Central R. Co. et al. (decided January 6, 1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. ——.

The question of assumption of risk argued so elaborately in the briefs of counsel is therefore more academic than essential to the determination of the cause. It results that the judgment of the Circuit Court must be affirmed.

BIGLOW et al. v. CONRADT et al.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1908.)

No. 1,457.

1. MINES AND MINERALS—POSSESSION—RIGHTS OF LOCATOR.

Where, prior to the time plaintiffs' predecessors in interest set out the corner stakes of their mining claim in question, they had no possession of any part of defendants' claim, which at all times was in defendants' possession, and was being worked by one of the defendants at the time plaintiffs' predecessors entered on defendants' claim for the purpose of setting out extension stakes to include the ground in conflict as a part of complainants' claim, such entry was a mere interruption, within the rule that, as against a mere intruder, the possession of a mining claim by a locator who has complied with the law is of itself sufficient to prevent the intruder, even by a peaceable entry, from acquiring a right to possession.

2. SAME—DISCOVERY.

Where plaintiffs' predecessors sunk a discovery shaft within the original boundaries of their claim six or seven months before they attempted to extend the boundaries so as to include that portion of defendants' claim in controversy within an overlap, such discovery had relation to the original boundaries of plaintiffs' claim, and not the claim within the extended boundaries, so as to confer on plaintiffs' predecessors any rights in the overlap on which defendants subsequently made the first discovery; defendants' occupation and discovery being without opposition.

[Ed. Note.—Sufficiency of discovery of mineral characteristics to support mining location, see note to Lange v. Robinson, 79 C. C. A. 6.]

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

This is an action in ejectment, brought in the District Court of Alaska, Third Division, by the plaintiffs in error against the defendants in error, to recover possession of certain ground within the overlapping lines of their respective claims. The claims are located on and near Esther creek, in the Fairbanks recording district. In the spring of 1904 one Carruthers located Creek Claim No. 6 Below Discovery on Esther creek. The course of Esther creek at this point is from west to east. In August, 1904, Carruthers, who then had associated with him one Anderson, ascertained that claim No. 6 was largely in excess of 20 acres, the quantity of placer ground limited to one claim by section 2331 of the Revised Statutes [U. S. Comp. St. 1901, p. 1432]. They accordingly, acting together, on September 14, 1904, located the downstream excess of No. 6 across the creek in the name of Anderson, and designated the excess as "No. 6A Creek Claim." In locating the boundaries of the new claim they set two stakes, an upper or western and a lower or eastern stake, with a base line connecting them. These two stakes are designated as center stakes on the claim. The lower center stake was the old lower center stake of the original No. 6 Creek Claim, and they set up a new upper center stake for No. 6A, which also became the lower center stake of No. 6 Creek Claim, as readjusted and limited to the proper area. Anderson placed location notices upon both the upper and lower center stakes of the new claim, 6A, setting forth that he claimed 1,000 feet upstream from the lower stake and 1,000 feet downstream from the upper stake, and 490 feet on each side of both stakes. The two latter boundaries were further identified by two pencil arrows on each stake, one pointing to the right and the other to the left, at right angles to the base line from center stake to center stake, and over each arrow Anderson placed in pencil the figures and word "490 feet," thus giving notice on each stake that he claimed a location 1,000 feet down the stream from the newly determined lower boundary of the original No. 6 claim, by 980 feet wide, extending across the stream. The actual distance from the upper center stake to the

lower center stake was 872 feet. A notice of the location of Creek Claim No. 6A was filed and recorded September 13, 1904.

On March 19, 1904, one Sjoblon, as agent in fact for the locator, William Salmon, located Bench Claim No. 6 Below Discovery on the right limit or south bench, and marked its courses with stakes, so that its boundaries could be readily traced. A notice of the location of Bench Claim No. 6, right limit, was filed and recorded June 15, 1904. In April, 1905, the defendant Sjoblon began work on this claim and started to sink a discovery shaft. After sinking the shaft to a depth of 14 feet Sjoblon met with an accident and abandoned the shaft, and two months later commenced work sinking a shaft at another place on the claim. On the last of April or the 1st of May, 1905, Anderson and Carruthers set out four corner stakes for Claim No. 6A, which gave that claim new boundaries. From the upper center stake to the upper right-hand or southwest corner stake the distance was 520 feet, instead of 490 feet, as originally stated on the notice on the center stake; and from the upper center stake to the upper left-hand or northwest corner stake the distance was 491 feet, instead of 490, as stated in the notice. From the lower center stake to the lower right-hand or southeast corner stake the distance was 609 feet, instead of 490 feet, as stated in the notice; and from the lower center stake to the lower left-hand or northeast corner stake was 499 feet, instead of 490 feet. In other words, the claim as located and described by notice on September 1, 1904, was 1,000 feet (actually 872 feet) by 980 feet. The claim as staked on the last of April or 1st of May, 1905, was 1,000 feet (actually 872 feet) by 1,011 feet on the upper or western boundary and 1,129 on the lower or eastern boundary. The extension of the claim on the left or north bank is immaterial. The extension of the claim on the right or south bank was made to include a strip of ground 30 feet wide on the upper or western boundary and 119 feet on the lower or eastern boundary, by 872 feet long east and west. It is in this strip on the southern boundary of plaintiffs' Creek Claim 6A and the northern boundary of defendants' Bench Claim No. 6 that the overlap occurs in the claims of plaintiffs and defendants. As plaintiffs' Claim No. 6A was located and described on September 1, 1904, there was no conflict with the defendants' Bench Claim No. 6 on the right limit, located and staked nearly six months previously, on March 19, 1904. The overlap and conflict arises by reason of plaintiffs' new staked corners made on the last of April or 1st of May, 1905; nor was there any conflict between the Creek Claim No. 6A and Bench Claim No. 6 as the notices were filed for record—the first on September 13, 1904 and the latter on June 15, 1904. Prior to about May 1, 1905, when Carruthers and Anderson set out their right limit or south side stakes so as to include the overlap, they had no possession of any part of the Salmon Bench Claim, which at all times was in the possession of the defendants. When Carruthers and Anderson set out the south corner stake of the extended boundaries for their Creek Claim No. 6A, they did so without opposition of any person whatsoever and in a peaceable manner. At that time neither of the defendants, nor any one in their behalf, was upon or engaged in any work upon any part of the ground designated as the overlap.

The first and only discovery of gold made on plaintiffs' Claim No. 6A was in September or October, 1904, when Anderson and Carruthers sunk a discovery shaft to the depth of 39 feet, when they found some color of gold. This shaft was on the left or north side of the creek and within the lines described in the original notice posted on September 1, 1904. The first discovery of gold made on defendants' Claim No. 6 right limit on the south side of the creek was made on the 7th of July, 1905, in a shaft designated as "No. 9." This shaft was located on the common corner of Bench Claims Nos. 5 and 6 and a fractional claim designated as "Hardin Fraction." The defendants began work March 22, 1906, on a shaft designated as "No. 7" and reached bed rock in this shaft on April 17, 1906, and continuously worked the same as a paying mine until the commencement of this action. This shaft was within the staked boundaries of Bench Claim No. 6 and within the limits of the extended boundaries of Claim No. 6A, designated as "the overlap." Berry, one of the plaintiffs, loaned the defend-

ants his boiler to enable them to sink this shaft No. 7, and he and his co-plaintiff Biglow examined the work, panned the dirt coming out of the shaft, had full knowledge that the defendants were on the ground which constitutes the overlap, and made no objection to their work until after they had reached bed rock in the shaft.

The case was tried by the court without a jury. The court found the facts and the conclusions of law in favor of the defendants, and entered judgment accordingly. The case comes here on a writ of error. There is no bill of exceptions.

John L. McGinn and Martin L. Sullivan (Campbell, Metson, Drew, Oatman & Mackenzie and E. H. Ryan, of counsel), for plaintiffs in error.

Heilig & Tozier (T. C. West, of counsel), for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The case is here on the sufficiency of the facts found by the court to support the judgment. The findings have not been carefully prepared, and do not state ultimate facts with fullness or precision; but a fair and reasonable construction of all the findings, taken together, will enable this court to determine the questions in controversy. O'Reilly v. Campbell, 116 U. S. 418, 420, 421, 6 Sup. Ct. 421, 29 L. Ed. 669. Plaintiffs' claim to the right of possession of the overlap rests mainly upon two facts drawn from the findings of the court. The first of these facts is that when Carruthers and Anderson, plaintiffs' predecessors in interest, about May 1, 1905, set out the corner stakes of Creek Claim No. 6A, extending the southeast corner of that claim so as to include the ground in controversy, they did so without opposition of any person whatsoever and in a peaceable manner, and that at that time neither of the defendants nor any one in their behalf was upon or engaged in work upon any part of the ground in dispute in this action designated as the overlap. But the court also found that prior to the time Carruthers and Anderson set out the corner stakes for their Creek Claim No. 6A they had no possession of any part of the defendants' bench claim, which at all times was in the possession of the defendants, and was being worked in April, 1905, by one of the defendants who was then engaged in sinking a shaft on the claim. The entry of Carruthers and Anderson upon defendants' claim for the purpose of setting out a stake for the extension of their Creek Claim No. 6A was, therefore, an intrusion. As against a mere intruder, the possession of a mining claim by a locator who has complied with the law is of itself sufficient to prevent the intruder, even upon a peaceable entry, from acquiring a right of possession. 1 Lindley on Mines, §§ 216, 218, 219; Haws v. Victoria Copper Mining Co., 160 U. S. 303, 316, 16 Sup. Ct. 282, 40 L. Ed. 436; McIntosh v. Price, 121 Fed. 716, 718, 58 C. C. A. 136; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66.

The second fact upon which plaintiffs rely is that, when Carruthers and Anderson went upon defendants' claim and set their corner stakes for their Creek Claim No. 6A, no discovery of gold had been made upon defendants' claim. It is therefore contended that as there was no discovery by defendants there was no location by them; but plaintiffs are not in a position to urge this objection to defendants' claim as a

reason for appropriating a portion of it by an overlapping location. To do this they must have had some superior right to the ground within such overlap, and this they did not have by reason of any discovery relating to a claim including the overlap. Plaintiffs' position is this: That Carruthers and Anderson in September and October, 1904, sunk a discovery shaft to the depth of 39 feet, where they found colors of gold, upon which they claimed a discovery for 6A. This was nine or ten months before the discovery of gold upon defendants' claim, which, as before stated, was made on July 7, 1905. But this discovery shaft was sunk within the boundaries of the original claim, and six or seven months before Carruthers and Anderson attempted to extend the boundaries of their claim so as to include that portion of defendants' claim within the overlap. This discovery—and no other was made—had relation, therefore, to the original boundaries of plaintiffs' claim, within which it was made, and fixed their right of possession to the claim within such boundaries; but it had no relation to the claim with the extended boundaries, made six or seven months later, so as to include a portion of defendants' claim in the overlap, and the discovery made within the original boundaries of the claim fixed no right of possession to such extended boundaries as against the defendants' right of possession of their claim.

Moreover, the defendants were the first and only persons to make a discovery of gold in the overlapping ground, and the occupation of the ground by the defendants for mining purposes which enabled them to make this discovery was without opposition on the part of the plaintiffs. It therefore appears, from the facts found, that the plaintiffs acquired no right of possession in the overlapping ground, by extending the boundaries of their claim so as to include it, as against defendants' actual possession of the ground as part of their claim. This we understand to be the law as declared in Belk v. Meagher, 104 U. S. 279, 284, 26 L. Ed. 735.

The findings being sufficient to support the judgment, the judgment of the court below is affirmed.

In re KOHLER.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1908.)

No. 1,716.

BANKRUPTCY—ASSETS—PROCEEDS—FRAUDULENT CONVEYANCES—APPLICATION.

Bankrupt Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], contain special provisions with respect to preferred creditors and sections 67a–67e relate to preferences or liens taken within four months prior to the filing of a bankruptcy petition, in all of which cases it is declared that the property covered by the conveyance and lien shall pass to the trustee "for the benefit of the estate," and section 70 provides that the trustee shall be vested by operation of law with the bankrupt's title to all property transferred by him in fraud of his creditors. Ohio Rev. St. 1892, § 6343, declares that every sale or transfer by a debtor with intent to defraud his creditors shall be void as to creditors of the debtor at the suit of any creditor or creditors "as hereinafter provided," and shall inure to the equal benefit of such creditor or creditors in proportion to the amount of their respective demands, and section 6344 pro-

vides that any creditor as to whom any of the actions prohibited by section 6343 are void may commence an action to have the same vacated, and to administer the property for the "equal benefit of all creditors." *Held* that, where a bankrupt while insolvent transferred property to his wife without consideration, and his indebtedness continued steadily to increase until he was adjudged a bankrupt, the proceeds of a settlement of a suit brought by creditors who were such at the time the transfer was made to vacate the same were distributable, both under the bankrupt act and under the state law among all the creditors, and not only among those who were creditors at the time of such transfer.

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

W. A. Slabaugh, for petitioner.

T. H. Bushnell, for respondents.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

RICHARDS, Circuit Judge. On July 2, 1903, George W. Crouse was adjudicated a bankrupt. Prior to this time, on August 22, 1901, Crouse transferred to his wife, without consideration, shares of stock in certain corporations. At that time the then existing indebtedness of Crouse aggregated $461,108.69. Additional debts contracted after August 22, 1901, and now existing, amount to $1,300,000. After Crouse was adjudicated a bankrupt, certain creditors who existed at the time of the transfer of the stock from Crouse to his wife applied to the trustee in bankruptcy to bring suit to set aside this transfer on the ground it was fraudulent as to them, and when the trustee declined to do so they brought suit themselves. Afterwards authority was given by the court below to the trustee and the parties interested to compromise and settle this suit for the sum of $29,100. This was paid to the trustee, and the controversy now is over its distribution, whether it should be divided pro rata among all the creditors of the bankrupt, or only among those who were creditors at the time the transfer of the stock was made, on August 22, 1901. The matter was referred to a special master, who held that the distribution should be pro rata among all the creditors. Exceptions to his report were taken before the court below, who held that the distribution should be limited to those who were creditors at the time of the transfer—on the 22d of August, 1901. Thus, the question has reached us.

The argument in favor of the conclusion reached by the court below seems to be based largely upon what is claimed to be the law of Ohio in such case, while the master, in holding the distribution should be made pro rata among all the creditors, plants himself squarely upon what he contends are the policy and provisions of the present bankruptcy law. The court below pointed out that, under the finding of facts as he reads it, the transfer was only "to the detriment of his [bankrupt's] then existing creditors," which he regards as controlling. The court thinks it "not harmonious with justice that persons whose legal rights have in no wise been invaded may participate in funds arising out of a transfer, which did result in the invasion of the rights of others." And it cannot believe that the bankruptcy law, in distribu-

ting an estate, intended to give any more rights to certain creditors than they had prior to its enactment.

It is apparent from the reading of the bankrupt law that one of its chief objects was to prevent fraudulent preferences and conveyances by providing means for setting them aside and distributing the proceeds equally among all the creditors. Special provisions are made with respect to preferred creditors. Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Such provisions are also made with respect to liens. Sections 67a, 67b, 67c, 67d, and 67e. All these relate to preferences or liens taken within four months prior to the filing of the petition in bankruptcy. In all these cases it is provided that the property covered by the conveyance or lien "shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right to such levy, attachment, judgment or other lien shall be preserved for the benefit of the estate." In section 70 it is broadly provided that the trustee shall be vested, by operation of law, with the title of the bankrupt, to all "property transferred by him in fraud of his creditors." It is apparent this provision applies to all property transferred by the bankrupt at any time in fraud of his creditors.

The record does not show that the Ohio court, in which the suit was brought to have the transfer to the bankrupt's wife declared fraudulent, made any finding as to the precise nature of the transfer. In fact, there was no finding; the suit was settled by a compromise approved by the court below. It appears clearly enough, however, in the record, that at the time of the transfer Crouse was indebted $461,108.69; and in the time succeeding that, before his petition in bankruptcy was filed, his indebtedness was increased by $1,300,000. We have a right, therefore, to say that the findings of the master commissioner are not open to the construction placed upon them by the court below. The finding that the "stock was transferred without consideration and to the detriment of the then existing creditors" did not, in our opinion, amount to a finding that the transfer was to the detriment of his then existing creditors alone. If his indebtedness increased so rapidly after this transfer was made that in three years it was quadrupled, we have a right to conclude that the transfer was "to the detriment" not only of his existing, but his future, creditors, and it was fraudulent in the sense that it was made not only in view of his existing but his future creditors.

One object of the bankruptcy law is to prevent preferences and secure equality. The letter of the law, from which we have quoted, provides for an equal distribution. All the estate of a bankrupt is to go to the trustee. This includes preferences and property fraudulently conveyed. In our view, the strong objection to the construction of the lower court is that it provides a ready method of effectuating preferences. A man heavily in debt, and likely to go in deeper, in other words, insolvent, but yet in business, may convey a large part of his property to his wife. Having thus put out an anchor to windward, he has the satisfaction of knowing that, if the conveyance stands, his wife is taken care of, but, if it is set aside, the creditors existing then will be preferred over the later ones. There may be reasons why the bank-

rupt would like to prefer his earlier over his later creditors. If so, here is a method ready at hand for the purpose.

The construction of sections 67f and 67c will be found in the case of First National Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967. Here, certain attachments had been levied within four months. The court held they could be annulled, or the lien of the attachments could be preserved under the bankruptcy act, for the benefit of the estate. There was no method suggested of passing over the property covered by these attachments to the creditors who had secured them. But they could be held by the trustee "for the benefit of the entire body of creditors; that is, 'for the benefit of the estate'—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors." 202 U. S. 146, 26 Sup. Ct. 580, 50 L. Ed. 967.

We have examined a number of Ohio decisions, but have not found one in which the distribution of the proceeds of property transferred in fraud of creditors, recovered by a trustee in bankruptcy, directly or through others, was limited to creditors existing at the time of the transfer. The precise question does not appear to have been raised, but the rule seems to be that the title of such recovered property would be held by the trustee for the benefit of all the creditors.

Sections 6343 and 6344 of the Revised Statutes of 1892 of Ohio regulate the recovery and distribution of property conveyed in fraud of creditors. Section 6343 provides that every sale or transfer procured by a debtor to be rendered with intent to hinder, delay, or defraud creditors shall be declared void as to creditors of such debtor at the suit of any creditor or creditors "as hereinafter provided," and shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the equal benefit of such creditor or creditors in proportion to the amount of their respective demands, including those which are unmatured.

Section 6344 provides that any creditor, as to whom any of the acts prohibited in section 6343 are void, "whether the claim of such creditor has matured or will thereafter mature," may commence an action to have such act declared void, and such court shall appoint a trustee, who shall proceed by due course of law to recover possession of all property so sold, etc., "and to administer the same for the equal benefit of all creditors," as in other cases of assignment to trustees for the benefit of creditors.

These sections appear to us to provide clearly that where property is conveyed in fraud of creditors, it may be recovered by a trustee "for the equal benefit of all creditors," and we understand this to mean for the equal benefit of all creditors, not part of them, not simply those existing at the time the transfer was fraudulently made.

In Bowlus v. Shanabarger, 19 Ohio Cir. Ct. R. 137, the court says that the action and relief afforded by sections 6344 and 6345 of the Revised Statutes of 1892 of Ohio "are for the benefit of all creditors," and since this is the case an appeal from such judgment may be likewise treated as one for the benefit of all the creditors.

In the Matter of Gray (Sup. Ct. N. Y.) 47 App. Div. 554, 62 N. Y. Supp. 618, it was held that the right of action to avoid alleged fraudu-

lent transfers made more than four months before the filing of the petition in bankruptcy vests in the trustee. On page 557 of 47 App. Div., 62 N. Y. Supp. 618, the court says as to fraudulent transfers made more than four months before the filing of the petition, as well as those made within four months, "in either case the avails must be distributed equally among the creditors."

The judgment of the lower court is reversed, and the case remanded, with directions to order the distribution of the money referred to among all the creditors.

NOTE.—The following is the opinion of Tayler, District Judge, in the court below:

TAYLER, District Judge. This matter is on for hearing on the exceptions to the report of the special master, to whom was referred the question as to the disposition to be made of a certain fund in the hands of the trustee in bankruptcy of George W. Crouse, arising out of the settlement of certain suits brought by some of the creditors of the bankrupt. On August 22, 1901, George W. Crouse, being largely indebted, chiefly as indorser on the paper of Aultman, Miller & Co., transferred to his wife, without consideration, 50 shares of the stock of the Goodrich Company, 39 shares of the stock of the Akron Cultivator Company, and 9,700 shares of the stock of the Cleveland Pressed Brick Company. Subsequently he incurred additional obligations to a very large amount. The indebtedness now existing, which existed at the time of the transfer of these shares of stock, aggregated $461,108.69. The debts now existing, and contracted after August 22, 1901, aggregate about $1,300,000. In 1903 he went into bankruptcy. Some of the creditors whose obligations antedated the transfer to the bankrupt's wife applied to the trustee in bankruptcy to bring suit against the bankrupt and others to set aside the transfer of the stock, which was claimed to be fraudulent as to them; this the trustee declined to do, and these creditors, acting for themselves and others, brought such suits themselves. Thereafter, authority was given by this court to the trustee and the parties in interest to compromise and settle the suits for the sum of $29,100. This sum was paid into the hands of the trustee, and the controversy now is over the question as to whether or not this sum of money is to be divided pro rata among all of the creditors of George W. Crouse, or among those only who were creditors at the time the transfer of the stock was made.

The finding of facts of the referee is as follows: "The facts agreed upon and found are: That on the 22d day of August, 1901, the bankrupt transferred to Martha P. Crouse 50 shares of Goodrich Company stock; 39 shares of Akron Cultivator Company stock; and 9,700 shares of the capital stock of the Cleveland Pressed Brick Company, without consideration and to the detriment of his then existing creditors. These creditors consisted of certain creditors of Aultman, Miller & Co., upon whose notes to them as evidence of such indebtedness George W. Crouse was an indorser."

Claim is made by counsel for the trustee that the creditors who now claim this fund alleged in their petitions, in the suits brought by them, that the transfers were made with the intention of defrauding future, as well as existing, creditors, and that this circumstance conclusively shows the right of subsequent creditors to participate in the fund arising from the suits. Whether or not such averments of the petition, made in such a case and in such a manner, would be conclusive under the circumstances which we have before us is unimportant in view of the finding of the referee. The referee has made a specific finding of facts, and it is further shown that his finding of facts is agreed upon, so that all parties are bound by it. That finding of facts is that the transfer was "to the detriment of his then existing creditors." In a formal finding such as this, the expression of the words "then existing creditors" excludes after existing creditors. Therefore the case must be considered as one in which we are to inquire whether or not a transfer of property by a debtor in fraud of the rights of existing creditors, and which could not

be attacked except by creditors in existence at the time when the transfer was made, will, if set aside, inure to the benefit of all creditors whether antecedent or subsequent to the unlawful transfer.

It seems to me not harmonious with justice that persons whose legal rights have in no wise been invaded may participate in funds arising out of a transfer, which did result in the invasion of the rights of others. The creditors whose debts arose after the transfer were not, in law, defrauded by the transfer. They lose nothing if they get none of the proceeds of the transferred property. They are benefited by the acts of the antecedent creditors in setting aside the fraudulent transfer because the amount of the antecedent indebtedness is, by so much, reduced.

I cannot think that the bankruptcy law, as to the setting aside of transfers, intended to give any more rights to creditors than they had prior to the enactment of the law, save only those rights growing out of its immediate administration, as, for instance, the unlawfulness of any transfer of property, except for a present consideration, made within four months from the filing of the petition in bankruptcy. Otherwise the rights of all parties remain as theretofore, and only those who were prejudiced by the unlawful transfer in this case may reap any benefit to be derived from a fund which the debtor, or his transferee, is compelled to pay in consequence of the unlawful transfer. This case has been argued very fully and instructively, many authorities have been cited, and some dicta quoted, which seem to imply a contrary opinion by some judges; but I am constrained to believe that the right will be done and no injustice accrue by giving to all the creditors existing at the time of the transfer the proceeds recovered in the suits which they, and they alone, could prosecute.

The exception to the report of the special master is sustained, and the trustee will be ordered to distribute the fund among the creditors who were such on the 22d day of August, 1901.

FRANK WATERHOUSE & CO., Inc., et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1908.)

No. 1,460.

1. ALIENS—DEPORTATION—REFUSAL OF MASTER OF IMPORTING VESSEL—STATUTES.

Where an alien deserted from the vessel on which he was brought to the United States, but there was no evidence that he was either insane, epileptic, a pauper, or a person likely to become a public charge when the vessel arrived in port, or at any other time when he was on board, nor until a month later, when he was arrested, and when he first gave evidence of insanity, the master was not chargeable with bringing an alien not entitled to land into the United States, under Exclusion Act March 3, 1903, c. 1012, § 2, 32 Stat. p. 1214, excluding idiots, insane persons, epileptics, paupers, and persons likely to become a public charge.

2. SAME—DESERTION—EFFECT.

Where an alien lawfully came into the country as a member of the crew of a foreign vessel, his subsequent desertion of the vessel did not make his arrival unlawful, unless such desertion was permitted or in some way aided or connived at by an officer or agent of the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, § 114.]

3. SAME—ESCAPE FROM VESSEL.

Where there was no evidence that any one connected with a vessel from which an alien escaped into the United States permitted or in any way connived at the alien's desertion, neither the master nor the agents of the vessel were guilty of an offense under Exclusion Act March 3, 1903, c. 1012, § 18, 32 Stat. p. 1217, requiring the owners, officers, and agents of vessels bringing any alien to the United States to adopt precautions to prevent their landing at any other time or place than those designated

by the immigration officers, and declaring that any such owner, agent, or person in charge of the vessel, permitting any alien to land contrary to such regulations, shall be guilty of a misdemeanor.

4. SAME—DEPORTATION—FINALTY OF DECISION.
The direction of the Secretary of Commerce and Labor that an alien should be deported on defendant's vessel, by which he was brought to the United States, was not conclusive on the officers and agents of the vessel, neither of whom had been a party to the proceedings before the Secretary.

5. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DEPORTATION OF ALIEN—RIGHT TO HEARING.
Where an alien had deserted from the crew of a vessel from which he was brought into the United States, and had been at large in the country for a month before he developed insanity, when he was arrested and ordered deported by the Secretary of Commerce and Labor, the Secretary's decision was not conclusive on the alien; the Secretary, as an executive officer, being without power within the year limited by statute to order the deportation of an alien without giving him an opportunity to be heard on the questions involving his right to remain in the United States.

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

Action on the part of the United States to recover penalties for refusal to return an alien to the country from which he came, under Act March 3, 1903, c. 1012, § 19, 32 Stat. p. 1218. The British ship Olivebank arrived at Port Townsend, in the state of Washington, on the 28th day of October, 1906. Among the crew on board this vessel was a boy named William Schmitz, who had shipped on board the vessel at Hamburg, Germany. The voyage of the vessel, as shown by the shipping articles, was from Hamburg, Germany, to Tacoma, on Puget Sound, and thence to any port or ports, and to terminate in the United Kingdom or the continent of Europe within the limits of 75 degrees north and 65 degrees south latitude, the maximum time of the voyage to be three years. The boy, Schmitz, signed as a member of the crew for the voyage, and was designated on the articles as a deck boy. The vessel having arrived at Port Townsend, the crew was inspected by Dr. Lyle, Acting Assistant Surgeon of the Marine Hospital Service. Schmitz was a member of the crew at that time, and the surgeon found him apparently sound mentally and physically. The vessel proceeded to Seattle, and on the night of October 30th Schmitz deserted. This fact was reported by the master to the British consul at Seattle. On November 30th Schmitz was arrested at Aberdeen, in the state of Washington, and taken to Port Townsend. Dr. Lyle again saw him on December 4th and found him in a nervous and excited condition. The doctor saw Schmitz again on December 7th. In the afternoon of that day Schmitz was very much excited, and in the evening he had an acute attack of mania. On December 9th Schmitz was removed to Seattle on account of his insane condition. Thereafter he was removed to the insane asylum at Stellacoom. The immigrant inspector at Seattle, on a warrant issued by the Secretary of Commerce and Labor, notified the officers of the Olivebank and Frank Waterhouse & Co., the agent of the vessel at Seattle, to return Schmitz to the country from which he came. This they refused to do.

A complaint was thereupon filed in the United States District Court at Seattle by the United States Attorney, charging, in substance, that Frank Waterhouse & Co. and John Doe (the master) did, on the 18th day of December, 1906, knowingly, unlawfully, and willfully bring into the United States at the port of Port Townsend, by water, upon the vessel Olivebank, from a foreign port and place, to wit, from the port of Hamburg, Germany, an alien by the name of William Schmitz, he, the said William Schmitz, being an insane person and epileptic, and being then and there a pauper and liable to become a public charge, which facts were then and there, during all the times mentioned in the information, well known to said Frank Waterhouse & Co. and said John Doe, the master of said vessel; that the Secretary of Commerce and Labor had ordered, directed, and decided that the said William Schmitz should return to the country from whence he came, and that he was not en-

titled to land or remain in the United States; that the said William Schmitz should be deported by the vessel, and by the owners, agents, and master thereof, upon which the said William Schmitz arrived in the United States; that the said Frank Waterhouse & Co. and the said John Doe, master of said vessel, had refused to deport the said William Schmitz, and refused to take him upon board of said vessel for any purpose whatsoever, and had refused and declined to take, receive, or deport the said William Schmitz from the United States to the port of Hamburg, Germany, and had refused to take the said William Schmitz from the United States to any foreign port or place. James Carse appeared as the master of the vessel, and his name became substituted for that of John Doe as representing the vessel, together with Frank Waterhouse, representing Frank Waterhouse & Co., the agent of the vessel. By stipulation of counsel on both sides the case was tried by the court without a jury. The court found the defendants guilty, as charged in the information, for violation of section 19 of the Act of March 3, 1903 (32 Stat. p. 1218, c. 1012), and defendants were then fined in the sum of $300 and costs. The case has been brought here upon writ of error.

W. H. Bogle, Thomas B. Harden and Charles P. Spooner, for plaintiff in error.

Potter Charles Sullivan, U. S. Atty., and Henry M. Hoyt and Charles T. Hutson, Asst. U. S. Attys.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The statute relating to the immigration of aliens in force when the proceedings were had in this case was the act of March 3, 1903 (32 Stat. pp. 1213, 1214, c. 1012). Section 2 of that act provided that:

"The following classes of aliens shall be excluded from admission into the United States: All idiots, insane persons, epileptics, * * * paupers; persons likely to become a public charge."

Section 19 provided:

"That all aliens brought into this country in violation of law shall, if practicable, be immediately sent back to the countries whence they respectively came on the vessels bringing them. * * * And if any master, person in charge, agent, owner, or consignee of any such vessels, shall refuse to receive back on board thereof, or of any other vessel owned by the same interest, such alien * * * or shall refuse or neglect to return them to the foreign port from which they came, * * * such master, person in charge, agent, owner, or consignee, shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine not less than three hundred dollars for each and every such offense."

The complaint filed by the United States attorney against the defendants in this case was based upon these two sections of the statute; but there was no testimony tending to show that the boy, Schmitz, was either insane, an epileptic, or a pauper, or a person likely to become a public charge, when the vessel arrived at Port Townsend, or at any other time while he was on board the vessel. It was not until a month later, when he was arrested at Aberdeen, that he gave evidence of being insane. It cannot, therefore, be said that Schmitz was brought into this country in violation of section 2 of the act. He had a right to come as a member of the crew of the vessel on which he had shipped, and, having passed the quarantine inspection, he was entitled to proceed with the vessel to Seattle. Up to the time of his desertion from the vessel at Seattle on October 30th his presence in the United States

was, therefore, lawful. His desertion from the vessel did not make his arriving here unlawful, unless such desertion was permitted, or in some way aided or connived at, by an officer or agent of the vessel.

Section 18 of the act provided:

"That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers; and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officer, shall be deemed guilty of a misdemeanor, and shall on conviction be punished," etc. "* * * And every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported as provided by law."

The defendants were not charged in the complaint with any violation of this section, nor did the evidence tend in any degree to show that the master or any officer of the vessel, or the agent or any one connected with the vessel, permitted or in any way connived at Schmitz's desertion. It cannot, therefore, be charged that he was in the United States in violation of section 18 of the act. Taylor v. U. S., 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. ——.

Section 20 of the act provided:

"That any alien who shall come into the United States in violation of law or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came at any time within two years after arrival at the expense, including one-half the cost of the inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section 1 of this act."

Defendants were not charged in the complaint with any violation of this section. There was, however, an effort made to prove that Schmitz's insanity arose from causes existing prior to the landing; but the effort failed, and there is no evidence in the record tending to prove a liability under this section of the act.

There is a suggestion in the argument of counsel that the decision of the Secretary of Commerce and Labor deporting Schmitz on the vessel which brought him into the United States was final. It is alleged in the complaint that the Secretary of Commerce and Labor had ordered, directed, and decided that Schmitz should be returned to the country from whence he came, that he was not entitled to land or remain in the United States, and that he should be deported by the vessel upon which he arrived in the United States. The only evidence in support of this allegation was a statement in the testimony of C. A. Turner, the immigrant inspector at Seattle to the effect that:

"After the arrest of this alien on the warrant of the Secretary of Commerce and Labor, * * * a written notice was served upon the ship's officers, and a written notice served upon Frank Waterhouse & Co."

This notice appears to have been a demand served upon the officers and agents of the vessel to take Schmitz back to the country from whence he came. We cannot, upon this evidence, determine what action the Secretary of Commerce and Labor took in this case; but, as-

suming that there was a decision by that officer that Schmitz should be so deported, the case is not one where such a decision would be final as against the defendants. Neither the officers nor the agents of the vessel appear to have been a party to the proceedings before the Secretary of Commerce and Labor. They were certainly entitled to a hearing before they could be adjudged guilty of violating the laws of the United States, and no action or decision of the Secretary of Commerce and Labor could finally determine the guilt or innocence of persons in a criminal proceeding wholly outside of his jurisdiction. But even with respect to Schmitz such decision would not be final. He had entered the country, and for a month was a part of its population and subject to its jurisdiction. In the Japanese Immigrant Case, 189 U. S. 86, 100, 23 Sup. Ct. 611, 614, 47 L. Ed. 721, the Supreme Court of the United States said:

"But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time he appropriated to the nature of the case upon which such officers are required to act. Therefore it is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported, without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

See, also, Hopkins v. Fachant (in this court) 130 Fed. 839, 65 C. C. A. 1.

The judgment of the District Court is reversed.

CURTISS v. KINGMAN et al.

(Circuit Court of Appeals, First Circuit. January 30, 1908.)

No. 748.

BANKRUPTCY—PREFERENCES—EVIDENCE.

On the state of facts shown by this record relating to an alleged preference in bankruptcy, Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562, followed.

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

William B. French and Elmer L. Curtiss, for appellant.

John M. Kendricken (William A. Quigley, on the brief), for appellee Gardner J. Kingman.

Edward N. Goding, Hugh W. Ogden, and Whipple, Sears & Ogden, for appellees Harold Dwight Corey, Parker L. Milliken, and William K. Corey.

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

PUTNAM, Circuit Judge. The real parties in this case are Curtiss, trustee in bankruptcy, and Kingman. The other parties respondent have no interest. The proceeding was a bill in equity brought in the District Court to recover a sum of money alleged to have been received by Kingman from the bankrupt by transfer of credits from the bankrupt to the other respondents, which transfer it is alleged operated as a preference to Kingman under the statutes in bankruptcy. The only question below was whether a preference was intended by the bankrupt and knowingly received by Kingman. The District Court found for Kingman in an opinion which carefully and clearly sets forth the facts. We adopt the opinion as containing a correct rehearsal of the circumstances; and, so far as it represents the standpoint of Kingman, we also adopt its conclusions, as the same is in line with our reasoning in Hardy v. Gray, 144 Fed. 922–928, 75 C. C. A. 562. Our views therein have been concurred in by the Circuit Court of Appeals for the Sixth Circuit in First Nat. Bank of Louisville, Ky., v. Holt (C. C. A.) 155 Fed. 100, 103.

Under the circumstances, we are not required to express our views as to the position of the District Court from the standpoint of the bankrupt; and, consequently, we refrain from doing so because we would hesitate to unnecessarily embarrass any application which the bankrupt has made for his discharge, or may make. All we need say in regard thereto is that Hardy v. Gray shows that we are not inclined to give the statutes in reference to preferences any artificial interpretation or application.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

NOTE.—The following is the opinion of Dodge, District Judge, in the court below:

DODGE, District Judge. The complainant in this bill is the trustee in bankruptcy of Hunt & Vickers, stockbrokers, whose place of business was in Brockton, Mass. He seeks to recover back, for the benefit of the estate, property transferred by the bankrupt within four months before the bankruptcy. The transfer is alleged to have been with intent to hinder, delay, and defraud creditors, and is also alleged to have been with intent to prefer the defendant Kingman. The case has been heard by the referee in bankruptcy, under a rule referring it to him as master. His report, and also the evidence taken before him, are now before the court on exceptions filed by the complainant. No exceptions have been filed by the defendants.

Before the master, the complainant appears to have based his alleged right to recover on the ground of preference only. The report makes no reference to the allegations of an intent to hinder, delay, and defraud.

The master has found that the defendant Kingman did not have reasonable cause to believe the bankrupts insolvent when the transfer was made, and did not have reasonable cause to believe that they intended to give him a preference. Were these conclusions wrong in view either of the facts found and reported by the master or in view of all the evidence before him? These are the questions raised by the exceptions, and, with the exception of questions as to the admissibility of evidence, the only questions now open.

The transfer complained of was made April 11, 1904. The master has found and reported that the defendant Kingman was on that day a creditor of the bankrupts, and that they were on that day insolvent within the meaning of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). He has further found and reported that, by the transfer, Kingman was given considerable advantage over the other creditors, and that this constituted a preference within the meaning of the act. He has further found and reported that the bankrupts intended this to be the case. No objections were made, and no exceptions are taken to any of the above findings, and they stand unquestioned for the purposes of this hearing. The proceedings in bankruptcy began on August 1, 1904, within four months after the transfer in question; so that it is voidable, and the trustee entitled to the relief sought by his bill, if the master ought also to have found that Kingman had "reasonable cause to believe that it was intended thereby to give a preference" within the meaning of section 60b, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445].

The master's report contains no express and distinct finding that the bankrupts knew themselves to be insolvent on April 11, 1904. It may well be, however, that the existence of such knowledge was regarded as implied in the finding that they intended a preference. That they had such knowledge or are chargeable with it is clear on the evidence. They kept books, the property belonging to them was of such a nature as to leave little room for uncertainty regarding its fair valuation at any given time, they could very readily tell with substantial accuracy just how they stood, and on the day in question, after consultation in regard to the matter, they had recognized the fact that their contract liabilities were very heavily in excess of their property, and that $5,000 more must be borrowed in order to enable them to go on. The evidence of intent to prefer, therefore, which the master has found to have existed on the part of the bankrupts, consisted, in part at least, in knowledge possessed by the bankrupts that they were heavily insolvent at the time they engaged in the transaction found to have given the defendant Kingman an advantage.

The master has found that Kingman had been dealing with the bankrupts since February 10, 1903, or for more than a year before the transfer; that his dealings with them had consisted in purchases of various stocks on margin; that his contracts with them of this kind during the period referred to were frequent; that he spent three or four hours each day in their place of business, saw the business carried on by them, knew that they kept liquor in their office, and knew that they "drank during business hours"; that he knew they had made many such contracts with other brokers on their own account; that he knew also that they had contracts with other customers binding them to deliver stocks; that he had frequently seen these customers and personally knew some of them; that he knew of no property owned by the bankrupts except their interest in their contracts with other brokers; and that his object in bringing about the transaction which involved the transfer complained of was that his account might be safe, because he expected to carry the stocks which it covered for a long time, until he could get what he wanted for them, and desired to have them in a condition so that he could sell out and get his money whenever he wanted it.

The master has further found that Kingman stated to one Howard and also to one Brown that he "got out from the bankrupts because he did not like the look of things." The evidence regarding the statement to Brown was admitted against the defendant's objection. The defendant has not excepted to the report upon this or any ground, and the evidence thus admitted might be disregarded without affecting any material finding or conclusion in the report.

Against the complainant's objection that it was too remote, the master admitted evidence that before beginning his dealings with them in February, 1903, Kingman inquired about the bankrupts' financial responsibility of a reputable firm of brokers in Boston, and received the assurance of that firm that they "were all right." The complainant has duly excepted. My ruling is that the evidence was properly admitted, its weight being for the master

to determine. But, without this evidence, the utmost effect of the evidence remaining is to show that Kingman "doubted the bankrupts' financial responsibility in a general way," and this the master has found. There can be no question that, whether he received the information testified to or not, he knew enough at the time of the transfer to raise such a doubt in the mind of a reasonably prudent person occupying his relation to the bankrupts. It does not follow, however, that he suspected or had reason to suspect them to be insolvent at the time of the transfer. He might well have doubted whether they were financially strong enough to be secure against all such emergencies in the stock market as might occur during a period such as the operations he had undertaken might require, without having sufficient reason to suspect that on April 11, 1904, their property was of a value less than the amount of their liabilities.

As to the amount of the bankrupts' assets, or their liabilities on the day mentioned, it does not appear that he had any actual knowledge at all. The master has found that he made no inquiry of them as to their liabilities or assets. The only way in which he can be charged with knowledge of their insolvency is by holding that he was put on inquiry, and must therefore be regarded as having known all that inquiry of the bankrupts would have revealed, supposing them to have disclosed to him the whole truth about their situation. The complainant argues that such knowledge must be imputed to him, and that by reason of it he must be held to have had reasonable cause to believe that the bankrupts intended to prefer him by the transaction in question.

I agree with the master that neither the facts found nor the evidence before him warrant the finding that Kingman had or is chargeable with knowledge of the bankrupts' insolvent condition. He is not shown to have known of any instance of failure on their part to meet an obligation when due, either to him or to any one else, or to have known of any instance in which they had to borrow in order to meet their obligations. There was nothing more to put him on inquiry than the facts that they were engaged in a business of speculative character, and that their method of conducting it afforded indications of reckless management on their part. That he knew of no other property owned by them, except their interest in contracts similar to his own, cannot be regarded as indicating to him that they had no other property. He is not shown to have been in such relations with them as would call on him to draw from his ignorance of the existence of other property the conclusion that there was none.

As to their other contracts, he had no knowledge, so far as appears, whether they were profitable or the reverse. If his own contract showed a loss, it did not follow that the same was true of the others.

The immediate facts and circumstances of the transaction claimed to have effected the preference are thus found by the master:

"On the 11th day of April, 1904, Kingman had marginal contracts with the bankrupts to deliver stocks valued at $42,550 upon the payment of $34,525.85.

"At that time Kingman demanded that his marginal contracts with the bankrupts should be transferred to Corey, Milliken & Company, and in compliance with this demand the bankrupts paid Corey, Milliken & Company $4,917.36 in money, and Corey, Milliken & Company charged the bankrupts on their open account $3,024.15, and in consideration thereof assumed the Kingman account with the bankrupts. Corey, Milliken & Company within a year subsequently carried out their marginal contracts with the said Kingman and they were closed out at a profit."

Kingman's request that his account be transferred as above was complied with by the bankrupts without delay and without any serious protest or objection on their part, so far as appears. It may be assumed that he understood that the margin in their hands would be in some form transferred with the account, but there is nothing to show that he knew anything about the actual manner in which this was accomplished, whether by payment or by charges in account, or that he knew anything as to the proportion which the property transferred bore to their total property at the time. There was no payment whatever to him, he had not at the time taken such action as

would make any payment due. In parting with the property involved in his account, the bankrupts were, of course, relieved of all their obligations in connection with it.

I do not think it can properly be said that facts and circumstances with respect to the bankrupts' financial condition have been brought home to the defendant Kingman such as would put an ordinarily prudent business man upon inquiry as to their assets and liabilities before allowing the transfer of the account. If not, since he had no actual knowledge of their insolvent condition, he had not reasonable cause to believe that they intended to prefer him by the transfer.

The exceptions to the report must therefore be overruled, the report confirmed, and the bill dismissed.

SONNENBERG v. SOUTHERN PAC. CO.*

(Circuit Court of Appeals, Ninth Circuit. February 10, 1908.)

No. 1,479.

1. WRIT OF ERROR—REVIEW—DIRECTED VERDICT.

In determining whether it was proper to direct a verdict for defendant, plaintiff is entitled to the benefit of all the inferences in his favor which the jury could have been justified in drawing from the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3748.]

2. MASTER AND SERVANT—RAILROADS—INJURY TO LABORER BY CAVING BANK—SAFETY OF PLACE—QUESTION FOR JURY.

In an action against a railway company for injury to a laborer caused by the caving of a bank of an excavation, *held*, under the evidence, a question for the jury whether the company provided a reasonably safe place in which he was required to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1031.]

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

This is an action by the plaintiff in error to recover damages for personal injuries occasioned by the alleged negligence of the defendant in error. The court directed the jury to find a verdict for the defendant, and plaintiff assigns this direction as error.

The evidence material to be considered upon this question is substantially as follows: In the fall of 1904 a wooden culvert passing through the embankment of defendant's railroad near a point designated as the "Nacimiento Switch" in San Luis Obispo county, Cal., was burned out. In the early part of December the company determined to replace the burned out wooden culvert with a concrete arch, and R. M. Drake, assistant resident engineer, was detailed to take charge of the work. The necessary material was sent to the switch for use at the culvert. The work was commenced about the 10th or 12th of December, under charge of R. P. Edgecombe, the gang foreman in the bridge and building department. The work had been in progress 10 or 12 days when plaintiff, who was residing at San Miguel, and another laborer by the name of Braffat, residing at the same place, were informed that they could get work at the culvert. San Miguel is about six miles from the switch. The plaintiff and Braffat were taken to the culvert by a work train on December 22d, and after their arrival they were set to work by the foreman. At that time there was a cut in the embankment under the rails from 18 to 20 feet wide, and from 12 to 15 feet deep. Piles had been driven on each side of the cut to support the rails above. The plaintiff and Braffat were sent to the bottom of the culvert to shovel dirt. There is some conflict in the evidence as to the work that had been done up to this time to secure the banks of the cut, but it is not very material. There is no conflict in the evidence as to the caving of the bank which resulted in the injury to plaintiff.

*Rehearing denied June 10, 1908.

When the plaintiff gave his testimony in court in February, 1907, he was 23 years of age. He testified that he had never before worked in cuts or excavations or in making ditches. He was not told of any danger to be apprehended when he went to work, and he apprehended no danger. He knew nothing about that kind of work. In his testimony he refers to the piles, but he says when he entered the excavation or cut there were no timbers or supports alongside either of the embankments. There was nothing in the cut or excavation other than the piles—nothing against the side of either bank. The plaintiff afterward qualified his testimony on cross-examination by saying substantially that there were no timbers in the wall to his back.

Braffat in his testimony on behalf of the plaintiff, mentions the piles, but says there was nothing to hold up the banks.

Brunskill, another witness on behalf of the plaintiff, who was employed in the cut on December 23d, 24th, and 26th, says that on those days there were no timbers upon either side against the embankments.

The foreman, Edgecombe, testified that it was necessary to drive piling and build a temporary trestle in order to carry the trains over; that the trains were in motion going over the work; that they dug an open trench down from the rails about 15 feet wide. At the time of the accident they were down approximately 12 feet below the base of the rails. Before they got down there they had shored everything—had shored the trestle down at a point four feet below the stringers; shored the banks outside of the line of piles. He testified further that the cave-in occurred from underneath the bottom end of the planking; it occurred at a point about five or six feet above the bottom of the excavation. When the accident occurred he investigated to see how much dirt had come down from the bank, and found that approximately a lump perhaps two feet in length had come down. It fell out from up inside under the end of the planking. He determined the amount of the earth that was underneath the planking. He had to look up underneath the planking to see the hole. The material and the bulkheading were still there; they did not fall. The foreman also testified that Paegles, Stukie, and a helper by the name of Guiles did the shoring.

Paegles testified that he put the shoring in and secured the banks. He did it with the assistance of Stukie. He says the shoring extended down to five feet from the bottom of the excavation where the accident happened. The sheathing or planking consisted of boards 2 inches thick by 12 inches wide and 5 feet long. There were five on the side where the man was hurt, five straight up and down, and two across, and a telegraph pole from that bank to the other one. The telegraph pole was the shore, and the planks that were put up against the sides of the bank itself were called "lagging." He says this was done five days before the happening of the accident to the plaintiff; that the earth that struck the plaintiff fell from a point between five and six feet above the bottom of the cut. It came from the end of the shoring, and about five or six feet from where plaintiff was standing. The earth fell from right underneath the planks. It fell right out of the bottom. It came from underneath the edges right close to the last plank. This witness testified that he and another man put in this lagging; that they were the men under the foreman whose business it was to put in the lagging when necessary. They put in all the lagging that they were directed by the foreman to put in.

Stukie testified that planking had been put up three days before the accident by himself, Peagles, and some helpers. He says he told Edgecombe he thought it needed it, and Edgecombe said: "Yes, put it up." At the time of the accident this piling or lagging came between five and six feet from the bottom of the excavation. The lagging was kept in place against the planking by two high planks crosswise of the perpendicular planking and a shore across to the opposite bank. He commenced timbering when they started to excavate, and they timbered as they went down.

W. A. Frye testified, on behalf of the defendant, that he was a laborer employed by the defendant company, worked under Edgecombe, had been working as a member of that gang for a little over a year; that whenever they would finish the upper portion of a cut they would put lagging on it, and they kept lagging the finished portions of it until they got down to a point within about five feet of the bottom. It was not finished, but was lagged

within five or six feet of the bottom. It was finished so far as their work was concerned.

The testimony of Edgecombe as to whether the timbering had been finished down to the point between five and six feet from the bottom of the cut was as follows: "Mr. Schlesinger: Q. I understand, Mr. Edgecombe, that this place was shored, according to your testimony, from the point marked 'rails' to a point within five feet of the bottom of the excavation? A. Between 5 and 6 feet; yes, sir. Q. That is, whenever you finished a portion of it, that portion which was finished, you shored up; is that right? A. You are talking now about the trestlework? Q. I am talking now about the embankment; did you shore it up as you finished it? A. The embankment was shored up; yes, sir. Q. As you finished it? A. Yes, sir. Q. You did not shore below the six-foot point, or the five-foot point, because it was not finished? A. Not at the time of the accident. Q. But up to the time of the accident it was finished up to within a point of 5 or 6 feet? A. The shoring was complete within a point of 5 or 6 feet at the bottom of the excavation. Q. That is, that part was finished? A. That was all excavated and dug out; yes, sir. Q. That is, that part was finished and shored up, was it? A. Shored up; yes sir. Q. And finished. That is all."

The plaintiff had been at work in the bottom of this cut shoveling dirt about 10 or 15 minutes when the south bank of the cut underneath the bottom end of the planking caved in, and a quantity of earth fell on him throwing him to the ground. A second caving of the earth from the same place immediately followed, which fell upon plaintiff's right leg and broke it, producing a compound comminuted fracture. On the day following the injury plaintiff was removed to the railroad hospital in San Francisco, and remained there for nearly seven months. The next day after arriving at the hospital he was operated on for the purpose of removing the broken pieces of bone. He underwent three operations in all while in the hospital. After recovering sufficiently to use the injured leg, it was found to be about half an inch shorter than the other.

This injury to the plaintiff is the cause of action against the defendant. The testimony, as has been stated, is to the effect that the earth which fell upon the plaintiff and injured him came from underneath the bottom end of the planking at a point about five or six feet above the bottom of the excavation. Upon this testimony the court instructed the jury to find for the defendant, upon the claim made by the defendant that the evidence showed that sufficient and adequate material was furnished the employés; that the material was to be adjusted and put in place by the employés as the work progressed, and as it should be deemed necessary for their own safety to do so; that the place where this work was being carried on and in which the plaintiff was being employed was not such a one as is contemplated by the law requiring that the master shall furnish a safe place for the servant to work in.

Bert Schlesinger, for appellant.

A. A. Moore and Stanley Moore, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The controversy in this case turns upon the question whether the rule requiring the master to furnish the servant a reasonably safe place in which to work is applicable to the facts of this case. In determining the question upon the instructions of the court, the plaintiff is entitled to the benefit of all the inferences in his favor which the jury could have been justified in drawing from the testimony. Pleasants v. Fant, 22 Wall. 116, 122, 22 L. Ed. 780.

The plaintiff, at the time of the accident, was 20 years of age. He

had never before worked in cuts or excavations. He knew nothing about that kind of work. He was not warned that there was any danger in the place where he was set to work, and he apprehended none. So far as he made a place for himself in shoveling the dirt from the bottom of the cut there was no danger, and he was not injured by reason of any weakness of the bank produced by his work. He was injured by the falling of the earth from behind the timbers, and not from the untimbered bank. To see the place from which the earth fell it was necessary to look up and underneath the planks. The plaintiff had nothing to do with the work of timbering this embankment. That was in charge of other workmen assigned particularly to that work, and it had been completed some days, down to the point where it stood on the day of the accident. The foreman evidently knew that as the work of shoveling out the cut proceeded the embankment would become dangerous to the laborers in the cut, and he undertook to make the place safe for them by setting men to work timbering the embankment. The fair inference is that the timbering was either not carried low enough or failed to make the bank secure as far as it did go, for the bank caved and the plaintiff was injured. The plaintiff did not know of the danger arising from the fact that the earth might fall from behind the timbers, and the danger was not so obvious that he could be presumed to have known of it.

In the case of Union Pacific Ry. Co. v. Jarvi, in the Circuit Court of Appeals for the Eighth Circuit, 53 Fed. 66, 3 C. C. A. 433, the plaintiff was at work in a coal mine digging coal, which was removed by cars furnished him on each day. On the day of the injury to plaintiff, which was the subject of the action, there were no cars at the place where he was working. He accordingly walked along a passageway in the mine to get a car, and was struck by a stone that fell from the roof of the passageway, which injured him. At the conclusion of the testimony defendant requested the court to instruct the jury to return a verdict in its favor. The request was denied, and this action of the court was assigned as error in the Circuit Court of Appeals. Judge Sanborn, in discussing the duty of the employer in that case, said:

"It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employé may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than of him who places his employé on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and, throughout all the varied occupations of mankind, the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence

the law requires of the master in the protection of the servant. For a failure to exercise this care, resulting in the injury of the employé, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended. * * * While the master is not a guarantor or insurer of the safety of the place in which he puts his servant, or of the safety of the tools or machinery he furnishes, he is in every case bound to exercise that care and diligence proportionate to the occupation and the occasion which a reasonably intelligent and prudent man would use under like circumstances both to provide and keep in reasonably safe condition the place of work and the machinery and appliances requisite to its performance. This duty is personal to the master, and cannot be so delegated as to relieve him of liability. * * * Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the slopes through which and in which the servants work as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself."

The testimony was conflicting as to the place and cause of the injury. The court, after referring to some of the features of the testimony, said:

"In view of this testimony it certainly was a fair question for the jury whether or not the defendant's failure to protect this particular portion of the roof by timbers or to remove it by blasting was not a lack of ordinary care."

In the case of Kelley v. Fourth of July M. Co., 16 Mont. 484, 496, 41 Pac. 273, 275, the court states the case and the law applicable thereto as follows:

"The evidence in this case is that the plaintiff was employed, at the time of the accident, in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with the plaintiff. The plaintiff was not engaged in creating a place, on his own judgment, and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of the defendant to keep that part of the tunnel or place already created safe, by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim on the defendant for damages; for these were risks he assumed as a miner. But he did not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure. For instance, if a stone or material blasted or dug from the tunnel by plaintiff should have been blown against, or should have fallen upon, him, he would have had no remedy against defendant for any injury sustained thereby. This is a risk belonging to his employment, and which he assumed. But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of the defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created upon him, while engaged in his work. Nor did he assume the risk of the failure of the defendant to keep the floor of the tunnel so free from rock and débris as not to materially hinder or obstruct his escape from his place of work, in case of accident, such as occurred in this case, or might occur by premature or unexpected explo-

sions of the dangerous materials he was using in his work. He assumed the risks incident to the work in front of him, and not the risks of defendant's failure to properly care for that part of the tunnel or place behind him which he had completed and turned over to the care and control of the defendant."

The court then refers to Union Pacific Ry. Co. v. Jarvi, supra, as collating a large number of authorities and containing an able and exhaustive discussion of the law governing that class of cases, and concludes with the opinion that the defendant in the case was guilty of negligence in not sufficiently timbering the tunnel where plaintiff was at work and received his injuries, and in not procuring competent timbermen to do the work. It is not necessary to go that far in the present case. We are here simply called upon to determine whether the reasonable sufficiency of the timbering of the embankment for the safety of the workmen employed in the cut below was a question for the jury.

In Mather v. Rillston, 156 U. S. 391, 399, 15 Sup. Ct. 464, 467, 39 L. Ed. 464, the Supreme Court of the United States had occasion to state the general principle applicable to cases of this character. The court said:

"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."

The authorities upon this question are numerous, presenting it in the various phases of employment; but we think the cases cited sufficient to show that upon the facts in the present case the court should have submitted to the jury, under proper instruction, the question whether the defendant had provided a reasonably safe place in which the plaintiff was required to work.

The judgment of the Circuit Court is therefore reversed, with instructions to grant a new trial.

UNITED SHEET & TIN PLATE CO. v. HESS et al.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1908.)

No. 1,744.

BANKRUPTCY—MORTGAGES—RESTORATION—PARTIES.

Complainants were mortgage creditors and stockholders in the T. Co., which was thereafter merged in the bankrupt. Shortly after the merger the bankrupt executed a trust mortgage to secure a bond issue, in which there was a provision for the satisfaction of complainants' debt from the

proceeds of the bonds; but complainants claimed that after they had agreed to such mortgage a surreptitious addendum was inserted, authorizing the bankrupt to employ the bonds as collateral security without reference to complainants' lien. Complainants also asserted that they were induced by fraudulent representations to surrender their security on the assets of the T. Co., and accept the bankrupt's bonds in lieu thereof, and prayed that the transfer of the T. Co.'s property to the bankrupt be set aside and complainants relegated to their original positions as creditors and shareholders of that company, and if that could not be done that their claims be declared and enforced as a first lien on that part of the T. Co.'s property that had been acquired by the bankrupt. *Held*, that a decree granting either relief would not be binding on the mortgagees under the trust mortgage, who were not parties, and that the trustee under such mortgage was an indispensable party to the suit.

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

I. H. Taylor, for appellant.

J. F. Foster, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree arising upon a controversy over a lien claimed against the property of the bankrupt by an intervening creditor. The bankrupt is the United Sheet & Tin Plate Company. The intervening creditors are the appellees, Henry Hess, Rankin L. Shoemaker, and the executors of Thomas Hackett. These creditors by petition asserted a mortgage lien upon certain property of the bankrupt corporation arising under a mortgage made to secure them by the Tuscora Steel Company, the then owners of the property upon which the lien is now asserted. This property of the Tuscora Steel Company was subsequently conveyed to the bankrupt. The contract of sale, it is claimed, recognized the lien of the debt due to the petitioners, and, among other things, provided that the United Sheet & Tin Plate Company, the bankrupt, should issue bonds secured—

"by a first mortgage on all the properties of the two plants [the Union Sheet & Tin Plate Company, acquired not only the plant of the Tuscora Company, but also the plant of another company known as the Marietta Sheet & Tin Plate Company] taken in by the said company under this agreement and such other properties as it may take in prior to the execution of the said mortgage, the total amount of the said issue to be $250,000. Said mortgage shall be executed to a trust company, as trustee, and it shall be incorporated in the terms of the said mortgage that the said trust company shall receive the proceeds of the said bond issue, and pay over to the said company the first proceeds arising from the sale of said bonds, up to the sum of $60,000, to be used as working capital for the plants taken in by the said company. The said trust company shall apply the proceeds of the sale of the remaining bonds, first and ratably to the payment of the preferred claims against the two companies, said preferred indebtedness of the Tuscora Steel Company, amounting to about $31,000, due R. L. Shoemaker, Thos. Hackett, Henry Hess, H. F. Strous, and Larkin C. Taylor, and secured by a mortgage of $38,000 to Thos. Hackett and others."

The mortgage provided for was drawn and submitted to the attorney for petitioners, and as so submitted was approved. As thus submitted and drawn, the petitioners state that it contained the provisions for their protection recited above. It is then averred that afterwards,

and without their knowledge or consent; there was added a clause in these words:

"But nothing in this article [referring to an article of the blanket mortgage providing for the satisfaction of the debt due the petitioners] shall prevent said company from using or employing said bonds or any of them as collateral security."

This mortgage, with this alleged surreptitious addendum, was recorded September 16, 1903. This alteration in the contract and mortgage, it is charged, was not known to the petitioners until they heard of the issuance of the bonds and the use of the bonds as collateral security as follows: To the American Sheet & Tin Plate Company, to the extent of $27,000; to the Guernsey National Bank, of Cambridge, Ohio, $14,000; to the Harbor Bank, of Canton, Ohio, $19,500. Upon learning the situation, petitioners say, they were about to file a petition to restrain the issuance of other bonds and to compel the return of the bonds so already issued. Negotiations were begun with the mortgagor company, which resulted in a certain showing being made to the petitioners in respect to the solvency of the mortgagor, whereby "they were induced to waive their objections to the violation of the original contract of consolidation by the fraudulent interpolation in said mortgage and the unauthorized issuance and disposition of bonds as aforesaid, and to take bonds of the Union Sheet & Tin Plate Company, secured by said mortgage," etc. The purpose of this agreement was, confessedly, to protect these appellees as preferred creditors, and that purpose was so declared. It was agreed between the bankrupt and the appellees, among other things, that appellees—

"hold notes of the Tuscora Steel Company, as follows: R. L. Shoemaker and Henry Hess, $2,500; Thomas Hackett, $5,000; M. F. Strauss and Larkin C. Taylor, $5,000. These parties agree to accept in payment for said notes and accrued interest bonds of said issue above mentioned at 85 per cent. and accrued interest, and the Columbus Savings & Trust Company, trustee, is hereby authorized and directed, upon receipt of said notes, canceled, to issue bonds for same as herein provided, and return said notes to the treasurer of the United Steel & Tin Plate Company, and fractional amounts necessary to adjust the account to be paid in cash out of the sales of the bonds as herein provided. The trustee is also authorized to issue bonds at 85 in payment of the account of the American Tin & Terne Plate Company amounting to $1,234.37; the amount necessary to balance the account to be adjusted in cash out of the proceeds of the bond."

In accordance with this arrangement the petitioners seem to have surrendered the notes of the Tuscora Steel Company and to have accepted from the trustee named in the clause of waiver above bonds of the bankrupt company as provided in that agreement. The petition attacks this latter agreement as induced by active fraud and as a part of a general scheme of fraud by which the said company had acquired the property of the Tuscora Company. They say that the representations made to induce them to accept the bonds of the bankrupt company so secured under said mortgage licensing an issue of $250,000 of bonds were false and fraudulent and made to cheat and defraud. They also aver that they were large shareholders in the Tuscora Steel Company, and had accepted stock for their interest therein in the bankrupt company, in reliance upon their agreement that the sale would be car-

ried out in good faith. The prayer is: (1) That the transfer of the property of the Tuscora Company be set aside and the deed canceled and the parties relegated to their original positions as creditors and shareholders in that company. (2) If this cannot be done, that their claims be declared and enforced as a first lien upon that part of the property of the Tuscora Company acquired by the bankrupt.

The court below upon the pleadings and the evidence decreed to the petitioners a lien and charge upon the property of the Tuscora Company and ordered the same to be sold for its satisfaction. It may be here added that, pending the bankrupt proceedings, a composition was agreed upon between the bankrupt corporation and its creditors, which was confirmed by the court, with a proviso that "the composition should not affect the secured creditors of said bankrupt, or any lien or other securities held by any creditor of said bankrupt," and that "all liens or claims alleged or claimed in any pleading now filed in this proceeding in bankruptcy * * * will be hereafter adjusted by this court." It was further ordered that the trustee should—

"turn over to said bankrupt all property in his hands as such trustee, but that such turning over shall in no wise affect any intervening petition or cross-petition filed herein, or any cause of action, right of action, or equity therein set up, or any lien therein claimed, or any other secured claim against said bankrupt, or lien or claimed lien on any of the property of said bankrupt, all of which, unless settled by agreement of the parties, shall be considered and heard and adjudicated herein, and enforced where adjudicated to exist, and all said intervening petitions and intervening cross-petitions shall be prosecuted to final adjudication herein unless sooner dismissed."

Under this reservation the claim of liens herein asserted was adjudicated with the result stated. From this decree the bankrupt only has appealed.

There is no better established principle than that all parties interested, whose rights will be directly affected by the decree, must be made parties to the suit. There are exceptions to this rule, growing out of the necessities of particular cases, which need not be here referred to. The relief which the petitioners sought was directly hostile to the mortgage of September 1, 1893. That mortgage included the property of the Tuscora Company and secures an issue of $250,000 in bonds issued by the mortgagor, the bankrupt appellant. In one aspect the petitioners sought to annul the agreement consolidating the Tuscora Company with the newly organized company, the mortgagor, and appellant, and to be relegated to their rights as stockholders in and mortgage creditors of the Tuscora Steel Company. Failing in this, they sought to enforce the lien of their mortgage, a lien antedating the conveyance to the bankrupt, as well as the mortgage made by it. A decree upon either aspect of the case would be fruitless, unless the mortgagees would be thereby concluded. That they would not be, not being parties, is too plain to be discussed. Louisville Trust Company v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Keokuk & Western Railroad Company v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450. That the decree adjudicating the appellees' lien will be fruitless, and the sale plainly subject to any rights which could not be affected by a decree against the mortgagor alone, is also obvious. It was error to proceed without the trustee under the mortgage of September 1, 1903.

Reverse, with direction to set aside the decree of reference, the decree confirming master's report, and final decree, with leave to amend by making the trustee of the mortgage of September, 1893, a party defendant, if appellees shall be so advised, or dismiss the petition for want of proper and necessary parties.

PENNSYLVANIA R. CO. v. FORSTALL.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 46.

1. WRIT OF ERROR—DIRECTION OF VERDICT—REVIEW.

On review of an order declining to direct a verdict for defendant, the Circuit Court of Appeals must examine the evidence from a viewpoint most favorable to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4024.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ASSUMED RISK—PROMISE TO REPAIR.

Plaintiff was employed as a brakeman in defendant's railroad yard, and required to assist in placing cars with a switch engine, to which a push pole was attached with a collar and chains, to prevent the pole from swinging too far to the side. The collar had been in a defective condition for some months prior to the accident, and plaintiff in various ways had attempted to prevent its slipping, without success, when he complained to defendant's agent, who promised that the collar should be fixed the next time the engine went to New Jersey. A few days after this promise was made plaintiff injured his hand, and was prevented from performing his regular duties, and had not worked again with such engine until just before the moment of the accident, when, as he was riding on the rear of the engine, "drilling" cars by means of the pole, it swung too far off the track, and struck a car on an adjoining track, and was forced back against plaintiff, causing his injuries. *Held*, that plaintiff was justified in remaining a reasonable time after the promised repairs, and in assuming that the repairs had been made in his absence, and that he therefore did not assume the risk, in the absence of proof that he knew that the promise to repair had not been fulfilled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638–640.

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

3. SAME—INSTRUCTIONS—REFUSAL.

Where there was evidence of a promise to repair a defective push pole attached to an engine, by which plaintiff was injured, and there was no evidence that plaintiff knew the repairs had not been made at the time of the accident, a request to charge that if plaintiff knew the pole was out of order, and if more than a reasonable time to repair it had elapsed after plaintiff had notified defendant of the defect before the accident, and no repairs were made, he assumed the risk therefrom by remaining in the service, was properly refused, as ignoring the distinction between knowledge that the pole was defective and knowledge of the danger to be apprehended from its use, and as failing to hypothesize that plaintiff knew the repairs had not been made.

4. SAME—PLEADING—PROMISE TO REPAIR.

Where a complaint charged that defendant failed in its duty as an employer and furnished unsafe appliances, and defendant, without pleading it, was permitted to offer evidence to show that plaintiff assumed the risk of

the dangerous appliance, plaintiff, without specific pleading, was properly permitted to show a promise to repair, which merely negatived the assumption of risk; plaintiff not being required to negative assumption of risk in his complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 868.]

5. SAME—NEGLIGENCE.

Where plaintiff, a railroad brakeman, was injured by a defective push pole, which defendant furnished and knew was unfit for use, defendant was negligent in failing to perform its duty to furnish safe appliances, notwithstanding an extra pole not shown to have been in good condition was in the yard; it being the duty of defendant, and not plaintiff, to install such extra pole on the engine.

6. SAME—CAUSE OF ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a brakeman, whether the accident was caused by the slipping of a collar attached to a push pole on the engine, or by the negligence of plaintiff and his fellow servants, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000–1009.]

7. SAME—INSPECTION—DUTY OF MASTER.

A switch engine was operated with a heavy push pole, secured to the engine by bolts and supports, as well as by chains attached to a collar thereon. The collar was defective, and required more than a mere ordinary adjustment, and plaintiff, a brakeman on the engine, prior to his injury by reason of the defect, tried without avail to repair it, whereupon defendant's agent promised to send it away for repairs. *Held*, that such appliance was not one requiring constant renewal and adjustment on account of daily wear and tear, and that it was the railroad company's duty to inspect the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 235.]

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

Writ of error to review a judgment entered upon the verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the opinion the parties are designated as in the court below.

Robinson, Biddle & Benedict (N. B. Beecher, of counsel), for plaintiff in error.

D. R. Almy, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was an action to recover damages for personal injuries received by the plaintiff, an employé of the defendant, through its alleged negligence. The plaintiff having recovered judgment in the court below, the defendant has brought this writ of error. We may conveniently consider the questions raised in the order of the points in the defendant's brief.

The defendant's first point is that a verdict in its favor should have been directed, because the plaintiff assumed the risk. The inquiry under this point necessarily involves an examination of the facts from a viewpoint most favorable to the plaintiff. We may therefore state the following as facts which the jury were warranted in finding from the evidence.

The plaintiff was employed by the defendant in its Brooklyn yard as a brakeman, but with certain additional duties with respect to the placing of cars. At the time of the accident he was riding on the rear end of a switch engine, which was "drilling" cars. The tracks in the yard had such sharp curves that it was impossible for cars to pass around them with ordinary couplings. To obviate this difficulty the rear end of this switch engine was fitted with a push pole eight feet in length, fastened so as to project horizontally, and prevented from swinging too far to each side by chains attached to an iron collar around the pole. This collar was worn, and before the accident had sometimes slipped upon the push pole. When it slipped, it permitted the pole to swing farther to each side than was intended. It slipped immediately before the accident, and this time the pole swung so far off the track—the engine going around a curve—as to come in contact with a car upon an adjoining track. The pole was thus forced back upon the plaintiff, squeezing his leg, and causing the injuries complained of. The collar upon the push pole had been in a defective condition for some months previous to the accident. The plaintiff had tried in various ways to prevent its slipping, but without effect. About a month before the accident he complained to the defendant's agent, his superior, about the trouble, and the agent promised that the collar would be fixed the next time the engine went to New Jersey. The engine was sent to New Jersey, but nothing was done to the collar. A few days after this promise was made the plaintiff injured his hand, which prevented him from performing his regular duties. He was about the yard, but did not work on this engine until just before the moment of the accident. It did not appear that the plaintiff, when he then went upon the engine, knew that the defendant's agent had failed to keep his promise to repair the collar.

These facts fall short of showing that the plaintiff was assuming the risk at the time of the accident. Even if his knowledge of the defect amounted to knowledge of the danger, so that he once had assumed the risk, his position was changed by the defendant's promise to repair. The jury were warranted in finding that after this promise was made the plaintiff continued in his employment relying upon it, and not taking upon himself the risk. This he had a right to do. He was justified in remaining a reasonable time for the promised repairs to be made. If he knew that they were not made within such time, he took his chances if he remained longer. But such knowledge is not shown. As we have seen, it does not appear that the plaintiff, when he returned to work upon the engine immediately before the accident, knew that the defendant had failed to keep its promise to repair. There can be no inference that the plaintiff did not rely upon the performance of the promise, and assumed the risk, unless he knew that the promise had not been fulfilled.

The defendant's second point is that the trial court erred in refusing to charge, as requested, that:

"If the plaintiff knew that the pole was out of order, and if more than a reasonable time to repair it had elapsed after he notified the defendant before the accident, and no repairs were made, he assumed the risk therefrom by remaining in the service."

The request as a whole did not correctly state the law. It ignored the distinction between knowledge that the pole was out of order and knowledge of the danger to be apprehended from its use. It also failed to state that the plaintiff knew the repairs had not been made. As we have just seen, it is not so much a question of remaining after promised repairs have not in fact been made as of remaining after knowledge that they had not been made.

In its third point the defendant claims that the trial court erred in permitting the plaintiff to prove that the defendant promised to repair, in the absence of any allegation to that effect in the pleadings. The complaint charges that the defendant failed in its duty as an employer and furnished unsafe appliances. The defendant, without pleading it, was permitted to offer evidence to show that the plaintiff assumed the risk of the dangerous appliance. Whether this practice was correct we need not now determine. But certainly the plaintiff then, without specific pleading, had the right to show that the defendant promised to repair. This was in no sense a promise which the plaintiff was seeking to enforce. It merely negatived the assumption of the risk. It showed that the plaintiff in continuing to work did not intentionally take upon himself the danger, but relied upon the defendant's promise to repair. The plaintiff in his complaint was not obliged to show that he did not assume the risk. A fortiori he was not bound to show why he did not assume the risk.

The defendant's fourth point is that a verdict should have been directed in its favor because it fulfilled its entire duty as master. The duty of the defendant was to use reasonable care to furnish the plaintiff safe appliances with which to work. The jury were warranted in finding from the evidence that the push pole furnished by the defendant was unfit for use and that the defendant knew of it. The fact that an extra push pole was at the yard did not meet the defendant's obligations. It was its duty, and not the plaintiff's, to install it upon the engine. Moreover, it does not clearly appear that the spare pole itself was in good condition.

The fifth point urged by the defendant is that the court erred in submitting to the jury the question whether the accident was caused by the slipping of the collar upon the push pole. There was, however, testimony that the collar slipped just before the accident and allowed the pole to swing. With this evidence in the case, the question whether such slipping caused the injury was most properly submitted to the jury.

The defendant's sixth point is that the verdict should have been directed in its favor because the true explanation of the accident was the gross negligence of the plaintiff and his fellow servants. The true explanation of the accident was for the jury to find. We cannot say from the testimony that they were bound to find contributory negligence or the negligence of co-employés. It is true that the plaintiff directed the placing of the car which the pole struck on No. 3 track. But it does not appear that he designated its precise location, nor that its location was dangerous, had the pole not swung. So it does not appear that the plaintiff, when riding upon the engine, could in any

way have prevented the heavy pole from swinging when the collar slipped.

In its seventh point the defendant claims that the court erred in refusing to charge that there was no duty upon the defendant to inspect the push pole. As a general rule it is the duty of a master to properly inspect the appliances used by his servants for the purpose of discovering defects. An exception to this rule exists in the case of appliances, not of a permanent nature, which require constant renewal and adjustment on account of daily wear and tear. There the master does his duty when he furnishes a supply of these appliances and the means by which the servants may adjust and repair them. But this was not a case of a simple appliance not of a permanent nature. The push pole was a heavy appliance of wood and iron, secured to the engine by bolts and supports, as well as by chains attached to the collar; and the slipping collar required more than a mere ordinary adjustment, which the plaintiff or his fellow servants were bound to make. In fact, the plaintiff tried without avail to fix it, and the defendant's agent promised to send it away for repairs. The trial court correctly refused to charge that the defendant owed no duty of inspection.

There is no error, and the judgment of the Circuit Court is affirmed.

MILLS v. J. H. FISHER & CO.

(Circuit Court of Appeals, Sixth Circuit. March 11, 1908.)

No. 1,740.

1. BANKRUPTCY—APPEAL—TIME FOR TAKING.

Where a petition for a rehearing was filed within 10 days after an order was made sustaining a demurrer to a petition in involuntary bankruptcy, an appeal taken within 10 days after the petition was disposed of and the judgment of dismissal became final was in time.

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

2. SAME—PARTNERSHIP.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], a partnership is a distinct entity, and may be adjudged a bankrupt, irrespective of any adjudication against its individual members; but, when there is no adjudication against the firm, the partnership assets cannot be administered, if there be one member not adjudicated, unless he consents.

3. SAME—"ACT OF BANKRUPTCY."

It is not an "act of bankruptcy," for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own, or one of the firm's, creditors.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 118.]

4. SAME—"ACT OF BANKRUPTCY" OF PARTNER—PREFERENCE OF FIRM CREDITOR.

One member of a partnership, which is insolvent and without assets, who applies his whole separate estate to the payment of a creditor of the firm, thereby gives such creditor a preference over others of the same class, and commits an "act of bankruptcy," which may be made the basis of a petition by other firm creditors to have him individually adjudged a bankrupt.

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

Wm. W. Goodwin, for appellant.

A. W. Biggs, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The court below sustained the demurrer and dismissed a petition praying an adjudication of bankruptcy against the defendants. From this judgment the petitioners have appealed.

The objection that the appeal was too late is not well founded. Before the 10 days allowed for an appeal had expired a petition to rehear was filed. Within 10 days after this was disposed of, and the judgment thereby made final, this appeal was prayed and allowed. This was in time. In re McCall, 145 Fed. 898, 76 C. C. A. 430. The case of Conboy v. First National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, is not applicable. The petition to rehear was filed after the time for an appeal had expired, and the right of appeal could not be resuscitated by an application to rehear.

The petitoner and appellant is a corporation in the cotton milling business in South Carolina. The petition averred that J. H. Fisher and Henry Fisher were partners, under the name and style of "J. H. Fisher & Co.," carrying on business at Memphis, Tenn.; that J. H. Fisher resided at Memphis; but that the other partner resided without the district. It is averred that this firm is indebted to the petitioner in a sum in excess of $500 over and above any security for the claim, and that the creditors of the firm are less than 12 in number. It is averred that the firm and its individual members were insolvent at the date of the acts of bankruptcy alleged, and continue so to be. To this petition J. H. Fisher, the only member of the firm served with process, appeared, and for the firm of J. H. Fisher & Co. and for himself as an individual member demurred, principally upon the ground that no act of bankruptcy is averred as having been committed either by the firm or by J. H. Fisher as a member thereof.

The act of bankruptcy relied upon consists in the transfer by J. H. Fisher of "substantially his entire property" to his son, George W. Fisher, for the "recited consideration" of $10,000 due to the grantee for services rendered and money loaned and "$5,000 cash in hand paid." The petition in respect of this says:

"But it does not appear to whom or of what kind the services were rendered, or to whom the money was loaned, and the petitioner will ask leave to show that the loan of money and services were for the firm of J. H. Fisher & Co. and the debt was a firm debt."

The transfer is not attacked as fraudulent, but as a transfer operating as a preference given within four months. The property transferred was the individual property of J. H. Fisher. It is averred that the firm and each member were insolvent; that the firm had never had any capital or assets in their business, but carried on the business of buying and selling cotton upon credit—the property and credit of J. H. Fisher being the one resource of the firm for credit. Upon this statement of

facts it is contended that, whether the debt preferred was a debt of the firm or the individual debt of the member, it was an act of bankruptcy by the firm.

A partnership, under the bankrupt act of 1898, is a distinct entity—a "person." Act July 1, 1898, c. 541, § 1, cl. 19, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]. As an entity it may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members. In re Meyer, 98 Fed. 976, 39 C. C. A. 368; In re Mercur, 122 Fed. 384, 58 C. C. A. 472; Loveland on Bankruptcy (3d Ed.) §§ 96, 97, 98. When there is no adjudication against the firm, the firm assets cannot be administered by the bankrupt court, if there be one member not adjudicated, unless he consent. In such cases the unadjudicated partner has the right to wind up the firm, paying over only the share of the bankrupt partner to his trustee. Act 1898, § 5. So distinct are the estates of the members of the firm from that of the firm that, when all the members of the firm are adjudged bankrupt individually and the firm is not so adjudged, the trustee of the individual members was adjudged not to be entitled to administer firm assets which were in the hands of a trustee under an assignment made by the firm. Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801; In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

But it is not an act of bankruptcy for which a firm may be adjudged a bankrupt that one of its members, out of his individual estate, prefers one of his own or one of the firm's creditors. In bankruptcy, the assets of a bankrupt partnership must be first applied to the payment of partnership debts, and the individual assets to the payment of the individual debts. The joint creditors are only entitled to share in the surplus of the individual assets, and the individual creditors only in the surplus of joint or firm assets. Bankr. Act 1898, § 5. The application by one partner of his individual property to the payment of one firm creditor would be an individual act, and not the joint act of the firm, and, therefore, not an act for which the firm could be adjudged bankrupt. In re Redmond, Fed. Cas. No. 11,632; Hartman v. John Peters & Co. (D. C.) 146 Fed. 82. Although the intent be to prefer a firm creditor, it is not enough to sustain a proceeding against the firm. Loveland on Bankruptcy, § 49. The general averment that the firm of J. H. Fisher & Co. have, within four months, "paid out large sums of money in the settlement of the debts of the firm and thereby making preferences among creditors," etc., is a vague dragnet, specifying no act of preference which under any rule of pleading would justify an adjudication. Loveland on Bankruptcy (3d Ed.) § 69. The dismissal of the petition, so far as an adjudication against the firm is sought, was not error.

There remains the question as to whether John H. Fisher can be individually adjudicated a bankrupt upon the averments of this petition. If we construe the averments to be that Fisher has applied his individual property to the payment of a joint debt, and we think we must, intending to prefer that debt over other firm debts, we are confronted with the question as to whether that is not a preference for which he may be adjudicated a bankrupt? He was individually liable for every

partnership debt, as well as liable for his individual debts. In equity, and in bankruptcy, his individual creditors are entitled to be paid out of his individual property before his partnership creditors. Manifestly, if the claim of the Watts Mills is an individual debt against J. H. Fisher, there would be no doubt but that such a preference of one creditor over another of the same class would be an act justifying an adjudication in bankruptcy. That is too plain to need discussion. But that is not the case. The claim of the Watts Mills is against the firm, and the preference was not given out of the firm property, but out of the separate property of J. H. Fisher. The utmost right of such a joint creditor against the individual assets of John H. Fisher was to share in them equally with other joint creditors after individual debts had been paid. If, therefore, the debt preferred was an individual debt, it was not a preference of which a partnership creditor can complain; for the debt paid was entitled to a preference over every partnership debt, including, of course, the petitioner's claim. A preference under section 60a of the bankrupt act is only such when it will enable any one of his creditors "to obtain a greater percentage of his debt than any other of such creditors of the same class." This is the principle upon which the payment of labor claims is not a preference, provided, only, that the general assets are enough to pay all other labor claims as great a percentage. Loveland on Bankruptcy, § 195. It is not a preference to make a payment upon a running account of purchases and payments, where the effect was not to diminish the fund to which the creditors look for payment. Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717; Yaple v. Dahl-Millikan Company, 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776. So the transfer of a homestead exemption is not a preference, since it is not subject to the demands of creditors. In re Tollett, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222.

While the averments of the petition in respect to the character of the debt preferred are not as clear as they should be, we nevertheless regard the petition as resting the claim to an adjudication against J. H. Fisher upon the fact that he has transferred practically and substantially his entire separate estate, being insolvent at the time, in payment of a debt of the firm of J. H. Fisher & Co., intending to prefer that debt over other debts of the same class. It is no answer to say that partnership creditors are benefited, and not injured, by such an application of the individual property of one of the members. If the fact be, as averred, that there were no joint or firm assets applicable to joint debts, and that neither of the partners had any separate property, other than that transferred to one of the joint creditors, it would seem that the one joint creditor had been very substantially preferred over every other creditor of the same class. That the members of the firm were each liable in solido for the joint debts is not disputable. Undoubtedly the individual creditors of John H. Fisher would be preferred over the joint creditors out of his individual estate. But, if there were none, then the whole of that separate property would have been subject to the demands of the joint creditors. If there were such separate creditors, then the right of the joint creditors to the surplus, after paying the other class of debts, is not deniable. That this preference of the in-

dividual creditor exists, independently of the existence of partnership assets, under the bankrupt act of 1898, may be conceded upon the reasoning and authority of In re Wilcox (D. C.) 94 Fed. 84, In re Janes, 133 Fed. 912, 67 C. C. A. 216, and Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975, 79 C. C. A. 485. Nevertheless, the right of a partnership creditor to share in the separate estate of the members of the copartnership gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate and to make such a claim the basis for an adjudication of bankruptcy against a member of a firm who has given a preference out of his estate. This was well settled under former acts, and in this respect the present law has not changed the rule. In re Melick, Fed. Cas. No. 9,399; In re Jewett, Fed. Cas. No. 7,306; In re Redmond, Fed. Cas. No. 11,632; In re Loyd, Fed. Cas. No. 8,429; In re McLean, Fed. Cas. No. 8,879; Hartman v. Peters (D. C.) 146 Fed. 82.

Upon the facts stated in this petition it is obvious that when one member of a firm, which is insolvent and without assets, applies his whole separate estate in satisfaction of one joint liability, that creditor will receive a greater percentage of his debt than other creditors of the same class. This, at last, is the supreme test of a preference. The first and second grounds of demurrer were properly sustained. The other grounds of demurrer should have been overruled.

Reversed, with directions to proceed according to this opinion. Costs of appeal will be divided.

In re MUNGER VEHICLE TIRE CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 74.

1. COURTS—RULES OF DECISION—STATE STATUTES—CORPORATIONS — DISSOLUTION.

   Where state statutes regulating the dissolution of corporations have been construed by the highest court of such state, the construction will be adopted by the federal courts in dealing with a corporation subject to such laws.

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

2. BANKRUPTCY—DISSOLVED CORPORATION.

   Under P. L. N. J. 1884, p. 236, § 7 (P. L. 1896, p. 319), providing for proclamation against New Jersey corporations, delinquent for taxes, prohibiting them from further exercising corporate powers, construed by the New Jersey Court of Errors and Appeals not to prohibit the use of such powers for the purpose of winding up the concern and settling its affairs, a proclaimed corporation is not so far destroyed as to prevent an adjudication in bankruptcy against it under P. L. N. J. 1896, p. 295, § 53, declaring that all corporations shall be continued bodies corporate for the purpose of prosecuting or defending suits and of enabling them to settle and close their affairs, or dispose of their property and divide their capital, etc.

3. SAME—APPEARANCE BY ATTORNEY.

   Where a New Jersey corporation had been declared dissolved for failure to pay taxes in that state, it had power to appear by attorney in bankruptcy proceedings against it.

4. SAME—PLACE OF PROCEEDINGS.

Where a New Jersey corporation, having been proclaimed against in that state for nonpayment of taxes, maintained its principal office in New York City, bankruptcy proceedings were properly instituted against it in New York.

Appeal from, and Petition for Revision of Proceedings of, the District Court of the United States for the Southern District of New York.

This cause comes here upon an appeal and petition to review (consolidated by order of this court) an order and decree denying petitioner's motion to dismiss a petition in involuntary bankruptcy against the Munger Company, and an adjudication of bankruptcy thereon. The petitioner, Charles A. White, is a creditor of the bankrupt in the sum of $50.

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

This is a very interesting proceeding in more ways than one. The party who moves to vacate is a creditor in the sum of $50, who has not proved his claim. His own personal interest in this matter must be microscopic. The moving papers largely consist of exemplifications of the New Jersey proceedings of January, 1907, and of certain laws of that state, and most of the exemplifications are dated on December 8, 1905, or upwards of a year prior to the filing of the petition in bankruptcy herein. Evidently somebody had an interest in watching and making a record of the negligence or misfortune of the Munger Vehicle Company. The trustee declares that the only asset of the bankrupt consists of a cause of action which will be barred in a few weeks by the statute of limitations. On examining the schedules it appears that the only asset therein revealed is a cause of action against the Rubber Goods Manufacturing Company for a large sum of money. Obviously, if this proceeding in bankruptcy is utterly wiped out on jurisdictional grounds, a condition of confusion will ensue very detrimental to the interests of the creditors of the Munger Vehicle Company, and highly beneficial to the person against whom the cause of action exists, and who (it is impossible to resist a suspicion) may be the same person who took such precautions with regard to procuring exemplifications of the New Jersey proclamation in December, 1905. I therefore doubt the good faith of Mr. Charles A. White.

If, however, there was no corporation when a petition herein was filed on January 23, 1907, it necessarily follows that there could be no adjudication. The proceedings under the New Jersey act of 1884 must be read in the light of chapter 130, p. 319, P. L. 1900, which is an amendment to the act of 1884, in force at the time of the proclamation against the Munger Company. Neither the act of 1884 nor any supplement thereto declares what shall become of the property which the delinquent corporation may have had at or after the date of such proclamation. Certainly something must be done with that property, and it is equally clear that proceedings may be just as necessary to collect assets of a corporation proclaimed for taxes as in the case of any other moribund incorporated concern. Evidently the executive of New Jersey feels this, for his proclamation of January 3, 1905, is said to declare "null and void certain charters of incorporations for unpaid taxes of 1902, under chapter 187, p. 319, P. L. 1896, and chapter 130, p. 319, P. L. 1900." Chapter 185, p. 277, P. L. 1896, is the general corporation act passed subsequent to the act of 1884, and declares (section 53) that all corporations, "whether they expire by their own limitation or be annulled by Legislature or otherwise dissolved," shall be continued bodies corporate for certain purposes. It appears by affidavits herein that for a long time prior to 1905 the Munger Company had been "inactive."

Upon the whole I have no doubt that under the statutes referred to by the moving papers the Munger Company continued to be a species of body cor-

porate, capable of being proceeded against and of certain forms of corporate activity. The situation is not different from that shown in Re Storck Lumber Company (D. C.) 8 Am. Bankr. R. 87, 114 Fed. 360. It there appeared that prior to the filing of the petition in bankruptcy proceedings had been taken under the statutes of Maryland which resulted in a decree of the court of competent jurisdiction "that the corporation was dissolved and that it be deemed to have surrendered its corporate rights, privileges and franchises." Nevertheless the adjudication in bankruptcy was sustained. In this opinion I concur. As long as there is a legal entity, capable of owing money, and of collecting money, and of paying debts with that money, something exists capable of being adjudicated a bankrupt, if otherwise entitled. If a legal entity is capable of being adjudicated a bankrupt, it is necessarily capable of committing an act of bankruptcy.

The other defects in the proceedings alleged in the moving papers are not jurisdictional, and upon the motion of Mr. White at all events are not worthy of further consideration.

The motion is denied.

Hollander & Bernheimer (M. J. Kohler, of counsel), for petitioner.

G. H. Montague, James F. Egan, and William A. Evans, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The facts shown by the record are these: The company was incorporated under the laws of New Jersey for the manufacture and sale of rubber tires December 2, 1899, and thereafter began said manufacture in certain mills owned or controlled by the Rubber Goods Manufacturing Company. On or about November 30, 1901, it ceased the manufacture and sale of such goods and became inactive. Thereafter the office in which the books of the Munger Company were kept, and the office from which letters were written, in which meetings of the directors and stockholders were held, and where outstanding accounts were collected and paid, was the office of its secretary and treasurer at 46 Cedar street, in the city of New York. Such office was subsequently, about January, 1905, transferred to that of one of the directors, No. 5 Nassau street, and again, on or prior to July 1, 1906, to that of its counsel, No. 76 William street, in said city. On January 3, 1905, the Governor of New Jersey, under the statutes of that state, proclaimed that the charter of the Munger Company was void because it was in default in payment of taxes assessed against it for the year 1902. In the summer of 1906 Louis De F. Munger, one of the directors, pressed for payment of a claim which he asserted against the corporation, and brought an action therefor in September, 1906. Thereupon the board of directors unanimously passed the following resolution:

"Resolved, that Lewis Earle [one of the directors] be directed to confer with Mr. Munger, or his attorney, and to state to them the situation of said company, and, in the event that Mr. Munger continues to press his claim, that Mr. Earle be directed to employ competent counsel to represent said company in such action and any subsequent proceedings which Mr. Munger may take against said company, and that Mr. Earle be, and hereby is, given full power to take any and all steps therein as may, after consultation with said counsel, seem advisable for the best interest of said company."

Thereupon said Earle, on behalf of the company and acting upon the advice of counsel, made an offer of judgment to Munger for an

amount less than the amount claimed in his complaint, which offer was accepted, and judgment entered for $11,881.95 on October 30, 1906. Subsequently on December 18, 1906, said Earle in pursuance of the above resolution signed an instrument in writing stating that the company was insolvent, was unable to pay its debts, and was willing to be adjudicated a bankrupt for that reason. Thereupon Munger and two other creditors filed a petition for adjudication in involuntary bankruptcy, which was served upon the counsel employed under resolution of October 11th. Said counsel entered an appearance. On October 20, 1907, another resolution was adopted by the board of directors, which, after recital of the acts of Earle and the counsel, resolved that they "be and hereby are in all things ratified and confirmed," and counsel continued as attorney for the company. On February 26, 1907, the company was adjudicated a bankrupt. The opinion of the district judge is reported herewith, and we fully concur in the same. It will be sufficient to refer only to such assignments of error as were presented on the argument.

It will not be necessary to review the numerous authorities cited by appellant in support of his contention that subsequent to the proclamation the company was defunct, and, like a deceased person, incapable of being adjudged a bankrupt. We are dealing with a New Jersey corporation, whose status is regulated by New Jersey statutes, and when such statutes have been construed by the highest court of New Jersey the federal courts will adopt the same construction. The proclamation was issued under an act further supplementary to an act of April 18, 1884, which further supplementary act was approved March 23, 1900 (chapter 130, p. 319, P. L. 1900). The history of this legislation is briefly as follows:

Chapter 159, p. 232, P. L. 1884, provided for the imposition of state taxes upon certain corporations and for the collection thereof. It enacted (section 7) that, in addition to other remedies for the collection of such tax, the Attorney General might apply to the court for an injunction against the further exercise of any franchise by the delinquent corporation, but contained no provision for the forfeiture of its charter by proclamation. Chapter 187, p. 319, P. L. 1896, as a "further supplement" to this act of 1884 (which is misprinted 1894 in the title), provided (section 1) that, if any corporation shall for two consecutive years neglect or refuse to pay any state tax, "the charter of such corporation shall be void and all powers conferred by law upon such corporation are hereby declared inoperative and void." It also provided in section 2 that on or before the 1st day of May in each year the Comptroller shall present to the Governor a list of all such delinquent corporations, and the Governor shall forthwith issue his "proclamation declaring under this act of the Legislature that the charters of these corporations are repealed. In the same year (1896) there was passed a general act (chapter 185, p. 277) concerning corporations, which contained the following:

"Sec. 53. All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dis-

pose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

In 1900 the Legislature amended the second section of the prior act (chapter 187, p. 319, P. L. 1896) merely by substituting the "first Monday in January" for the "first day of May" (chapter 130, p. 319, P. L. 1900).

With all these statutes before it (except the last one, which changed the date from May to November), the Court of Errors and Appeals held that these acts, being parts of a legislative scheme respecting corporations and being in pari materia, are to be construed together, and that the prohibition against the use of corporate powers of proclaimed defaulted corporations did not extend to their use in winding up and settling the affairs of such corporations. And that court reversed a decision of the Vice Chancellor and remitted the cause, with instructions to appoint a receiver on the prayer of creditors of the proclaimed corporation. American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579.

Upon such construction the proclamation of default, etc., in the case at bar, did not work such a destruction of the corporation that it could not be adjudicated a bankrupt. The language of the section quoted (section 53) seems plainly to warrant the taking of such action as will secure the intervention of the bankruptcy court. A procceding in involuntary bankruptcy may fairly be considered a suit to settle and close up the affairs of the bankrupt and dispose of its property.

The suggestions that the corporation could not appear in bankruptcy proceedings by an attorney and that the proceeding was not properly instituted in New York City seem to be without merit.

The order of the District Court is affirmed.

BURT v. CUMBERLAND COAL & COKE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1908.)

No. 1,723.

1. EQUITY—JURISDICTION—LACK OF REMEDY AT LAW.

Where a married woman has been disseised of her lands, of which she has a present right to the possession and use, and she cannot maintain an action of ejectment without joining with her husband, if he refuses to join, or by his laches his right to do so has become barred, equity has jurisdiction of a suit by the wife, by her next friend, for their recovery, on the ground that she is without adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 153.]

2. SAME—DISSEISIN OF WIFE—RIGHT TO SUE IN EQUITY—TENNESSEE STATUTE.

Under Acts Tenn. 1849-50, p. 111, c. 36 (Shannon's Code, § 4234), which, as construed by the Supreme Court of the state, provides in effect that a wife shall not be deprived of possession of her lands by any act of her husband or his creditors, where she has been disseised and her husband neglects or refuses to join with her in an action for their recovery until such an action has become barred by the seven-year statute of limitations, the wife is not compelled to wait until after discoverture to enable her to bring her action, under the saving clause of Shannon's Code, § 4448, but may, by her next friend, bring her suit in equity, joining her husband as a defendant.

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

This bill was dismissed upon motion of the defendants, because it did not present a matter cognizable in equity; it being, in the opinion of the learned trial judge, nothing more or less than a simple ejectment suit and the remedy at law plain and adequate. The complainant is a feme covert and brings this bill by a next friend. Her husband is made a defendant, along with a number of corporations and individuals. The subject-matter is a tract of some 5,000 acres of mountain land alleged to be valuable chiefly for its coal and timber. The bill avers that this body of land came to complainant by descent while a married woman; that after descent cast, and while feme covert, the defendants, other than her husband, dispossessed her and her husband unlawfully and with force and arms, and have ever since continued in the actual, adverse possession under title papers the character of which is unknown to her, and that this adverse claim and possession has continued for more than seven years. It is also alleged that during all of this time she has been the lawful wife of the defendant, Nathan J. Burt, but that he has at all times and still neglects and refuses to bring any suit or action against those who have thus been holding adverse possession of her lands, although such possession has been adverse to both the joint estate of husband and wife, as well as to the fee which is in her. In respect to the matter of waste and trespass, the bill alleges that the defendants, other than her husband, while so in possession and control of said lands, have from time to time "wrongfully and unlawfully destroyed, cut, removed, sold, and disposed of large quantities of valuable timber and growing trees from said lands, and have dug, mined, and removed large quantities of coal and other minerals, and now threaten to cut, remove, and dispose of valuable timber and growing trees, and dig, mine, remove, and dispose of large quantities of coal from said lands, and while so in possession and control of said lands, said defendants, and each of them, have from time to time permitted and allowed other persons to go upon said lands and cut, remove, and appropriate to their own use large quantities of valuable timber and trees, and dig, mine, remove, and appropriate to their own use large quantities of coal from said lands, all to the great injury and damage of your orator; that the trees, timber, and coal on said lands constitute their principal value." The prayer of the bill is for an injunction pendente lite, restraining the transfer, disposition, or incumbrancing of said lands, and enjoining defendants from cutting or removing timber, or mining or removing coal or other minerals, and that upon final hearing the claim of title under which defendants claim, their character being unknown, be canceled as clouds upon her title; that complainant be restored to possession and defendants enjoined from "cutting, removing, or disposing of any timber or trees, or digging, mining, or removing coal, or committing any other waste or trespass upon said lands." The prayer concludes with one for "other and further relief as may be just and equitable in the premises."

Theodore Richmond, Henry A. Chambers, William T. Cooper, Henry M. Caldwell and George S. Grimes, for appellant.

John F. McNutt, Conaster & Case, and Garvin & Cantrell, for appellees.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

LURTON, Circuit Judge (after stating the facts as above). The sole question is whether this bill can be maintained in equity. The court below thought it a simple ejectment bill. But, if this be conceded, does it follow that it cannot be maintained as a bill in equity? A married woman cannot maintain at law an action of ejectment, in respect of her fee-simple estate, without joining her husband. 21

Cyc. 1512, 1517; 2 Story's Equity, § 1368. If her husband refuses to join she has no remedy at law, and if she cannot obtain relief in equity she is without remedy so long as her disability may continue. It is the high function of a court of chancery to give a remedy where there is a right for which common-law writs afford no complete or adequate relief. This principle is the very cornerstone of equity jurisdiction. Neither is this jurisdiction extinguished by the fact that courts of law may now give a remedy in respect of rights which they originally rejected. Lord Eldon, in Kemp v. Pryor, 7 Vesey, 249, 250, well said, with respect to the permanency of the jurisdiction once acquired:

"Upon what principle can it be said that the ancient jurisdiction of this court is destroyed because courts of law now very properly perhaps exercise that jurisdiction which they did not exercise 40 years ago?"

Jurisdiction must then depend upon whether Mrs. Burt has a present right to be restored to the possession of her lands and a present right to the use and profits therefrom. If, being a married woman, she cannot sue at law without joining with her husband, and if he will not protect her by bringing a joint action, or cannot now do so, because of his laches in not sooner bringing such a joint action, then it is clear that we have a case where the remedy at law is not adequate, and upon this foundation equitable jurisdiction may be sustained. What, then, are the present rights of Mrs. Burt?

The interest which at common law a husband acquires in the fee-simple estates of his wife is a freehold, in her right, which may continue during their joint lives, and may, by birth of issue and his survival of the wife, become an estate for his life as an estate by the curtesy. He is not, during the wife's life, solely seised, but jointly with his wife. The common-law expression of his interest in her lands during marriage is that "husband and wife are jointly seised in right of the wife." Guion v. Anderson, 8 Humph. (Tenn.) 299; Weisinger v. Murphy, 2 Head (Tenn.) 676. A disseisin during coverture is a disseisin of the joint estate, and to recover possession husband and wife must jointly sue, and the statute of limitations will begin to run against this joint estate from the date of the adverse entry. If suit by the husband and wife is not brought within seven years from such joint disseisin, the joint suit of the husband and wife will be effectually barred. Shannon's Code Tenn. §§ 4457, 4458. Such an adverse possession effectually extinguishes any interest he may have in his wife's fee-simple estate, and, if he survives her, he has no right as tenant by the curtesy. Weisinger v. Murphy, 2 Head (Tenn.) 674.

The Tennessee statute of limitations runs against married women as well as against those who are single, and an adverse possession begun during coverture would not only bar the joint estate of husband and wife, but also the single estate of the wife, but for the proviso in the statutes which saves to the wife and her heirs a right of action for three years after the removal of the disability. Shannon's Code, § 4448; Guion v. Anderson, 8 Humph. (Tenn.) 299, 326; Weisinger v. Murphy, 2 Head (Tenn.) 674. This estate of freehold in right of the wife the husband could sell, or it might be seized and sold

by his creditors, and the wife could take no step to protect herself, either against a disposition of this joint estate by the husband or his creditors, or against its loss through his laches. Coleman v. Satterfield, 2 Head (Tenn.) 261. So when a joint disseisin had continued for more than seven years without action brought, the only right of the wife was to bring her suit after her disability had terminated within the three years under the saving clause of the statute. Guion v. Anderson, 8 Humph. (Tenn.) 299; Murdock v. Johnson, 7 Cold. (Tenn.) 616; McCallum v. Petigrew, 10 Heisk. (Tenn.) 396. Thus the law of Tennessee stood prior to Acts 1849–50, p. 111, c. 36 (Shannon's Code, §. 4234). That act provided as follows:

"The interest of the husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree or execution against him; nor shall the husband and wife be ejected from or dispossessed of such real estate of the wife by virtue of any such judgment, sentence, or decree; nor shall the husband sell his wife's real estate during her life without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands."

The Tennessee Supreme Court in a uniform line of decisions have construed this act as so changing the common law as to secure to married women the free use and enjoyment of their fee-simple estates against any act of the husband in which the wife does not join in the statutory mode for conveying her lands, as well as against any act of his creditors, or process of the courts in respect of any freehold estate he may have therein. Coleman v. Satterfield, 2 Head (Tenn.) 264, 265; McCallum v. Petigrew, 10 Heisk. (Tenn.) 394; Moore v. Walker, 3 Lea, 657; Key v. Snow, 90 Tenn. 663, 666, 667, 18 S. W. 251. Neither will the laches of the husband, in consequence of which the joint estate of husband and wife is barred, operate to destroy her right of possession and enjoyment. Being unable to sue alone at law, she has, under the cases cited above and that of Cantrell v. Davidson County, 3 Tenn. Ch. App. 426, where the opinion was by the learned Chancellor Cooper, the right to bring a bill in equity by next friend, making her husband a party defendant. Referring to the jurisdiction of a court of equity to give relief to the wife in a case where the joint estate of husband and wife in right of the wife was barred by an adverse possession of more than seven years, Chancellor Cooper, in the case last cited, said:

"The wife's right to come into this court, according to the decisions, depends, not upon a removal of a cloud from the title, in the sense of annulling an actual paper title, void as to her, but upon the fact that she has no remedy at law, being incapable of suing in that court without her husband, and he being estopped, either by his deed or the bar of the statute of limitations, to join her in suing; and this, whether the adverse holding be without paper title or under an assurance from a third person. In the latter class of cases the disseisin is, so far as the wife is concerned, as if the disseisor had 'entered upon, took possession of, and unlawfully ejected her.' The fact that the defendant claims under an assurance of title from a third person, purporting to convey an estate in fee, is of no importance upon the question of jurisdiction, where the suit is by a married woman, however important it may be where a person sui juris comes into this court to try title to land, instead of bringing an action of ejectment at law. A cloud upon the title, created by adverse possession alone, may, under the decisions of our Supreme Court, be

as efficacious to confer jurisdiction in this court as a cloud created in any other way. Almony v. Hicks, 3 Head (Tenn.) 39; Graham v. Caldwell, at Knoxville, June 10, 1876. Be this as it may, the equity of this bill rests upon the ground that the wife cannot sue alone at law, and that the rents and profits sued for are her separate property, the only remedy for which is in equity."

In Key v. Snow, cited above, the court, referring to the act of 1850 and its construction in Coleman v. Satterfield, supra, said:

"Since that case the right of the wife to sue separately in equity has not been debatable. But is this right of separate suit, pending coverture, one against which the statute of seven years operates? Confessedly she is not barred unless she delay her suit for more than three or seven years after death of her husband. Is she compelled to await the death of her husband to recover possession of her lands, if her husband negligently or willfully permit the seven-year statute to bar the joint action? It would seem that, if the husband cannot deprive her of her right to the possession by his deed, she ought not to be defeated by any negligence of his in failing to sue with her a stranger who has wrongfully disseised her. If this be not so, then we have the strange anomaly that while the husband, by his deed, cannot defeat her right of possession, yet he may, by his negligence, deprive her during his life of the very estate the statute intended should be protected against his act or the act of his creditor."

In McCallum v. Petigrew, cited above, the Supreme Court of Tennessee said:

"By a fair construction of Acts 1849–50, p. 111, c. 36, and by giving effect to its spirit and intent, which is that the wife shall not by the act of her husband be deprived of the possession of her land, it secures to her when necessary the right to prosecute by next friend a separate action to recover her possession. The argument of the defendant, one that has great force, is that the only effect of the act of 1849–50 is to render inoperative the deed of the husband during life of the wife, but without in any manner affecting the statute of limitations, thus leaving the party entering under the husband's deed as a naked disseisor, as if no deed were executed, and as a consequence, under the authorities before referred to, the joint right of action of husband and wife would be barred in seven years. But we think the object of the act of 1849–50 was to protect the possession of the wife against the acts of her husband, and whenever he has executed his deed for the land, whether he would be estopped by it from joining in the prosecution of an action to recover the land or not, this act gives to the wife a right, independent of and against the act of her husband, to be restored to the possession of her land. Against this separate right of action the statute does not run. Before this act she could not prosecute an action without her husband joining. Against this joint action the statute did run, and the wife was compelled to wait until she could bring her separate action, which was after discoverture; but now she may prosecute this separate action without waiting until discoverture. The act of 1849–50 was intended to secure to the wife the use and enjoyment of the estate during her life. She may prosecute her right without her husband joining as plaintiff. She, it is clear, has the right within three years after discoverture to bring her suit. This must be upon the ground that her right is not extinguished by the adverse possession; but, the joint action being barred, she could only have the saving of the statute within which to sue. If her right is not extinguished, and she can prosecute a separate suit to recover her property, we do not see that she should be postponed until the death of her husband, although the result is to restore the husband as well as the wife to possession. We think, therefore, the action is not barred."

Under the well-settled line of opinions by this court and the Supreme Court, the construction of this act by the Supreme Court of Tennessee should be accepted by this court. If, therefore, the effect of this Tennessee act of 1849–50 is to protect Mrs. Burt in the enjoy-

ment and possession of her fee-simple estates against any act of her husband or his creditors, as well as the consequences of his neglect and refusal to bring a joint action before such an action was barred, she has a present right to the possession of the lands described, a right for which no remedy at law exists in consequence of her coverture. Under such circumstances we quite agree with the Tennessee court in holding that, when a right is given by statute which cannot be enforced at law by reason of the estoppel of the husband and the coverture of the wife, equity will give relief.

We do not deem it essential to consider another ground of jurisdiction growing out of the averments of the bill as to the waste which has been committed and the threat to continue cutting timbers and mining coal. In Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551, and Douglas Co. v. Tenn. Lumber Co., 118 Fed. 438, 55 C. C. A. 254, we held that where one object of such a bill was to restrain trespass and waste of timber, and the principal value of the land was in its timber, if a case for an injunction pendente lite was made out, the bill would be retained for the purpose of settling the question of title also. The averments of this bill are somewhat meager as to fear of future trespass and the necessity for a restraining order. We do not, therefore, put our judgment sustaining jurisdiction upon this aspect of the relief sought, though we do not wish to be understood as regarding the bill as fatally defective in that regard.

The decree dismissing the bill will be reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

BENNETT BROS. LUMBER CO. v. ROBINSON.

(Circuit Court of Appeals, Sixth Circuit. March 11, 1908.)

No. 1,746.

CARRIERS—LIEN—FREIGHT ADVANCED.

An owner of lumber delivered it at a lake port to a lumber company under an agreement that the latter should ship the same to another port and market it, advancing freight and the expenses of loading, unloading, piling, and reshipment, for which it was to reimburse itself when the lumber was sold. The company shipped the lumber to Sandusky, and on its arrival procured a railroad company to receive it, pay the lake freight, and transport it to its yards, where it was piled for reshipment as sold. *Held*, that the railroad company, having acted in good faith in receiving the lumber as a connecting carrier, was subrogated to the lien of the lake carrier for the freight advanced as well as to the rights of the lumber company as agent for other advances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 897.]

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

A. W. Smith, for appellant.

Lawrence Maxwell, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by the receiver of the Columbus, Sandusky & Hocking Railroad Company against the Bennett Bros. Lumber Company for lake charges advanced by the railroad company on lumber shipped by lake by one Putnam, from Bayfield, Wis., to Sandusky, Ohio (for which it claims a lien), and for certain loading, switching, and storage charges on such lumber. This lumber consisted of 2,000,000 feet, and, belonging to Putnam, was in July, 1896, piled on the docks at Bayfield. On the 16th of that month Putnam made a contract in writing with the Toledo Lumber & Manufacturing Company for the purpose of procuring the services of the latter as a commission merchant to sell the lumber. Putnam agreed to furnish the lumber company, on the docks at Bayfield, all of his lumber then piled thereon, to be by it sold for him as provided in the contract. The lumber company agreed to receive all of said lumber at the docks, as the agent of Putnam, "and ship the same to Toledo or Sandusky, Ohio, and there pile it, separate from all other lumber, and mark each pile as follows: 'A. C. Putnam.'" The lumber company agreed to advance the freight charges from Bayfield to Toledo or Sandusky, to advance the expenses of loading and unloading, piling, and reshipping, and all other sums necessary to ship and sell said lumber; to advance such sums as may be necessary to keep said lumber fully insured—which insurance shall be made payable "to Putnam, and to use due diligence in selling said lumber." The lumber company further agreed to furnish Putnam, on the 10th of each month, an account of all the lumber by it sold, and to pay over the proceeds of the lumber sold the preceding 30 days. Putnam agreed to pay over to the lumber company as its compensation "all such sums as may be realized from the sale of said lumber, after deducting all advances by it made for freight and other expenses incident to handling said lumber, including insurance, and after deducting the further sum of $10.25 per thousand feet for merchantable lumber, 12 feet and upward in length, and $5.25 per thousand feet for all mill cull." It was further mutually agreed that the lumber company should not sell the lumber at a price that would not net to the owner thereof the said sums of $10.25 per thousand feet for the merchantable portion of said lumber, and $5.25 per thousand feet for the mill cull.

Under the contract, in August, 1896, the lumber in question was shipped in barges from Bayfield to Sandusky. It was shipped by and in the name of Putnam to the lumber company as assignee for the account of Putnam. The representative of the lumber company at Sandusky was one Koch. He was to market the lumber for a share of the commission. He received the bills of lading, but neither he nor the lumber company was able to advance the money to pay the lake freight and thus secure a delivery. Under these circumstances he made an arrangement with the Columbus, Sandusky & Hocking Railroad Company, which had a terminus in Sandusky, to load the lumber into cars, switch it to certain yards owned by the railroad company, and there store it until it could be sold and billed out. Koch had the privilege of doing the loading and unloading, for which the railroad company was to allow him $2 per car. The railroad company was to do the switching

and furnish the storage free of charge. This was done for the sake of getting the freight; the understanding being that, when the lumber was sold and billed out, there should be added to the freight charges for rail transportation on each car a proportionate part of the lake freight charges, which should be paid by the purchaser of the lumber, and in this way the railroad company would be reimbursed for the amount advanced by it to pay lake freight. About one-third of the lumber was sold and billed out during the summer and fall of 1896. There is a credit of $90 given by the railroad company for the reimbursement of lake freightage advanced during this time.

With things in this condition, in 1896 the lumber company became insolvent, and a receiver was appointed. On December 1, 1896, the railroad company brought its action in the state court against Putnam for $2,917.29, on account of the lake freight advanced by it. An order of attachment against Putnam as a nonresident was levied on the lumber in question then in the hands of the railroad company. Thereupon Putnam removed his case to the court below. He was desirous of giving a redelivery bond and regaining possession of the lumber; but the attorneys for the railroad company advised him that, although he gave the bond, the railroad company would not handle his cars, nor allow any one to trespass upon its property, for the purpose of switching them, unless its claim for freight advanced was paid. The railroad company passed into the hands of a receiver, and Putnam sold his lumber en bloc to the Bennett Bros. Lumber Company, giving the latter a bond to indemnify it against the claim of the railroad company. Thereupon, on August 28, 1897, the Bennett Bros. Lumber Company filed a petition in the foreclosure case for an order directing the receiver to deliver the lumber to the petitioner "upon such terms and conditions as may be equitable and proper." The court allowed the petition and ordered the receiver to turn over the lumber to the petitioner upon the delivery to him of a bond in the sum of $5,000, "conditioned that said petitioner shall pay or cause to be paid to said receiver all moneys that shall finally be adjudged to be due said receiver on the said petition." In the order it was stated that the lien, if any, of the receiver for the charges in dispute, if any, should not be affected by the order. A bond was accordingly delivered, and the lumber was delivered to the Bennett Bros. Lumber Company as prayed. Then, on September 16, 1897, the receiver filed a petition in the same case for the purpose of determining the validity of the lien, and requiring the Bennett Bros. Lumber Company to pay the amount thereof. The court, after hearing the parties, decreed that the receiver recover from the Bennett Bros. Lumber Company the amount of said lake freight and other charges. From that decree, the present appeal is taken.

It is contended by the present owners of the lumber that Koch had no authority to pledge it for the advances made by the railroad company of the lake freightage, that the railroad company had no power to do this itself, and that the payment by the railroad company of the lake freightage extinguished the lien, although the court below held that it passed to the railroad company by subrogation. It is contended that there was a definite transportation from Bayfield to San-

dusky, that it ended at Sandusky, and when the lake carriers were paid their lien on the lumber for their freight was extinguished. The railroad was not a connecting line, the lumber might or might not go over its road, and, if it did, it was under a new transportation. Thus the matter resolves itself, even in the view taken by counsel for the purchaser of the lumber, into a question of the authority under the contract, express or implied, and the reasonableness of the action of the railroad company in advancing the lake charges on the strength of thus acquiring a lien to secure its reimbursement.

We do not think this is a case where Putnam entered into a contract limited to the shipment of the lumber to Sandusky, with no expectation of shipping it farther. The contract contemplated the procuring of the services of the lumber company as a commission merchant to sell the lumber. For that purpose the lumber was to be shipped to the selling point. Sandusky was only a point en route. There the lumber company was to separate the lumber from all other lumber and mark each pile "A. C. Putnam." The contract provided that the lumber company should advance the freight charges to Sandusky, but also should advance the expenses of loading and unloading, piling and reshipping, and all other sums necessary to ship and sell the lumber, as well as to advance such sums as might be necessary to keep the lumber fully insured. This covers all the charges included in this case, and clearly looks to the advancement of lake freightage, as well as all items of storage, loading, and unloading, etc. But it does further than that. While it provides for the advancement by the lumber company of all these charges, it contemplates their reimbursement and ultimate payment by Putnam; for he agrees to pay the lumber company as its compensation "all such sums as may be realized from the sale of said lumber, after deducting all advances by it made for freight and other expenses incident to handling said lumber including insurance, and after deducting the further sum of $10.25 per thousand feet for merchantable lumber, 12 feet and upward in length, and $5.25 per thousand feet for all mill cull." In other words, the lumber company was made his agent to market the lumber, ship it, and sell it, advance the freightage and other incidental expenses, and deduct the same, reimbursing itself and accounting for the proceeds at a stipulated rate.

While it does not appear that the railroad company knew the specific terms of the contract, the conduct of the parties who handled the lumber and placed the same in its cars gave reasonable ground to believe that it was only doing what Putnam expected and desired when it paid the lake freightage and stored the lumber in its cars, awaiting a sale and expecting reimbursement. In the case of Wabash R. R. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397, it was held a railroad company had a lien for the duties paid by it on imported goods which passed over its line in transit. Mr. Justice Brewer, who delivered the opinion, cited and quoted a number of authorities, including Overton on Liens, § 135, page 166, Hutchinson on Carriers, § 478a (being section 867 of the third edition), Ray on Freight Carriers, § 104, and Schouler on Bailments, p. 544. From the latter he quotes (192 U. S. 187, 24 Sup. Ct. 233 [48 L. Ed. 397]):

"A common carrier, then, may usually retain particular goods, by virtue of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien, moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines, since the last carrier or final warehouseman may advance what was lawfully due his predecessors and hold the property as security for his reimbursement."

To the same effect is Bowman v. Hilton, 11 Ohio, 303, 305, in which the court sustained the lien of the warehouseman for the freight charges advanced by him on goods delivered by the carrier, saying:

"By the usages of the trade he became, for the purposes of paying charges and receiving and forwarding from Brunnersburg to Williams Center, the agent of the plaintiff, and his lien attached for the moneys expended in an honest endeavor to discharge his duty. Liens of this kind are said to be favored in law, and are not subject to the objections against general liens."

See, also, and especially, Vaughan v. R. R. Co., 13 R. I. 578; Evans & Hollinger v. R. R. Co., 76 Mo. App. 472.

Judgment affirmed.

NOTE.—The following is the opinion of Sater, District Judge, in the Circuit Court:

SATER, District Judge. This proceeding is brought by the receiver of the Columbus, Sandusky & Hocking Railroad Company to recover freight advancements to the owner of lake vessels and charges for unloading, loading, switching, and storage of lumber shipped from Bayfield, Wis., to Sandusky, Ohio. The Bennett Bros. Lumber Company dispute the entire claim, excepting a portion of the storage charges. On an application made to this court the lumber, which was stored on the premises of the railroad company, was surrendered to the Bennett Bros. Lumber Company on their execution and delivery of a bond to protect the receiver. The Toledo Lumber & Manufacturing Company (hereinafter called the "Lumber Company"), in its contract with Putnam, stipulated as his agent to receive certain lumber owned by him at the docks at Bayfield, Wis., and ship the same to Toledo or Sandusky, Ohio, and there pile it separate from all other lumber and mark each pile "H. C. Putnam." It agreed to pay all freight charges, the expense of loading, unloading, piling, reshipping, insurance, and all other sums necessary to ship and sell the lumber, and on the 10th day of each month to furnish an account to Putnam for the lumber sold by it, and deliver to him at that time, or as soon thereafter as settlements with customers could be had, cash or good negotiable paper representing the proceeds of all lumber sold during the preceding 30 days. Putnam agreed with the Lumber Company to pay it as his agent for its compensation all sums realized from the sale of lumber, after deducting therefrom the freight payments, insurance, expense incident to the handling of the lumber, $10.25 per thousand feet for all merchantable lumber 12 feet or more in length, and $5.25 per thousand feet for mill culls. The Lumber Company had the privilege of purchasing the lumber at any time by paying in cash or in notes acceptable to Putnam.

There is no evidence that the shipper who carried the lumber to Sandusky, Ohio, or any of the officers of the railroad company, had knowledge of the terms of the contract. Putnam consigned the lumber to the Lumber Company as if purchased from him. It was in fact his individual property. The lake carrier acquired a lien for the cost of transportation from Bayfield to Sandusky, and Putnam, as well as the Lumber Company, became liable for such lien. 6 Cyc. 500, 501. The lumber, when unloaded from the vessels, was piled on the docks by the railroad company and transported then by it from one-half to three-fourths of a mile to its yards, where it was piled, and each pile was marked in such a way as to designate Put-

nam's ownership. The railroad company advanced the money to pay the lake freight, and the bills of lading were delivered to it.

The railroad company's agent, Odenbaugh, and Koch, the Lumber Company's agent, differ in their testimony as to the circumstances leading up to the railroad company's advancement of the money to pay the lake freight. Koch testifies that what was done in payment of lake freight was in pursuance of a course of dealing then and theretofore existing between the railroad company and himself. Odenbaugh testifies the payment was made in consequence of an agreement between him and Koch, who claimed to be Putnam's agent. The railroad company, in either event, acquired a lien on the lumber. Hutchinson on Carriers (3d Ed.) § 867; Caye v. Pool's Assignee, 108 Ky. 124, 55 S. W. 887, 94 Am. St. Rep. 348, 49 L. R. A. 251; Kansas City Transfer Co. v. Neiswanger, 18 Mo. App. 103; Moore on Carriers, p. 432. There was not a new pledging of the property or the creation of a new lien. The amount of the railroad company's advance payments was to be returned to it as a freight charge, as the lumber was sold. The railroad company acted in good faith. Putnam, retaining the ownership of the property, constituted the Lumber Company his agent, and that agent, through Koch, such an instrumentality as it might rightfully invoke to aid it in its business transactions, was clothed with such apparent authority at least to act for Putnam that a lien upon the lumber for the charges of transportation passed to the railroad company. Hutchinson on Carriers, § 885; Vaughan v. Prov. & Worces. R. R. Co., 13 R. I. 580. The railroad company was subrogated to the rights of the lake carrier. Sheldon on Subrogation, § 10; Jones on Liens, § 289; Evans & Hollinger v. C. & A. Ry. Co., 76 Mo. App. 475; 5 Am. & Eng. Ency. of Law, 414. The subsequent delivery of a portion of the goods on which the railroad company had a lien for freight did not discharge the lien for the entire freight on the portion not delivered, or even pro tanto. Moore on Carriers, pp. 441, 442. The lien remained, unless waived by the hereinafter noted attachment proceedings, to the full extent to which it was unpaid on the property delivered to the Bennett Bros. Lumber Company. The Lumber Company failed, and a receiver was appointed for it. The contract between it and Putnam, then partly executed, was canceled. The Bennett Bros. bought the lumber of Putnam and took a bond to indemnify them against the claim of the railroad company. The railroad company refused to permit the Bennett Bros. to take possession of or remove the lumber until its claims for freight, storage, switching, loading, and unloading were paid.

The railroad company, having commenced a suit in attachment in the state court to recover the amount of the freight advanced by it and still remaining unpaid, and having attached the lumber in question, it is urged that it waived its lien by pursuing a remedy inconsistent with its enforcement. The Bennett Bros. Lumber Company, in its application filed in this court on the 28th day of August, 1897, recites that "it is ready and willing, and now offers, to pay or cause to be paid all reasonable charges for storage upon said lumber from the 26th day of November, 1896, to the present time, but that it is unable to agree with said receiver as to the proper amount to be paid therefor." The railroad company claims a lien, not only on account of freight advanced to the shipowner, but for storage also, and the Bennett Bros. admit the existence of this last lien from the 26th day of November, 1896. The railroad company attached on account of only one of the liens. The other lien began to run prior to the date of the attachment. The lumber, when attached, was in possession of the railroad company, and so continued until surrendered to Bennett Bros. under an order of this court. There was never a time after the railroad company paid the lake freight that it did not assert a lien therefor. The sheriff had such possession only of the property as his writ of attachment gave. While the attachment suit was still pending, both parties herein invoked the jurisdiction of this court to determine their respective rights; the attachment suit being held in abeyance pending this present proceeding. It is urged that by attaching, the railroad company waived its lien.

The lien for storage was not only a different lien from that for the freight, but it was a superior lien. Moore on Carriers, p. 440; Powers & Co. v.

Six Tons of Marble, 21 La. Ann. 402. The affidavit in attachment did not allege that the railroad company has no lien, as was done in Wingard v. Banning, 39 Cal. 543; nor was the property disposed of under the attachment lien; nor did the railroad company, by virtue of its attachment, divest itself of the power of restoring the property to Putnam or his vendee. In fact, it has delivered the property to Putnam's vendee. It may fairly be said that, in so far as the sheriff held the property, he held it for the railroad company, which had a lien also for storage. The intention was manifest all the while on the part of the railroad company not to yield its lien or surrender the lumber until it was paid in full. A proceeding in attachment does not always waive a lien. Palmer v. Tucker, 45 Me. 316. Other cases are Whitaker v. Sumner, 20 Pick. 399; Townsend v. Newell, 14 Pick. 332; Roberts v. Wilcoxson & Rose, 36 Ark. 355; Calkins v. Lockwood, 17 Conn. 155, 42 Am. Dec. 729. The attachment proceeding was not an abandonment of the lien of the railroad company. (Then follows a discussion of charges for loading, unloading, and switching.)

An order may be drawn in accordance with the foregoing.

UNITY BANKING & SAVING CO. v. BOYDEN et al.

(Circuit Court of Appeals, Sixth Circuit. March 23, 1908.)

No. 1,750.

BANKRUPTCY—SECURITIES—CLAIM—SUBROGATION.

F., while a customer of the bankrupts, deposited with them 50 shares of C. manufacturing stock as a basis for credit, without signing the power of attorney for transfer, and also deposited certain railroad stock, on which he did sign a power for transfer. The bankrupts forged F.'s name to the power of transfer on the manufacturing stock, and pledged the same to a bank as security for a loan, and also pledged the railroad stock to another for more than its value. On the final closing of F.'s account with the bankrupts he was indebted to them in the sum of $930, which was more than covered by the railroad stock. *Held*, that the bank was at most only entitled to subrogation to the bankrupt's right to hold the manufacturing company's stock for F.'s indebtedness, and that such facts were insufficient to show that the bankrupts had any equitable right thereto.

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

Constant Southworth, for appellant.

Theo. Horstman, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On May 25, 1905, the firm of Holzman & Co., brokers, doing business in Cincinnati, made an assignment for the benefit of its creditors, and afterwards, on July 1, 1905, was adjudicated a bankrupt. On May 13, 1905, Richard Fritz, a customer of this firm, "placed in the hands of Ross Holzman, a member of the firm, a certificate, No. 10, for 50 shares of the preferred stock of the Carey Manufacturing Company, the certificate being in the name of Fritz Bros., and indorsed to Richard Fritz by Fritz Bros., per Otto Fritz." On May 15, 1905, this certificate was pledged by Holzman & Co. with the Unity Banking & Saving Company as a substituted security upon a note of March 21, 1905, for $10,000, executed by the firm to the bank, other security corresponding in value being withdrawn at

the time of the substitution. At the time this certificate was pledged by Ross Holzman there was pinned to it a power of attorney purporting to have been signed on May 3, 1905, by Richard Fritz in the presence of Ross Holzman. None of the blanks in the power of attorney are filled; the only writing being the date, the name "Richard Fritz" in the blank for the signature, and "Ross Holzman" in the blank for the attestation. Richard Fritz testified that he did not sign the power of attorney, or authorize any one to sign it for him. The questions referred to the referee were raised by the amended petition of Richard Fritz, the answer of the Unity Banking & Saving Company, the answer of Boyden, trustee of Holzman & Co., and the reply of Richard Fritz to the answers of the Unity Banking & Saving Company and Boyden, trustee. Richard Fritz claimed he was the owner of the 50 shares of the Carey Manufacturing Company preferred stock now in the hands of Boyden, trustee, and prayed for an order on the latter to deliver him a certificate free from all liens and interest therein of the Unity Banking & Saving Company. The banking company answered that on March 21, 1905, it loaned to Holzman & Co. $10,000, taking a demand note, and as security certain collateral; that on May 15, 1905, the banking company took from Holzman & Co., as a substitute for some of the collateral, the 50 shares of the Carey Manufacturing Company preferred stock, collateral substantially equal in amount being withdrawn. It did this without knowledge or notice of any claims of Richard Fritz thereto, relying on the representations of Holzman & Co. that it had full power to pledge the stock; that Richard Fritz executed the blank power of attorney authorizing the transfer of the Carey stock, or authorized Holzman & Co. to execute it in his name. Boyden, trustee, admits that the Unity Banking & Saving Company took as security for the $10,000 notes mentioned in the answer certain collateral, and denies that said collateral was taken as security for any indebtedness other than the said $10,000 note. Richard Fritz in his reply denies the allegations of the Unity Banking & Saving Company respecting the circumstances under which it came into possession of the certificate for 50 shares of the Carey Manufacturing Company preferred stock. He avers that at no time prior to the assignment of the bankrupt did it make any demand upon him to pay any indebtedness which he did not forthwith pay, and that the bank had no authority to hypothecate the 50 shares of the Carey stock. He says that at the time of the commencement of these proceedings in bankruptcy he was not indebted to Holzman & Co. in any sum. The case was referred to Charles T. Greve, who weighed the testimony carefully, and presented an elaborate opinion, in which he found that Mr. Fritz did not sign or authorize the signature to the power of attorney upon the authority of which the 50 shares of the Carey Manufacturing Company preferred stock was pledged by Holzman & Co. to the Unity Banking & Saving Company. In other words, the referee found that this power of attorney was a forgery. It was also found that the Carey stock was deposited with Holzman & Co. upon an express contract that it was simply to be held to show Fritz's responsibility, and not to pass out of Holzman & Co.'s possession, and that at no time was any demand made upon him or notice served upon

him changing the conditions of this contract; also, that at the conclusion of the dealings between Fritz and Holzman & Co. Fritz was a creditor of Holzman & Co., not a debtor.

As a conclusion of law from these conclusions of fact the referee found that:

"Where F. deposits with a broker a certificate of stock belonging to F. and in his name, without any indorsement or power to execute or transfer said stock, upon an agreement that said stock is to be held by said broker, as an evidence of F.'s financial responsibility only, and is not to leave the broker's possession, and the broker pledges said certificate to a bank as security upon a note of the broker for money loaned by the bank to the broker for general use of the broker, the bank holds said certificate subject to all the conditions of the original deposit by F. with the broker, and F. is not estopped to claim title to said certificate as against the bank by the mere placing of said certificate in the hands of the broker, or the further fact that in the course of dealings beween F. and the broker large balances have at various times been owed by F. to the broker when it appears that no demand for the payment of said balances was made upon F. or notice served upon him changing the conditions of the deposit of said stock, and, further, that at the conclusion of the dealings between F. and the broker F. is a creditor, and not a debtor, of said broker."

On consideration, the referee found that Fritz is the owner of the 50 shares of the Carey Manufacturing Company preferred stock, and the certificate therefor now in the hands of the trustee, and that he is entitled to the possession of the same free from all liens of the Unity Banking & Saving Company and Boyden, trustee in bankruptcy. The matter was carried before the court below, which found no errors in the rulings, findings, and orders of the referee, and the same were affirmed. It is quite unnecessary to go into a rediscussion of the questions of fact and law so ably handled by the referee.

On May 15, 1905, Holzman & Co., without authority, rehypothecated this stock certificate to the Unity Banking & Saving Company. On that date Holzman & Co. held not only that certificate, but another for 50 shares of C. N. & C. stock. Both certificates, we shall assume, constituted in equity a security for their entire claim against Fritz. Between that date and May 25, 1905, Fritz's liability to Holzman & Co. gradually decreased, and on May 25th, if a settlement had occurred, Fritz would have been entitled to receive back both of his stock certificates upon the payment of $920.02. That sum was the amount of the lien or equity of Holzman & Co. against the Fritz hypothecated securities. If on that date Fritz had brought this action against the Unity Banking & Saving Company to recover the certificate wrongly pledged to it, the utmost right of the Unity Banking & Saving Company would have been to hold that certificate by subrogation to the Unity Banking & Saving Company's equity for the balance then due to the Unity Banking & Saving Company; and this is the equity which counsel now say they are entitled to claim against Fritz. But against this claim to be subrogated to the equity of the Unity Banking & Saving Company, to the extent of $920.02, it is said that the Unity Banking & Saving Company had no equity, inasmuch as they had another certificate for 50 shares, and that, instead of owing them $920.02, they owed him the difference between $920.02 and the value of both

their certificates, and this is just what the account of Holzman & Co. shows to be the case on May 25th.

Now, upon what ground can it be contended that Holzman & Co. have an equitable claim which may be counted against the certificate for 50 shares of the preferred stock of the Carey Manufacturing Company? Obviously the Unity Banking & Saving Company have no better right than the trustee in bankruptcy could have against the owner of the certificates. The liability of Holzman & Co. to account to Fritz for both of these hypothecated certificates is clear. If, therefore, Holzman & Co. or their trustee in bankruptcy holds or should hold the certificate for 50 shares of C. N. & C. stock, they have no equity which would enable them to resist the claim of Fritz for the Carey certificate; and, if neither Holzman & Co. nor their trustee has any equity, it must follow that the appellant has none. But it appears that at some time before bankruptcy Holzman & Co. rehypothecated the C. N. & C. stock to one Driefus, and that certificate had been indorsed in blank by Fritz. Driefus advanced to Holzman & Co. a sum probably in excess of the value of these shares. Appellant now contends that, inasmuch as Fritz has a proceeding to recover from Driefus that certificate thus wrongfully transferred to him by Holzman & Co., if he shall succeed, he will remain indebted to Holzman & Co. in a sum stated as of $930. But, as matters stand, the bankrupt has appropriated to its own use this C. N. & C. stock, and is liable to Fritz for its return or value. Thus, whether we confine the accounting to May 25th, the date of the lowest amount of the indebtedness of Fritz to Holzman & Co., or to the final closing of the account, Fritz owes to the bankrupt something over $900. Against that the bankrupt must account for both of these certificates, or return them. The burden is upon the appellants to show that Holzman & Co. have an equitable interest in the shares which they hold to which they should be subrogated. It will not do to say that possibly Driefus may not be able to hold the shares wrongfully rehypothecated to him. That certificate has been, as we have said, indorsed in blank by Fritz. Holzman & Co. were apparently authorized to assign it. The burden was upon the appellants to show a right to subrogation to some equity which Holzman & Co. have. This they have not done.

Judgment affirmed.

COOK v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 3, 1908.)

No. 45.

1. BANKS AND BANKING—NATIONAL BANKS—AIDING MISAPPROPRIATION—EVIDENCE—ADMISSIBILITY.

In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank as collateral for a loan, defendant having used the certificate as collateral on a note he discounted, defended on the ground defendant did not know of the bank's interest in the certificate and was innocent of any purpose to aid and abet in abstracting it, the prosecution could show that the bank's minute book disclosed no record of the directors sanctioning the use of the certificate.

2. WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.
In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, defended on the ground that defendant did not know of the bank's interest in the certificate and was innocent of any criminal purpose, any error in admitting the bank's minute book on the prosecution's part to show that it disclosed no record of the directors sanctioning the use of the certificate, was harmless, where a witness, without any objection to the competency of the book, had testified to the substantive fact, which was admissible, that there was no such record in the book; the authenticity of the book not being questioned on writ of error, the effect of the testimony being wholly negative, and there being nothing to show that the directors had authorized the withdrawal by the cashier of the certificate, or had taken any action respecting it which was not recorded.

3. CRIMINAL LAW—TRIAL—INSTRUCTIONS.
A point presented by defendant in a federal prosecution, that the burden of proof was on the government, that defendant was entitled to the benefit of a reasonable doubt, and that when testimony contradictory or explanatory is introduced by defendant it becomes a part of the burden resting on the government to make the case so clear that there can be no reasonable doubt as to the inferences and presumptions claimed to flow from the evidence presented by the government, in effect called for instructions as to the burden of proof, and was properly answered by the court saying: "Understanding by this point it is meant that the burden of proving the guilt of the defendant rests upon the government, and that the proof must satisfy the jury of such guilt beyond any reasonable doubt that may arise upon all the evidence in the case, in order to warrant a conviction, the point is affirmed."

4. SAME—INTENT.
The following instruction, in a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, was unobjectionable, being but a broader statement of the principle that every man is presumed to know the natural and probable consequences of his own acts: "As I have said before, the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge; and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his act. I have said that is what is presumed in every case a man means."

5. SAME—WRIT OF ERROR—REVIEW.
Where, on writ of error in a criminal case, it appears that the punishment imposed was justified by one count, assignments of error affecting other counts will not be reviewed.

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

Defendant's ninth point, referred to in the opinion, was as follows:

"Ninth. The burden of proof is on the government, and the defendant is entitled to the benefit of a reasonable doubt; and, when testimony contradictory or explanatory is introduced by the defendant, it becomes a part of the burden resting upon the government to make the case so clear that there can be no reasonable doubt as to the inferences and presumptions claimed to flow from the evidence presented by the government."

The part of the charge complained of under defendant's fifteenth assignment of error is as follows:

"As I have said before, the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his act. I have said that is what is presumed in every case a man means."

A. M. Imbrie and Wm. W. Wishart, for plaintiff in error.

John W. Dunkle, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. The plaintiff in error, Lemert S. Cook, was convicted and sentenced in the court below of aiding and abetting the cashier of the Enterprise National Bank to misapply certain rights and credits of said bank. The first count charged aiding to abstract a certificate for 15 shares of Duquesne National Bank stock, which the Enterprise National Bank held as collateral for a loan. The remaining six charged aiding to abstract the bank's funds by the wrongful payment of checks of Cook on the Enterprise Bank. None of the assignments of error affect the two substantial facts underlying both charges, namely, that Cook had, in connection with Clark, the cashier, used such certificate, and had also obtained the funds of the bank by drawing, with Clark's consent, checks on his overdrawn account. These facts are not controverted. His defense was that these acts were innocently done by him and in ignorance of any criminal intent and conduct on the part of Clark. The certificate in question was given by Clark to Cook, and was used by the latter as collateral on a note he had discounted. When the bank failed, the defendant's checks held by the bank made Cook's account largely overdrawn. In the proofs submitted by the defendant he did not contend the certificate had not been wrongfully abstracted, but alleged he had received it from Clark, with whom he had business dealings, and used it in ignorance of the fact the bank held it, or that it was wrongfully taken therefrom.

The first assignment is to alleged error in the court's allowing Rinaker, the receiver of the bank, to testify that he had examined the minute book of the bank and had found no record of the directors' sanctioning the use of this certificate. It will be noted the objection went solely to the materiality of the fact, and not to the competency of the minute book to enable the witness to prove it. The court properly admitted proof of the fact, saying: "It is a link in the chain showing that this was misappropriated." No error was committed by the court in so holding. The proof, it is true, was merely negative; but, the burden being on the government to establish the defendant's guilt, we cannot say it had not a right to negative the contention that might have been made that the cashier used the bank's collateral with the consent of the board. It in no way prejudiced the case of the defendant. The defense he made was that he was ignorant of the bank's interest in the certificate, and innocent of any purpose to aid and abet in abstracting this property.

The tenth assignment is to alleged error in the admission of the minute book itself in evidence. In reference to this book the same witness (Rinaker) testified:

"That is one of the record books of the meetings of the board of directors of the Enterprise National Bank, as I found it there in the bank when I took possession."

The book was "objected to as incompetent and irrelevant; second, insufficiently proven; and, third, from the testimony already before the court, the books of the Enterprise National Bank are inaccurate." It will be noted that, as we have already seen, the witness Rinaker, without any objection to the competency of the book concerning which he spoke, had already testified to the substantive fact of there being no entry in the book, and the court was justified in treating the objection as referring to the relevancy of the book, which showed the fact to which Rinaker had already testified. Finding, then, as we do, that the testimony of the substantial fact was properly admitted, we think no error can be charged to the court in its general ruling disposing of all the objections. The exception taken may as well refer to the first objection, which was properly overruled.

As to the second, which is now challenged, we are satisfied that no injustice was done to the plaintiff in error in the premises. The authenticity of the book is not now questioned. In the shape the trial took, and the fact that the defense made was that the defendant did not know the bank had any connection with the certificate, the absence of entries in the book became a matter of inconsequence. Its effect was wholly negative. If there had been any entry in the book which affected the defendant, he would, of course, be entitled to have the entry authenticated; but here no entry, or the authenticity of it, was in question. The proof simply went to show that the minute book, which it is conceded to be, contained no entry, and neither in the defendant's proof in the court below nor in the review in this court has there been any suggestion that the board of directors had ever authorized the withdrawal by the cashier of this stock certificate, or taken any action in reference thereto which was not recorded. Indeed, their nonaction in this respect seems to have been so assumed at the trial that, although the directors were on the stand and testified that no board action was taken to discount the notes of the defendant, by the unwarranted discount and application of which to Cook's account Clark concealed Cook's overdrafts from the directors, neither side questioned them as to the board not having authorized the cashier to use this certificate. It will therefore be apparent that this assignment is of that immaterial character of proof which does not affect the substantial controversy on which the defendant's guilt rested, namely, whether Cook's use of this certificate was with guilty knowledge and intent. This assignment falls within the spirit of those wholesome holdings of the Supreme Court in Holmes v. Goldsmith, 147 U. S. 164, 13 Sup. Ct. 288, 37 L. Ed. 118, that:

"Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

The fourteenth assignment, which complains of the court's answer to the defendant's ninth point, is without merit. The point in effect called for instructions as to the burden of proof. This the court properly answered by saying:

"Understanding by this point it is meant that the burden of proving the guilt of the defendant rests upon the government, and that the proof must satisfy the jury of such guilt beyond any reasonable doubt that may arise upon all the evidence in the case, in order to warrant a conviction, the point is affirmed."

We are also of opinion that the portion of the charge made the subject of the fifteenth assignment was unobjectionable. It was but a broader restatement of what had previously been said, and to it there can be no objection:

"Every man is presumed to know the natural and probable consequences of his own acts."

This disposes of all the assignments affecting the first count, and, as that count justified, as we have seen in the case of Harvey v. United States (at this term) 159 Fed. 419, the sentence imposed, it is unnecessary to discuss the assignments which affect the other counts only.

The writ will therefore be dismissed, and the record remanded to the court below to enforce sentence.

TURNER, Tax Collector, v. JACKSON LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1908.)

No. 1,693.

1. COURTS—FEDERAL COURTS—JURISDICTIONAL FACTS—RECORD.

The facts on which the jurisdiction of the courts of the United States rest must appear in the record of all suits prosecuted before them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 816-818.]

2. SAME—AMOUNT IN CONTROVERSY.

Act Cong. Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], provides that the Circuit Courts shall have original cognizance of all suits of a civil nature where the matter in dispute exceeds the sum or value of $2,000, exclusive of interest and costs, and arising under the statutes or laws of the United States, or in which there shall be a controversy between citizens of different states, etc. *Held*, that the Circuit Court is without jurisdiction unless the matter in dispute, exclusive of interest and costs, exceeds the sum or value of $2,000, whether jurisdiction is based on diverse citizenship or a controversy arising under the Constitution or laws of the United States.

[Ed. Note.—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.]

3. SAME—NATURE OF ACTION.

Where suit was brought against a tax collector alone to enjoin the collection of certain taxes amounting to $1,724.24, on the ground that such taxes were illegal and in violation of complainant's constitutional rights, and an amended bill was filed after sale of the land for taxes, but while it was still subject to redemption for $1,857.51, alleging that such sale cast a cloud on complainant's title, the bill was not one to remove a cloud on title, but to enjoin the taxes, the amount of which, and not the

value of the land, constituted the amount in controversy; and, this being under $2,000, the suit was not within the jurisdiction of the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890–896.]

Appeal from the Circuit Court of the United States for the Northern District of Florida

S. K. Gillis (W. H. Ellis, on the brief), for appellant.
Wm. W. Flournoy, for appellee.

Before McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit by the Jackson Lumber Company, a corporation chartered under the laws of Alabama, against Charles F. Turner, tax collector for Walton county, Fla., "with his residence" in the state of Florida. The bill avers that the complainant returned its real estate for taxes for the year 1904, valuing it at $79,834; that the tax assessor unlawfully increased the value of the land by the sum of $37,238; that this increase in value is illegal, and was made without notice to the complainant. It is alleged that such increase of value and taxes is "contrary to the right of your complainant, and is in violation of both the Constitution and statutes of the United States and the state of Florida." The procedure was also alleged to be in violation of the due process clause of the Fourteenth amendment. The bill alleged a tender of $1,221.59 admitted to be due for taxes for the year 1904. This money was paid into court; but is was subsequently, by leave of the court, withdrawn by the complainant. It is further alleged that the defendant had advertised the land for sale on July 3, 1904, for the taxes, and that the sale would cast a cloud "upon the title of your complainant to said real estate, the value of which is more than $2,000." In the amended bill it is alleged that the land was sold pursuant to the advertisement. The amended bill alleges that the "said assessment and the sale made thereupon, although the same is void, will cast a cloud upon the title of your complainant to said real estate, the valuation of which is far more than $2,000." The prayer is that the assessment and sale may be declared void.

The defendant presented various defenses, one of which was that the Circuit Court did not have jurisdiction, because the case did not involve the sum or value of $2,000, exclusive of interest and costs.

The Circuit Court decided in favor of the complainant, and assumed jurisdiction in the case, holding that the Florida statute as to the assessment of taxes is violative of the federal Constitution, which guarantees due process. The court decreed the assessment void, and perpetually enjoined the collection of the taxes.

The defendant appealed to this court, and assigns the decree as error, for the reason that the Circuit Court was without jurisdiction.

The rule is without exception, and has been announced in cases too numerous for citation, that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them.

The relevant part of the statute relied on to confer jurisdiction on the Circuit Court in this case provides that the Circuit Courts "shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. * * *" Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). If we assume that the averments of the bill are sufficient to show that the complainant corporation is, for the purposes of jurisdiction, a citizen of Alabama, and that the defendant, Turner, is a citizen of Florida, the jurisdiction of the Circuit Court does not appear upon the record as founded on diverse citizenship, unless it is shown "that the matter in dispute exceeds, exclusive of interest and costs," the sum of $2,000. If we assume that the averments of the bill are sufficient to show a suit in equity "arising under the Constitution or laws of the United States," the rule is the same—that the Circuit Court is without jurisdiction unless the matter in dispute, exclusive of interest and costs, exceeds the sum or value of $2,000. Fishback v. W. U. T. Co., 161 U. S. 96, 99, 16 Sup. Ct. 506, 40 L. Ed. 630; U. S. v. Sayward, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508. It follows that the jurisdiction of the Circuit Court in this case, assuming that the averments as to jurisdiction in other respects are sufficient, is dependent on the question as to whether the matter in dispute involves the jurisdictional amount.

The contention of the complainant is that it is the value of the land, the possession and enjoyment of which is threatened and over which the alleged illegal claim extends, that determines the amount in controversy; and, as the bill avers that the land on which the taxes have been levied exceeds in value $2,000, it is contended that this sufficiently shows the jurisdiction of the Circuit Court. The defendant, on the contrary, contends that the question of jurisdiction is dependent on the amount of the taxes sought to be enjoined and claimed to be illegal.

The record shows that the entire amount of taxes levied is $1,774.24, and that the complainant admitted to be due and tendered $1,221.59. The amount of the taxes, therefore, claimed to be illegal and excessive, is $552.65. The record shows that there would have been no suit or controversy, except for the fact that the values of the lands as listed by the complainant were so increased as to enlarge the taxes by the sum of $552.65. The entire amount of the taxes, however, did not reach the jurisdictional amount. The purpose of the litigation is clearly to enjoin and prevent the collection of the taxes—taxes for a sum less than $2,000. It is true that the amended bill avers that the tax collector sold the lands on July 3, 1905, the day before the original bill was filed; but the record shows that they were bought at such sale by J. T. Manning, the agent of the complainant, and that the complainant, on July 14, 1905, applied in writing to the defendant, as tax collector, asking to have the certificate of sale "made out in the

name of Jackson Lumber Company." Even if the certificate had been issued to a purchaser who was a stranger to the complainant, it would have conveyed no title. The certificate issued under the statute is only evidence of the fact of purchase, and by its terms shows that the purchaser would be entitled to a conveyance of the land, should it not be redeemed in two years by the payment of the amount of taxes, with interest at the rate of 25 per cent. per annum. Acts Fla. 1895, p. 34, c. 4322, § 54.

On the day the bill was filed the total amount of the taxes and costs of advertising amounted to only $1,837.51. If it had been bought by a stranger, and not by complainant's agent, it could have been redeemed on the day the bill was filed by paying that sum, a redemption fee of 50 cents, and one day's interest. Acts Fla. 1895, p. 36, c. 4322, § 57.

The bill is filed only against the tax collector. No one is made a party as purchaser or holder of any adverse claim on the land. The bill cannot, therefore, be construed to be one to remove cloud and to cancel an adverse title. The only relief that could be granted under the bill is relief against the defendant tax collector. We therefore construe the bill to be one to enjoin and prevent the enforcement and collection of taxes on the land described.

It may be conceded, as contended by the learned solicitor for the complainant, that in a case to remove cloud from title the value of the land embraced by the suit would fix the jurisdictional amount, and such concession would not control the decision of this case. This, as we have said, is a bill against a tax collector to enjoin the collection or enforcement of a tax, and it appears from the record that the tax in question is less than $2,000. In such case it has been repeatedly held by the Supreme Court that the Circuit Court has no jurisdiction, because the amount of the tax, and not the value of the land, is the sum or value in controversy. Fishback v. W. U. T. Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; N. P. R. Co. v. Walker, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494; Walter v. N. E. R. Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451.

For want of jurisdiction in the Circuit Court the decree of that court is reversed, and the cause remanded, with instructions to dismiss the bill.

TURNER, Tax Collector, v. JACKSON LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1908.)

No. 1,694.

COURTS—FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where suit was brought against a tax collector to enjoin the collection of certain taxes, the amount of which was less than $2,000, the case was not within the jurisdiction of a federal court.

[Ed. Note.—Jurisdiction of Circuit Courts as dependent on the 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.]

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

S. K. Gillis (W. H. Ellis, on the brief), for appellant.
Wm. W. Flournoy, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit is between the same parties and is like the case just decided. 159 Fed. 923. It is a suit to enjoin the collection of the taxes for the year 1905 on the same land and upon the same grounds. The same defenses were interposed. The record shows that the amount of taxes sought to be enjoined and declared illegal is less than $2,000. The Circuit Court, as in the first case, decided in favor of the complainant, and against the tax collector, who appealed.

The decree of the Circuit Court is reversed for want of jurisdiction, and the cause remanded, with instructions to dismiss the bill.

HENDRICKS v. WEBSTER et al.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1908.)

No. 2,657.

1. BANKRUPTCY—APPEAL—PETITION FOR REVIEW—DISMISSAL.
Where on appeal from, and on petition for review of, a judgment determining priorities of liens upon land, the Circuit Court of Appeals is asked to consider evidence in the record, it will dismiss the petition for review, and hear the case upon the appeal.
[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. EVIDENCE—PAROL TESTIMONY AFFECTING MORTGAGE—ADMISSIBILITY.
In a proceeding to determine priority of rights under a mortgage to secure a specific loan, and stipulating that, on default, the mortgage might be foreclosed for the full amount, together with interest, etc., any other sums advanced, or expenses incurred on the mortgagors' account for whatsoever purpose, and that any advances so made should draw interest and be liens under the mortgage, oral testimony tending to show the intention of the parties as to what the mortgage should secure was incompetent, since the agreement was unambiguous, and since the execution of a written contract, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument. The language of a contract, when clear and explicit, must govern its interpretation, and when a contract is reduced to writing the intention of the parties must be ascertained from the writing alone, if possible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1748, 2129.]

3. CONTRACTS—CONSTRUCTION—SCOPE.
However broad may be the terms of a contract, it extends only to those things concerning which it appears the parties intended to contract.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 730.]

4. MORTGAGES—CONSTRUCTION—SCOPE OF SECURITY.
A mortgage covering a homestead to secure a specific loan, and stipulating that, on default, the mortgage might be foreclosed for the full amount,

together with interest, etc., any other sums advanced or expenses incurred on the mortgagor's account for whatsoever purpose, and that any advances so made should draw interest and be liens under the mortgage, does not secure the payment of future advances, excepting those made to protect the security of the mortgage and expenses necessarily resulting from foreclosure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 230–232.]

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

B. N. Hendricks (W. L. Converse and D. L. Grannis, on the brief), for appellant.

John McCook, for C. F. Webster.

Joseph Griffin and W. L. Barker, for Chris. Hansen.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. In a proceeding had in the court below for the purpose of determining the priority of certain liens upon land belonging to the estate of Chris. Hansen, a bankrupt, the District Court on May 22, 1907, ordered, adjudged, and decreed:

"That the mortgage made by the bankrupt and his wife to James Hendricks January 31, 1898, on the S. ½ of the S. W. ¼ of section No. 22, township No. 99 N., range No. 14 W., does not by its terms secure any loans that may have been made by the mortgagee to the bankrupt, since the making of said mortgage; that said mortgage secured only the note of $1,500 therein described, the interest thereon and such sums as Mr. Hendricks may have paid as taxes upon said land, for insurance, to keep buildings in good state of preservation, or to otherwise preserve and protect said mortgage lien, and any costs, or expenses of foreclosure."

James Hendricks appealed from said decree to this court, and also filed an original petition asking for a review of the same. As we are asked to consider evidence in the record, we dismiss the petition for review, and will hear the case upon the appeal. The clause in the mortgage referred to in the decree appealed from which it is claimed by Hendricks created a lien for future advances is as follows:

"It is further agreed that if the party of the first part shall fail to pay any installment of interest within thirty days, after due, or permit said lands to be sold for taxes to any person, or fail to perform any of the covenants in the note or in this instrument, or do, or fail to do, anything whereby the security of this loan of money may be lessened, then the whole amount of the debt hereby secured shall become due and collectible at once, at the option of the holder without notice, and this mortgage or trust deed may be foreclosed for the full amount, together with interest, costs, taxes, insurance, reasonable attorney's fee for plaintiff's attorney, to be assessed by the court, and any other sums advanced or expenses incurred on account of the party of the first part for whatsoever purpose paid, and any advances so made shall draw interest at 7 per cent. per annum, and be liens under this mortgage."

Prior to the hearing in the District Court evidence was taken in the proceeding by a referee. Before the referee B. N. Hendricks, son of James Hendricks, who negotiated the loan and made out the mortgage, and his partner, C. C. Arnold, were permitted to testify that Chris. Hansen and Alice Hansen, his wife, at the time of the execution and delivery of the mortgage, made declarations tending to show that

the mortgagors understood the mortgage as providing for future advances, B. N. Hendricks testified that he so understood it. Chris. Hansen and Alice Hansen both denied that they ever so understood the mortgage, or that they had ever made declarations to that effect.

It was conceded that the west half of the land described in the mortgage was the homestead of the Hansens. The District Court, therefore, did not pass upon the above testimony for the reason that an oral agreement could not under section 2974, Code Iowa 1897, create a lien upon the homestead; and, as the amount due on the mortgage would, regardless of future advances, exhaust the east half of the land, it became immaterial as to whether an oral agreement was made or not. We think this view involves a misconception of the object of the evidence. The evidence was not introduced to prove an independent oral agreement that the mortgage should cover future advances, if such an agreement could be made, but to prove that it was the intention of the parties that the mortgage in question should cover future advances made for other purposes than the protection of the mortgage lien, and thus enable the court in carrying out such intention to construe the mortgage as creating a lien for advances made for such purposes.

We are of the opinion, however, that the evidence introduced for the purpose of showing the intention of the parties as to what the mortgage should secure was clearly incompetent, for the reason that the parties had reduced their contract to writing, and in unambiguous terms expressed their intention therein. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument. The language of a contract, when clear and explicit, must govern its interpretation, and, when a contract is reduced to writing, the intention of the parties must be ascertained from the writing alone, if possible. These are elementary principles, and their wisdom is well illustrated in the present case, wherein the parties to the contract testify in direct opposition as to their intention in executing the mortgage.

The intention of the parties to the mortgage must be ascertained from the mortgage alone, and we agree with the trial court that it does not by its terms secure the payment of future advances, except those made to protect the security of the mortgage. However broad may be the terms of a contract, it extends only to those things concerning which it appears the parties intended to contract. The transaction involved in the mortgage between Hendricks and the Hansens was the loan of $1,500 by Hendricks to the Hansens, payable in 10 years with interest at 7 per cent. per annum. The object of the mortgage was to secure the payment of the same, and the mortgage ought to be construed with these two incidents in view—the loan and the security for its payment. When viewed in this light, we think the natural and reasonable view which presents itself when an unprejudiced mind considers the words, "and any other sums advanced or expenses incurred on account of the party of the first part for whatsoever purpose paid," when taken in connection with the place where they are found, is that no other advances were intended to be made or secured than

those which should be necessary in order to protect the security and such expenses as would necessarily result from a foreclosure.

The cases cited by counsel wherein other contracts have been construed have been considered. None of them are parallel cases, and we are left to construe the contract here presented, aided by fundamental principles which we believe have guided us to a correct result. The portion of the decree below appealed from should be affirmed; and it is so ordered.

MAYDWELL v. ROGERS LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1908.)

No. 1,498.

1. SALES—CONTRACT—CONSTRUCTION—CERTAINTY—"ANOTHER CARGO."
Plaintiff, having sold to defendant a cargo of ties, by certain telegrams offered to sell defendant "another cargo" on certain terms, which offer defendant accepted. *Held*, that the contract was not objectionable for failure to fix the amount of ties to be furnished; the words "another cargo" being construed to mean another cargo of the same quantity as the former one.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 189–196.]

2. EVIDENCE—PAROL EVIDENCE—PLEADING.
Where plaintiff sued for breach of a contract for the sale of "another cargo" of ties, plaintiff was entitled to introduce parol evidence, without further proof of the quantity of ties contained in the preceding cargo.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2083.]

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

McBurney & Cummings and D. V. Halverstadt, for plaintiff in error.
Corwin S. Shank and Winfield R. Smith, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This appeal presents only the question of the sufficiency of the second amended complaint, a demurrer to which was sustained by the court below. The action was for damages for the alleged breach of a contract growing out of the five telegrams set out in the complaint, and reading as follows:

"San Francisco, Cal., Jan. 5, 1906.

"Mr. W. M. Rogers, Anacortes, Washington.

"Will you accept another cargo ties March April shipment want five days option. C. A. Maydwell."

"Anacortes, Wash. Jan. 5, 1906.

"C. A. Maydwell, 519 Mission Street, San Francisco, Cal.

"11:42 A. M. Yes at nine dollars net. W. M. Rogers."

"San Francisco, Cal., Jan. 8, 1906.

"W. M. Rogers, Anacortes, Washington.

"Offer nine dollars net thirty days will arrange with bank.
"C. A. Maydwell."

"10:55 Anacortes, Washington, January 9, 1906.

"C. A. Maydwell, 519 Mission Street, San Francisco, Cal.

"Our price nine dollars net cash same terms as present order and on six by eight ties.

W. M. Rogers."

"San Francisco, Cal. Jan. 9, '06.

"W. M. Rogers, Anacortes, Washington.

"Accept one cargo your price and terms. Telegram ninth.

"C. A. Maydwell."

These telegrams and the third and fourth paragraphs of the complaint present the whole case. Those paragraphs are as follows:

"That on or about the 9th day of January, A. D. 1906, the plaintiff and the defendant, by its duly authorized agent, W. M. Rogers, entered into a written agreement whereby the plaintiff agreed to purchase of the defendant and the defendant agreed to sell to the plaintiff and to deliver to him, during the months of March and April, 1906, at Anacortes, Washington, one ship's cargo of railroad ties for the agreed price of nine (9) dollars per thousand feet; a copy of which said written agreement, consisting of copies of certain telegrams marked 'Plaintiff's Exhibits A, B, C, D, and E,' is hereto attached and filed herewith.

"That it was mutually understood and agreed, by and between the parties to said written agreement, that the said cargo should contain one million (1,000,000) feet of timber board measure. That the total agreed purchase price was nine thousand (9,000) dollars for said cargo."

The objection made to the pleading is that the telegrams do not constitute a valid contract, in that they do not fix the amount of ties to be furnished. We think the contention unsound. The telegrams show that the plaintiff had already ordered of the defendant one cargo of ties, and that an order was then given by the plaintiff and accepted by the defendant for "another cargo" at $9 net cash, the same terms as the previous order, and on 6x8 ties. The true meaning of "another cargo" in these telegrams is, in our opinion, another cargo of the same quantity. Without any other or further allegation in respect to the contract, we therefore think the plaintiff would be entitled to clear the ambiguity by making oral proof of the quantity of ties contained in the preceding cargo. Lindblom v. Fallett, 145 Fed. 805, 76 C. C. A. 369; North American Transportation & Trading Co. v. Samuels, 146 Fed. 55, 76 C. C. A. 506. See, also, Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Iowa Life Insurance Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204.

The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer, with leave to the defendant to answer.

UNITED STATES v. COLLETT.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1908.)

No. 2,610.

1. PUBLIC LANDS—PATENTS—FRAUD—EQUITY JURISDICTION.
The public land belongs to the government, and it may impose such conditions upon its alienation as to it seems best; and when, through fraudulent representations or practices, a patent has been wrongfully secured equity, as long as the title remains in the patentee at least, affords ample redress.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 332.]

2. SAME—CANCELLATION OF PATENT—EVIDENCE—SUFFICIENCY.
Under the principles that the law deals tenderly with one who in good faith goes upon public lands to make his home thereon, and that proof to set aside a written instrument for fraud must be clear, unequivocal, and convincing, equity will refuse to cancel a homestead patent on the ground of fraud where the patentee was a cripple; had an invalid wife and one child; went upon land shortly after making entry; built a house and barn; cleared land for a garden, and planted a small orchard; undertook to organize a homestead; his wife's illness and his father's illness and death required his occasional absence; the infertility of the soil required him to work elsewhere part of the time to raise money for necessary expenses; after a severe drought he remained away for a year with the local land officer's consent, hauling freight and doing any other work he could secure to provide a living; when away from home he had others care for his stock and household goods which he left there; he never left home with intent to abandon his entry; though witnesses for the government stated that they had not seen him on his place at certain times; that they did not know of his cultivating the homestead; that he lived at other places during part of the five years' period during which the statute required his residence on the land, and though some of the witnesses gave opinions that he had not resided on and cultivated the homestead for such period.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands. § 332.]

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

Edwin W. Sims, U. S. Atty., and Wm. G. Whipple, for appellant.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill in equity brought by the United States to cancel a patent issued to Collett, the defendant, for a quarter section of land in Arkansas. It appears that Collett entered the quarter section as a homestead on October 8, 1897, made final proof of residence and cultivation in March, 1904, and obtained his patent in November, 1904. It is claimed by the government that Collett practiced such a fraud as requires the cancellation of his patent.

The testimony on Collett's part, given by two witnesses, tends strongly to show the following facts: That he was a cripple and had for his family an invalid wife and one child. That he went upon the land in the spring of 1898 soon after making his entry, and commenced making a home for himself and family. That he built a house and barn, cleared

land enough to make a garden, brought to the place a meager outfit of household goods with some live stock, and undertook to organize a humble home there. His wife's illness required much of his time and attention as well as that of a physician who resided at a distance. This, with the dangerous sickness and death of his father, who resided in Missouri, required his occasional departure from home. The small patch of land which he had cleared and the unfertility of its soil imperatively required him to get work elsewhere a part of the time to raise money for his immediate and necessary expenses. A severe drought and the consequent failure of crops in his region drove him from home in the fall of 1900. At that time he left the place with the consent of the local land officer, and remained away with that consent for the period of a year. During this time he hauled freight and did any other kind of work he could secure to make a living for himself and family; and during the full period of five years following the date of his entry he was compelled by his necessities just recited to be frequently away from home. When absent he got his neighbor and brother-in-law to care for his stock and household effects which he left there. Besides building his house and barn, and clearing some of his land for cultivation, he planted a small orchard of apple, peach, pear, plum, and cherry trees. He never left his home for any purpose with the intention of abandoning his entry.

The government called three or four witnesses who testified mainly in a negative way that they had not seen Collett on his place at certain times or in certain years; that they did not know of his cultivating his homestead, and that he lived at other places during part of the five years, and some of them announced their opinions that he had not resided on or cultivated his homestead for the period of five years. On this evidence the learned trial judge found against the contention of the government.

The statute requires residence and cultivation in good faith for a period of five years by an entryman to entitle him to a patent of a homestead. The public land belongs to the government, and it may impose such conditions upon its alienation as to it seems best; and when, through fraudulent representations or practices, a patent has been wrongfully secured from the government equity, as long as the title remains in the patentee at least, affords ample redress. United States v. Bell Telephone Co., 167 U. S. 224, 238, 17 Sup. Ct. 809, 42 L. Ed. 144.

We think the recognition of one or two cardinal principles will satisfactorily show that this case does not warrant the drastic remedy invoked. "The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon." Ard v. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524; Northern Pacific Railroad v. Amacker, 175 U. S. 564, 567, 20 Sup. Ct. 236, 237, 44 L. Ed. 274. "The evidence adduced to set aside a written instrument for fraud must be clear, unequivocal, and convincing." Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. Ed. 112; Mastin v. Noble (C. C. A.) 157 Fed. 506, and cases cited. The learned trial judge found against the government on the issue here presented, and we entirely approve of that action. No fraud is disclosed by any clear,

unequivocal, or convincing proof. A most pathetic, simple, and persistent effort to secure a home under discouraging and distressing circumstances is all that this record clearly discloses. The liberal policy of the law towards honest homestead settlers dictates an affirmance of the decree below, and it is so ordered.

NATIONAL ELECTRIC CO. et al. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. February 4, 1908.)

No. 1,380.

PATENTS—INVENTION—ARMATURE CORES.

The Reist patent, No. 508,637, for an armature core, is void for lack of invention.

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

For opinion below, see 145 Fed. 193.

Charles A. Brown, for appellants.

W. K. Richardson, for appellee.

Before BAKER and KOHLSAAT, Circuit Judges, and ANDERSON, District Judge.

PER CURIAM. The decree that is appealed from adjudged that claims 2, 4, and 6 of patent No. 508,637, issued on November 14, 1893, to Reist, for improvement of means for ventilating armature cores, were valid and infringed. An exposition of these claims and of the prior art is found in Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 C. C. A. 229, wherein the Court of Appeals for the Sixth Circuit declared the patent void for want of invention. Complainant is entitled to our independent judgment, based on a study of the record now before us. That judgment, founded on a consideration of the same prior art that was shown in the Bullock Case, is that the claims in suit are void for want of invention. We have considered the rebuttal testimony which, it is claimed, was not included in the Bullock record. Even if appellee's commercial success with a ventilated armature core was due to Reist's teachings, rather than to the skill of appellee's mechanics in working out indispensable features that were not disclosed by Reist, that fact "would only be influential in resolving a doubt—it would not also serve to inject a doubt into an otherwise clear case."

The decree is reversed, with the direction to dismiss the bill for want of equity.

COMMERCIAL ACETYLENE CO. v. AVERY PORTABLE LIGHTING CO.

(Circuit Court of Appeals, Seventh Circuit. February 5, 1908.)

No. 1,364

INJUNCTION—SUBJECTS OF INJUNCTION—ENJOINING MULTIPLICITY OF SUITS FOR INFRINGEMENT OF PATENT.

Where the owner of a patent has brought suit against a rival manufacturer to enjoin infringement, and to recover profits and damages on account of the manufacture and sale of an alleged infringing device, in which suit both the validity of the patent and infringement are put in issue, the court has power on a proper showing to enjoin the complainant from instituting a multiplicity of suits in different parts of the country against customers of the defendant, who are charged with infringement solely by reason of the sale or use of the defendant's device, until the issues are determined in the principal suit before it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 31.]

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

For opinion below, see 152 Fed. 642.

George H. Mitchell, for appellant.

Walter H. Chamberlin, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

PER CURIAM. This appeal is from an order of the Circuit Court enjoining the appellant, as complainant below, "from bringing any further suits, either in law or in equity, against the purchasers or users of the defendant's tanks, for infringement of complainant's patents," pendente lite. The order was granted upon petition of the appellee, as defendant in a bill filed by such complainant in the court below, charging the defendant with manufacturing and selling apparatus which infringed letters patent owned by the complainant; and the opinion filed by Judge Quarles thereupon, with statement of the circumstances involved, is reported in 152 Fed. 642, 644. Reference to such report is deemed sufficient for an understanding of all questions presented for review, and we are content to rest affirmance of the order upon that opinion, with remark upon the case of Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065 (decided since the hearing below), as plainly upholding jurisdiction in equity for like relief, in favor of the manufacturer, primarily sued for infringement, to prevent complication and injury in further suits against purchasers from him of the alleged infringing article. Whether the injunction should issue depends upon the equities presented, and the above-cited case exemplifies and confirms the view that sufficient cause appeared for the present order.

The order of the Circuit Court, accordingly, is affirmed.

WESTINGHOUSE et al. v. HIEN et al.

(Circuit Court of Appeals, Seventh Circuit. October 31, 1907. Rehearing Denied January 14, 1907.)

No. 1,370.

PATENTS—PROCEEDINGS TO OBTAIN PATENT—EFFECT OF DECISION IN INTERFERENCE PROCEEDING.

Under the rules and practice of the Patent Office the decision of the examiner of interferences on a declared interference determines only the question of priority of invention in time as between the parties, and the party against whom the decision is rendered may still contend that there is no interference in fact or that the successful party is not entitled to the claims made, and he is not concluded upon the question of his right to a patent until the expiration of the time allowed him by statute for an appeal from the final order rejecting his application.

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

This is an appeal from a decree of the Circuit Court dismissing on demurrer appellants' bill as amended, because, as the Circuit Court held, it was brought prematurely. The question relates entirely to the Patent Office practice as to appeals in interference cases. The action was brought to rescind a contract for the sale of rights claimed under applications for patents for inventions in friction draft and buffing apparatus.

The bill was filed February 1, 1906, and prays for a decree for the cancellation of three contracts by which the appellee, Phillip Hien, granted to the appellants the exclusive right to manufacture, use, and sell apparatus under certain inventions supposed to have been made by him, for an injunction against a suit at law on the contracts, and an accounting for moneys paid thereunder.

The bill, as amended, after averring the citizenship and residence of the parties, alleges that on or about November 24, 1902, appellant George Westinghouse was the owner and patentee of certain specified United States letters patent (12 in number) relating to improvements in friction draft and buffing apparatus; that appellant, the Westinghouse Air Brake Company, as licensee, was then and for many years had been manufacturing and selling apparatus embodying said improvements, and that this was a large and valuable part of its business.

The following facts appear from the amended bill: On or about said day, November 24, 1902, appellees Hien and Chamberlin represented to appellants that Hien was the inventor and owner of certain inventions for which applications for United States letters patent were then pending, viz., No. 116,187, for a friction spring; No. 117,244, for draft gear and buffing apparatus; and No. 121,756, for friction spring; and of a Canadian patent for improvements in friction spring. Messrs. Hien and Chamberlin further represented that the invention set forth in application No. 116,187 was a broad and generic invention, and that the inventions set forth in applications Nos. 117,244 and 121,756 were specific and detailed features of improvements of the said generic invention under and subordinate to said application No. 116,187; that the said generic invention set forth in said application No. 116,187 was a wide departure from anything theretofore known in the art to which it related, and by reason of its effectiveness and cheapness of construction would work a revolution in said art, and would be of great practical commercial value and importance. Messrs. Hien and Chamberlin stated also that an interference had been declared by the Patent Office between Hien's application No. 116,187 and that of one Shepard, No. 90,831, involving claims 1. 3, 4, and 13 of Hien, and was then pending, but that they, the said Hien and Chamberlin, had carefully investigated the patentable subject-matters involved in said interference; that the said subject-matters were in fact separate and distinct, and that no interference in fact existed.

After making the aforesaid representations and statements, Hien and Chamberlin solicited the appellants to enter into a contract with Hien for the exclusive right to manufacture, sell, and use devices made in accordance with the inventions set forth in said applications and Canadian patent, upon a royalty; and the appellants believing that said representations and statements were true, and that said Hien was in fact the true, original, and first inventor and owner of the inventions, and relying upon said statements and representations, consented to and did, on or about said November 24, 1902, enter into a contract with the said Hien. It is not necessary to state the terms of the contract with particularity, but it gives and grants to Westinghouse the exclusive right to make, sell, and use the invention, and Westinghouse agrees to pay a certain royalty on all friction draft and buffing apparatus made and sold by him, whether under the invention assigned by the contract or otherwise. A large sum was paid under the contract, but on July 1, 1905, further payment was refused, on the ground that the contract conveyed nothing, and was made by mistake of fact.

The bill further alleges that, according to the practice of the United States Patent Office, no interference is declared until the Office has determined that the subject-matter in interference is patentable; and that by virtue of said practice, when said appellees Hien and Chamberlin informed appellants that said interference with said Shepard was pending, appellants understood and believed, and were warranted in understanding and believing, that both applications disclosed patentable subject-matter.

It is also alleged that both appellants and appellees Phillip Hien and Walter H. Chamberlin were mistaken as to the fact of said patentable subject-matters being separate and distinct subject-matters; that upon the hearing of said interference in the Patent Office it was contended on the part of Shepard that the said patentable subject-matters were in fact one and the same, and that an interference in fact existed, and that Shepard was the first and original inventor of the said patentable subject-matters; that, upon the part of Hien, it was contended that the said patentable subject-matters were in fact separate and distinct, and that no interference in fact existed; that said contentions were fully argued before and considered by the Primary Examiner in said Patent Office and also before the Commissioner of Patents in person on appeal; and the Commissioner of Patents decided that the said patentable subject-matters in interference were in fact one and the same; that an interference in fact existed, and that Shepard was in fact the first and original inventor of said patentable subject-matter, and was entitled to letters patent of the United States therefor; that said determination was and is the final determination of said Patent Office in said interference proceedings; that no appeal therefrom to the Court of Appeals in and for the District of Columbia was had or taken; or any other proceedings in said Court of Appeals to review, modify, or set aside said final determination; and that afterwards, and in consequence of the said final determination of said Patent Office, letters patent of the United States, No. 769,841, dated September 13, 1904, were granted to the said Louis A. Shepard, as assignor to Cornelius Vanderbilt, said letters patent containing claims for the subject-matter in issue in the said interference between the said application of the said Shepard, and the said application serial No. 116,187 of the appellee Hien, and that on or about the 2d day of October, 1905, the said United States Patent Office, acting by its Primary Examiner, formally and finally rejected the said claims, 1, 3, 4, and 13 (the claims involved in said interference) of the said application No. 116,187 of appellee Hien, pursuant to rule 132 of the Patent Office, and refused to grant and issue to the said defendant Phillip Hien letters patent of the United States upon said four claims.

The applications of Shepard and Hien each contained a number of claims, and four of the claims in each disclose a broad, generic invention of draft gear and buffing apparatus. The four Hien claims, when compared with the four Shepard claims, appear to be identical in substance, and show an almost complete identity of language; but the devices accompanying the applications are quite different, although apparently operating along the same lines. The representations made by Hien and Chamberlin to Westinghouse that the patentable subject-matters of the two applications were in fact separate and

distinct, appear to have been based on the difference of construction shown by the drawings. The eight claims in question follow:

Alleged Hien claims 1, 3, 4, and 13 are:

"1. A device of the character described comprising a series of resilient elements having inclined frictional surfaces adapted when said series of elements are subjected to compression to be relatively moved thereby placing said resilient elements under tension."

"3. A device of the character described comprising a series of resilient rings having inclined frictional surfaces adapted when said series of rings are compressed to be relatively moved thereby placing said rings under tension.

"4. A device of the character described comprising an expansible resilient ring and a compressible resilient ring, said rings having complemental inclined engaging frictional surfaces."

"13. In an apparatus of the character described, an open spring ring having an inclined frictional surface adapted to be engaged by a similarly inclined surface to impart tension to the ring."

The alleged corresponding claims in Shepard's patent are:

"14. A device of the character described comprising a series of resilient elements having inclined frictional surfaces, adapted when said series of elements are compressed to be relatively moved, thereby placing said elements under tension."

"13. A device of the character described comprising a series of resilient elements having inclined frictional surfaces, the surfaces on adjacent elements adapted when said series of elements are subjected to compression to be relatively moved through engagement with each other, thereby placing said resilient elements under tension."

"15. A device of the character described comprising an expansible resilient element and a compressible resilient element, said elements having complemental inclined engaging frictional surfaces.

"16. In an apparatus of the character described, an open spring element having an inclined frictional surface adapted to be engaged by a similarly inclined surface to impart tension to the element."

Payments under the contract, and expenses in the Patent Office and in the applications for patents, all paid by Westinghouse and the Westinghouse Air Brake Company, amount on the whole to $44,700. Such payments covered the amounts stipulated in the contract up to July 1, 1905, when the appellants refused to make further payments. Hien then brought an action of covenant to recover royalties under the contract for July, August, and September, 1905, and this bill was brought in February, 1906, to stay the action of covenant, to rescind the contract of sale, and for an accounting and repayment of all sums paid under the contract.

A demurrer to the bill was interposed, the third ground of which is that the suit cannot be maintained until there has been a final adjudication upon the application and claims of the appellee Hien. The Circuit Court sustained this ground of demurrer, and a decree followed dismissing the bill. This appeal is taken from such decree.

Charles P. Abbey, for appellants.

D. S. Wegg and Walter H. Chamberlin, for appellees.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The question whether appellants are entitled to relief in any court was fully argued on the hearing, but at this stage the only question necessary to be considered is whether the Circuit Court was right in dismissing the bill as prematurely brought. This depends on the statutes relating to the issue of patents, and the rules and practice

of the Patent Office. When an application for a patent is filed, an officer known as the "Primary Examiner" decides whether the application on its face shows a patentable invention. Rules 95, 96. No appeal lies from his decision. Rule 124. Patentability being affirmed, it may occur that the application discloses the same invention as another application on file or as a patent already issued. If so, an "interference" exists, and the patent officers are then required, according to the practice and rules of the office, to set on foot an interference proceeding, in order to determine which of the hostile claimants first discovered the invention. This proceeding is carried on before the Examiner of Interferences, and is a proceeding inter partes, and results either in a decision awarding priority to one, and denying it to the other, or for some particular reason denying priority to either.

This question of priority of invention, meaning priority in time, has become the important and almost the sole question for consideration in the interference proceeding. Other questions may arise in the Patent Office, such as whether one or both parties has the right to make claim, whether he has really disclosed in his drawings the invention claimed, whether he is the real inventor, whether he is guilty of laches or estopped to claim priority, whether his device is operative, whether both claim the same invention so as to actually show interference. By the course of practice in the Patent Office, however, the interference proceeding is confined to the question of priority in time, other questions being raised by motion before the Primary Examiner. The Examiner of Interferences may also call the attention of the Commissioner to facts showing that no interference exists, or that the declaration of interference was irregular, and the Commissioner may then suspend the interference proceedings, and remand the case to the Primary Examiner for consideration of the questions so raised. Rule 126. It may also appear in the interference proceedings that while both applications disclose patentability and interference, and one is clearly prior in time, yet that neither party is entitled to a judgment of priority against the other, because it would operate inequitably against the other. This happened in Bechman v. Wood, 15 App. D. C. 484, hereafter commented on, where Wood first discovered a broad invention, but made only a narrow claim, and the junior applicant, Bechman, claimed a specific device in the same field, and also claimed the broad invention. Wood was adjudged not entitled to the broad claim because this would defeat Bechman's specific apparatus, and Bechman was not entitled to it because he was not the first inventor. But in the ordinary case an award of priority follows as a matter of course.

While the question whether the interference was properly declared, or any interference in fact exists, cannot be directly raised in the interference proceeding, it may be by a motion to dissolve the interference. It is the practice to present to the Examiner of Interferences a motion to transmit the motion to dissolve to the Primary Examiner, together with the motion to dissolve. If the latter motion is in proper form he transmits it to the Primary Examiner, and he may at the same time proceed with the interference. Rule 123. When the Primary Examiner has decided the motion, an appeal may be taken to the Commissioner, but no further appeal is permitted, the motion being regard-

ed as an interlocutory proceeding. U. S. ex rel. Lowry v. Allen, 203 U. S. 476, 27 Sup. Ct. 141, 51 L. Ed. 281. If the motion to dissolve is denied, the Examiner of Interferences, in the usual case, renders judgment awarding priority of invention to one of the contestants, and also fixes the limit of appeal from such judgment. If no appeal be taken letters patent are issued to the successful party, and the Primary Examiner notifies the other party that his claims stand finally rejected. Section 4904, Rev. St. (U. S. Comp. St. 1901, p. 3389). Rule 132. If the defeated party desires to appeal he may do so within the time limited. The appeal first goes to the examiners in chief (section 4909 [U. S. Comp. St. 1901, p. 3390]), then to the Commissioner in person (section 4910 [U. S. Comp. St. 1901, p. 3391]), and from his decision to the Court of Appeals of the District of Columbia (Act Feb. 9, 1893, c. 74 (27 Stat. 436, § 9 [U. S. Comp. St. 1901, p. 3391]). No such appeal was taken in this case; and the chief question is whether such an appeal would have reached the issue of interference in fact, raised by the motion to dissolve. Appellants contend that this appeal reaches this and all other fundamental questions, like that of the right to make claim; while appellees assert that they come within the first provision of section 4909, allowing every applicant for a patent whose claims have been twice rejected to prosecute ex parte appeals to the Examiners in Chief, the Commissioner and the Court of Appeals.

Before examining this question it should be stated that the practice in the Hien-Shepard Case was substantially as indicated in stating the Patent Office practice. Interference was declared, Hien moved to dissolve it, was beaten, appealed to the Commissioner, was again unsuccessful, and priority was awarded to Shepard, he having filed a long time before Hien. A patent was issued to Shepard September 13, 1904, and the Primary Examiner formally rejected Hien's claims October 2, 1905. The time limited for the appeal is fixed by section 4896 (U. S. Comp. St. 1901, p. 3384) at one year, so that, on February 1, 1906, when this bill was filed, Hien's right to appeal, as he claims, had not expired. On this ground the Circuit Court dismissed the bill, as prematurely brought, since it might happen that Hien would obtain a patent after all.

We now come to the important question of the case. Was the decision of the Examiner of Interferences, awarding priority to Shepard, a final judgment which, not appealed from, settled all questions in Shepard's favor, so as to finally destroy the possibility of Westinghouse obtaining the inventions assigned to him by the contract? Or, might Hien, at any time within a year after the final rejection of his claims, appeal or take further proceedings, and show, if he could, that Shepard had no right to make his claim, or that his four claims, read on the Shepard device were substantially different when read on his own, and thus obtain a patent on the four claims? As a theoretical problem, or a question of first impression, it would appear to be clear that the interference proceeding logically involves the fundamental question whether there is, in fact, any interference, whether one or both claims be patentable, and whether either party has the right to make the claim. A judgment of priority would seem to have no force if the rival claims do not conflict, or if the junior claim be not patentable, or either

party be not the real inventor. Likewise, it would seem that an appeal from the judgment of priority should raise these fundamental questions, and the result on appeal dispose of the whole case, and all these questions. But such has not been the rule of the Patent Office, nor of the Court of Appeals.

By the rule actually in force in the Patent Office the term "priority of invention" is used in the narrow sense of first in time, and not as involving interference in fact or the right to make claim. And this limited meaning is also given it by Mr. Justice McKenna in U. S. ex rel. Lowry v. Allen, 203 U. S. 476, 27 Sup. Ct. 141, 51 L. Ed. 281. This use of the term seems to have resulted from the practice of trying the questions of interference in fact and right to claim by motion before the Primary Examiner, and thus treating these as interlocutory questions. Since priority means only first in time, a judgment awarding priority is deemed to establish only that the successful party was the first inventor of the device or article claimed by him, without involving the question whether he had the right to claim it, or whether the other party claimed in substance the same invention. This conclusion has been reached many times in the decisions of the Patent Office and Court of Appeals. The judgment of priority is not a direct decision that the defeated party is not entitled to a patent, and he may appeal, ex parte, from the final rejection of his application. Ex parte Schupphaus, 100 O. G. 2775, 1902 C. D. 339; Ex parte Guilbert, 85 O. G. 454, 1898 C. D. 225. The right to make the claim does not relate to priority of invention, but should be presented on a motion to dissolve. Woods v. Waddell, 106 O. G. 2017, 1903 C. D. 393. The question of interference in fact will not be considered on appeal from a judgment awarding priority. Schupphaus v. Stevens, 95 O. G. 1452, 1901 C. D. 369, citing many cases in the Court of Appeals; Ex parte Lyon, 124 O. G. 2905.

It is true that the Court of Appeals has held that it will, in extreme cases, on appeal from a judgment awarding priority, review the decision of the Commissioner declaring the interference, or refusing to dissolve it. This was held in Seeberger v. Dodge, 24 App. D. C. 476 (1905); and the same conclusion is stated, though not actually applied, in Podlesak v. McInnerney, 26 App. D. C. 399, 120 O. G. 2127 (1906). But this is quite a different thing from holding that in all cases, including this, a judgment establishing priority in time settles the question of interference in fact, and precludes the defeated party from ever raising that question, by further proceedings in the Patent Office. The Podlesak Case, supra, is relied on by appellants as conclusive. But the Court of Appeals in that case, as appellants admit and expressly state, refused to reverse on the ground that there was no interference in fact, but remanded the case to the Commissioner for further consideration as to identity of invention, with the statement that, if the Commissioner should adhere to the opinion that there was interference in fact, the court would further consider the case. This falls far short of a decision that a judgment of priority necessarily involves the question of identity or interference.

It will also be seen from the statement of facts that the right of Shepard to make his claims has never been adjudicated inter partes

in the Patent Office. It may ultimately appear that the Shepard claims when read on Hien's device mean a different thing when read on the Shepard device; so that Hien, after all, will be entitled to his four generic claims. It does not appear from the bill that any of these matters have been finally determined or concluded.

Bechman v. Wood, 15 App. D. C. 484, is also cited to support the argument that a judgment on priority involves the question of interference in fact. We do not so regard it in view of the conclusions reached by the court in the opinion on rehearing, whatever may be thought of the first opinion. It may be added that the case was an unusual one, and so treated by the court. In that case Wood actually discovered a broad, generic invention, but in filing his application did not make the broad claim, limiting his application to his specific device. Later, Bechman invented a specific mechanism in the same field, one which would have been absolutely dominated by a broad claim had Wood filed one; and Bechman filed an application claiming both the broad, generic invention, and the specific one covered by his apparatus. Wood then amended his application so as to make the broad claim, and thus cover the specific claim filed by Bechman. Thus the case presented quite unusual features, and the decision rests to a considerable degree on the peculiar facts presented.

The court, in its first opinion, held Wood's device operative, and that he was prior, if the two inventions were one and the same. Judge Morris, in the opinion, said that it would be manifestly improper to award a judgment of priority when there was no interference—no identity of subject-matter; that Wood was the first inventor of the special mechanism claimed by him, and incidentally of a broad invention, but one which he did not claim, Bechman being the first to set up such broad claim. But Bechman could not be awarded priority of the broad claim because not the first inventor, nor could Wood be adjudged priority of it, because a patent covering it would sweep within its control all special inventions in the same field previously made, and thus be unjustly retroactive, since Bechman was entitled to the specific device claimed by him. Wood sought by amendment to include the broad claim in his specifications, but it was held that the power of amendment did not reach to the extent of displacing specific claims made in the same field before the amendment. Direction was given that there should be no priority for either party with reference to the broad claim, but that both were or might be entitled to patents for their respective devices.

On petition for rehearing it was urged by the parties, and also on behalf of the Patent Office, that the original opinion had seriously affected the rules of practice of the Office. It was argued that it had been the long established practice to make the generic claim the issue of the interference, and put the specific claims under the broad issue; and that the court exceeded its jurisdiction in declaring that there was no interference in fact. The court said that its decision had been greatly misapprehended; that it did not interfere with the power of amendment, but simply declared the effect of the amendment when allowed; and adhered to its decision to the effect that an amendment could not contravene existing or intervening rights, nor overrule the

settled principles of law. It was proper for the second applicant to make the broad claim, and thereupon for the first applicant to so broaden his specific claims as to present the same generic claim; and then it was right and proper that an interference should be claimed, which was, in fact, unavoidable with or without amendment. So far from holding that there was no interference in fact, the court said it could not see how the Office could have failed to declare it in respect to the broad claim, although none existed as to the narrow claim of each party. But Bechman could not be allowed the broad claim, because that would have dominated the invention of Wood, who was his predecessor in the same field; nor could that predecessor be allowed the broad claim because he had not advanced it before the arrival of Bechman on the field of invention. Neither party, under the special circumstances of the case, was entitled to prevail against the other on the broad claim.

It was further held that, as a general proposition, it was entirely correct that neither patentability nor the propriety of the declaration of interference is open to consideration in an interference case, but the decision is not inconsistent with this rule, under the peculiar circumstances of the case. The same conclusion was reached as on the first hearing.

In view of the practice and course of decision in the Patent Office and Court of Appeals, and of the fact that the question of Shepard's right to make his claims has never been determined inter partes, it would be quite unjust to hold that Hien was absolutely bound on all matters by the judgment of priority. To a considerable extent the issue of a patent is the exercise of executive power, only incidentally involving private rights cognizable by the courts; and for this reason, also, the practice should be respected in judicial contests, although deemed somewhat variant from that contemplated by the statutes.

The decree appealed from is affirmed.

PENN ELECTRICAL & MFG. CO. v. CONROY.

CONROY v. PENN ELECTRICAL & MFG. CO. (two cases).

(Circuit Court of Appeals, Third Circuit. February 7, 1908.)

Nos. 65, 66.

1. PATENTS—PRIOR USE—WHAT CONSTITUTES "PUBLIC USE"—"EXPERIMENTAL USE."

The use of a machine while it was being perfected, in a room from which the public and all others not engaged in its operation were excluded, changes and improvements being made from time to time, although extending back to more than two years before application was made for a patent, was an experimental and not a public use, and did not invalidate the patent granted therefor, and it is immaterial that the product of such experimental use was sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 95.

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.

Priority and continuance of public use of invention as affecting patentability, see note to Eastman v. City of New York, 69 C. C. A. 646.]

2. SAME—VALIDITY AND INFRINGEMENT—MACHINE FOR ORNAMENTING GLASS. The Conroy patent, No. 735,949, for a machine for ornamenting glass, was not anticipated, and is not void for prior public use. Claim 1 also *held* infringed.

3. SAME—ANTICIPATION—METHOD OF ORNAMENTING GLASS. The Conroy patent, No. 723,139, for a method of ornamenting glass, is void as simply for the function of a machine designed to manufacture an old product previously produced by hand by practically the same method.

4. SAME—INFRINGEMENT—MACHINE FOR ORNAMENTING GLASS. The Conroy patent, No. 731,667, for a machine for ornamenting glass, construed, and *held* not infringed.

Appeals from Circuit Court of the United States for the Western District of Pennsylvania.

Paul Synnestvedt, Bayard H. Cristy, and George H. Christy, for appellant.

J. M. Nesbit and James I. Kay, for appellee.

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

CROSS, District Judge. Two separate suits were begun in the court below, in each of which John M. Conroy was the complainant and the Penn Electrical & Manufacturing Company was the defendant, and in this opinion for convenience Conroy will be styled "complainant," and the manufacturing company, "defendant," as in the lower court. The bill of complaint in the cause, which will be first considered, was in the usual form in suits of this character, and included two patents No. 735,949, dated August 11, 1903, for a machine for ornamenting glass, and No. 723,139, dated March 17, 1903, for a method for ornamenting glass. The original application included claims for both the machine and the method, but, at the instance of the patent examiner, they were separated and ultimately appeared in the two patents just referred to. The bill of complaint in the second suit is founded upon patent No. 731,667, dated June 23, 1903, for a machine for ornamenting glass. All of the patents were issued to John M. Conroy, the complainant. The proofs in both suits were taken together, and the cases were argued together, both in the court below and in this court. In the first suit the Circuit Court held claim 1 of the machine patent valid and infringed by the defendant's machine No. 1, but found the method patent did not disclose a patentable invention within the meaning of the law, and consequently denied any injunction and accounting with respect thereto. The defendant thereupon appealed from that portion of the decree which allowed an interlocutory injunction against it upon the machine patent, and the complainant appealed from that portion of the decree denying an injunction and an accounting as to the method patent. In the second suit the Circuit Court held that the defendant had not infringed the patent therein involved, and accordingly dismissed the bill of complaint, from which decree the complainant appealed. The patent involved in the first suit will now be considered.

Claims 1, 4, 5, 6, and 7 of the machine patent were involved and both of the claims in the method patent. The art of chipping glass by

hand was old. Its origin does not appear in the record, although it does appear that the complainant practiced it as early as 1895, and that it was in use still earlier. The process, however, was somewhat laborious and slow, and in rapidity of execution the machine method far surpassed it. The hand tool and process of hand chipping may be described as follows: The tool consists of a bar of iron, with a forked or pronged head. One of the prongs, the lower one as used, is considerably longer than the other, and is curved inwardly in the shape of a claw or hook. A piece of glass previously scored with a diamond about one-eighth of an inch from its edge is placed with its scored face uppermost upon a table, and projecting over its side sufficiently far to allow the tool to be manipulated. The glass is ordinarily held with the left hand and the tool with the right. When the tool is applied, the upper and shorter prong is above and the curved prong below the glass. The handle of the tool is then lifted, and a quick downward stroke given, which forces the lower and curved prong against the under surface of the glass, and causes the upper prong to strike its scored edge. The blow thus given chips or scallops the glass. The tool is then moved rapidly along the edge of the glass, and the operation repeated as often as may be desirable.

Claim 1 of the machine patent which was found in the court below to have been infringed by the defendant is as follows:

"In a machine for shaping the edges of glass articles, the combination of a carrier having a series of two or more pins secured to the carrier and spaced in the direction and transversely of the path of movement of the carrier so as to operate successively and at different points on the article, means for moving the carrier and a rest or bearing arranged to support the article adjacent to the edges to be operated on, substantially as set forth."

The machine in one of its forms, briefly described, consists of a cast-iron cylinder or drum of considerable length, diameter, and weight, which is mounted in a suitable bed to rotate in a horizontal position on a central shaft. On the face of the drum and projecting slightly therefrom are steel pins arranged in four evenly spaced straight rows; each row extending diagonally across the face of the drum. The pins are made of small steel rods, and are bevelled at their exposed tips. A rest bar is supported by the bed of the machine across, and in close proximity to the face of cylinder, but at a level lower than the axis of the drum. When the machine is operated, the drum is caused to revolve, and the piece of rectangular glass intended to be ornamented is held by the operator upon the rest bar and against the face of the drum, whereupon as the drum revolves the pins of the approaching row rapidly, and, in turn, strike the glass at its edge at equidistant points. The edge thus presented to the machine is quickly scalloped, when the operator may, if desired, present in turn its various sides to the machine until their ornamentation is likewise completed. The machine because of the rapid and uniform character of its work has supplanted the old hand method. We deem it unnecessary to discuss in detail the prior art, since it does not disclose anything which can properly be considered an anticipation of the complainant's machine patent. He was the first to devise a practical machine for decorating glass. The file wrapper of patent No. 723,139 discloses that the examiner found no

device or method anticipating those claimed by the applicant under the subclass of "Glass," "Ornamenting" and "Cutters." Among the many patents cited as anticipations are machines for gear cutting, saw tooth cutting, dressing stone, finishing the edge of cards, and other like purposes, none of which, however, are in the same or in an analogous art; but were they, they are all, in our opinion distinguishable from the patent in suit, notwithstanding the surface resemblance in some respects of one or two of them.

The above defense was not, however, so strongly insisted upon at the oral argument as was that of prior use by the complainant and anticipation by the defendant. The learned judge below, speaking of this question, said that, while it was not without difficulty, nevertheless, in his judgment, the alleged use was experimental, and in this view he is satisfactorily supported by the proofs. The first machine built by the complainant is known in the case as the "Rieseck drum," and was operated subject to various changes, tests, and alterations for about two years, or until February, 1901, when what is known in the case as the Jones and Laughlin drum was installed, which the evidence shows is still in use. Soon after the idea of a machine for chipping glass was presented to Conroy, he procured from one Rieseck an ordinary broad-faced belt pulley, equipped it with steel pins projecting from holes drilled to receive them, and mounted it upon a frame on which it was to rotate. A rest bar was also arranged, upon which the glass could be held by the operator. The machine, when tested, did not prove satisfactory. There were many difficulties to be overcome. Its imperfection was shown by the frequent breaking of the glass. The rest bar which at first was made of wood, was found to be too springy, and, after various alterations, a bar of tool steel was applied, and proved satisfactory; but its proper adjustment, in order that glass of various thicknesses might be decorated, and its relative position to the drum and glass, had to be ascertained by experiment. Various other matters, such as the extent to which the pins should project, their size, and shape, afforded more or less perplexing problems for solution. It is unnecessary, however, to mention, much less discuss, all of the various changes and adjustments which from time to time were made in the machine in the effort to perfect it. It is sufficient to say that they extended to a time within two years of filing the application for a patent. During this experimental stage the machine was used under the supervision of the complainant and his foreman, but its use was not public within the meaning of the statute. The machine was placed in a room on the first floor of the factory, which was partitioned off from the main shop. No persons, other than one operating the machine and a girl engaged in cleaning the glass, were present. If employés entered that apartment, they did so contrary to express orders. The glass in its windows was painted, and a wooden hood was built for the machine, which, when it was not in operation, was placed over it and locked, and as a further measure of privacy the machine was after a time removed to the second floor of the factory. These precautions were continued until the patent was obtained. From what has been said it is apparent that whatever knowledge, if any, was obtained of the machine by the public, was

surreptitious and contrary to the manifest wish and intention of the inventor. In Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000, Mr. Justice Bradley, speaking for the court, at page 134 of 97 U. S. (24 L. Ed. 1000), says:

"When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case such use is not a public use within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to either alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent."

Nor do we think that the sale of the product during the experimental stage alters the situation. In Jennings v. Pierce, Fed. Cas. No. 7,283, Judge Shipman says:

"It would be a harsh limitation of the statutory rights of an inventor which should give to a naked infringer the privilege of using an invention, because the patentee had attempted, in good faith and in secrecy, to incidentally make his experiments of some pecuniary benefit, while he was patiently endeavoring, amid many failures, to remedy the defects of the machine, test its value, and ascertain whether it could be used advantageously, and whether it ever would be of any benefit either to himself or to the public."

In Smith Co. v. Sprague, 123 U. S. 249, 256, 8 Sup. Ct. 122, 126, 31 L. Ed. 141, the court lays down this test:

"A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible, and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purpose of trade and profit, and the experiment is merely incident to that, the principle and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment."

We are convinced that, while the product of the Rieseck machine was sold, such sale was incidental to its experimental use. Our conclusion is that no such use has been shown as invalidates this patent. An attempt was also made to show prior use on the part of the defendant. We deem it unnecessary, however, to discuss this evidence at length. It appears that in the latter part of December, 1900, or prior to the middle of January, 1901, the defendant made and used a machine for chipping glass. It was, however, an experimental machine, and to some extent imperfect; and while considerable work was performed by it for several months, and its aggregate product was quite large, nevertheless, considering the length of time it was in operation, its weekly output was small. Some of the witnesses speak of it as an experiment, and it is noticeable that hand chipping was not abrogated during its use.

Furthermore, it was operated in part at least, by night, and upstairs in the factory, so that its use was private rather than public. The burden of proof upon this part of the case rests upon the defendant, and every reasonable doubt should be resolved against it. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, 285. The defendant's machine No. 1 was in the court below decreed to infringe claim 1 of the patent just considered. Briefly described, it consists of a frame in which a pivoted arm oscillates in a vertical plane. On this arm are arranged and spaced a series of pins in an oblique line across its face. When operated, the arm oscillates up and down in proximity to a rest bar on which the plate of glass is held, and the arm thus moved causes the pins thereon to strike successive blows on the edge of the glass, which produces the desired scallops. This oscillating arm carrying the pins differs from the complainant's device as shown in figures 4 and 5 of the patent only, in this: That it is pivoted, while in the complainant's it moves up and down in guides. The mechanism and mode of operation are substantially the same, and the defendant's machine is plainly an infringement.

We come, now, to a consideration of the method patent, which the court below held void "as simply being for the function of a machine devised to manufacture an old product." The question presented for consideration is not so much whether an old or a new product was created by the method claimed, but whether or not there was in point of fact a new method disclosed; or, further narrowed and applied to the present case, the question is whether the method pursued in the use of the hand tool, prior to the patent for the machine, was substantially the same as that followed in the use of the machine. If the complainant simply gave to the art a better implement for proceeding by an old method, his method patent is void. There are two claims in the method patent as follows:

"As an improvement in the art of shaping the edges of glass articles, the method herein described which consists in removing by blows at successive points closely adjacent to the edge, the edge and a portion of the opposite side of the article in pieces approximately uniform in quantity, substantially as set forth.

"As an improvement in the art of shaping the edges of glass articles, the method herein described, which consists in removing by blows at successive points closely adjacent to the edge pieces approximately uniform in shape from the edge and a portion of the opposite side, substantially as set forth."

Counsel for the complainant studiously attempts to differentiate the method of the hand tool from that of the machine, in this: That, while the latter method removes the chips of glass by blows, the former does it only by what he described as a "prying" or "pressure" or "pinching" method. This suggested distinction, in any event, would seem to be very attenuated; but, however that may be, the proofs do not disclose its existence in point of fact. In the use of the hand tool a blow is struck, which, although possibly not of the same force and uniformity as the blow struck by the machine, is nevertheless essentially like it. At the most, the difference is one of degree. In both cases blows are struck, and struck at successive points closely adjacent to the edge of the article, which remove the edge and a portion of the opposite side

of the glass, and the pieces removed are approximately uniform in size and shape. Thus we have substantial identity of operation in both cases. The claims of the method patent include the hand operation, as well as the machine operation. The hand and machine methods of chipping glass are essentially the same. The fact that in one case the work is done by a hand tool, and in the other by a machine, does not influence, much less control, the decision of the question. The complainant did not discover a new method of chipping glass. It is rather the old method performed by a new tool. As already suggested, it is impossible to demonstrate wherein the claims of this patent set forth anything not methodically pursued in the hand operation. As counsel for the defendant well says:

"If, in order to escape anticipation by the hand method, complainant seeks to differentiate therefrom upon the theory that his is a machine-practiced method, then his method is, and can mean, nothing more than the functional operation of the machine, which is, of course, not patentable."

We think the court below was right in holding this patent invalid.

Coming to the second suit, based upon patent No. 731,667, we find that it has two claims as follows:

"(1) In a machine for shaping the edges of glass articles, the combination of a movable carrier having a pin secured thereto, a table arranged to support the glass at an angle less than a right angle to the axis of the pin at the time of impact on the glass, and means for shifting the table step by step across the path of movement of the pin, substantially as set forth.

"(2) In a machine for shaping the edges of glass articles, the combination of a rotating carrier having a pin projecting radially therefrom, a table for supporting the glass, and means for shifting the table step by step across the path of movement of the pin, substantially as set forth."

Both of the claims are involved in the suit. The patent describes two machines, one for chipping circular plates where the plates are supported on a rotating table, moved by suitable mechanism step by step in position to be operated upon by a single pin on a rotating head or carrier, and the other where the work is moved in a straight line step by step past the single pin on the carrier. In the specification the patentee says:

"In operating the machine, the feed movement is so adjusted that for each operative stroke of the carrier the bed or table carrying the glass is moved forward a distance equal to that of the desired spacing of the scallops."

When the machine is operated, the table to which the glass is clamped rotates or moves in a direct line, as the case may be, step by step "a predetermined distance," thus bringing the edge of the glass "across the path of the movement of the pin." The court below found that the defendant's machine did not infringe this patent, and we concur in its judgment. In the defendant's device the table to which the plate of glass intended for decoration is clamped is stationary, and its chipping tool rotates around this fixed plate; while in the complainant's, as we have seen, the plate rotates step by step, while the chipping tool moves in a fixed path. It is claimed on behalf of the complainant that the defendant's arrangement of parts is a mere transposition of the complainant's, and therefore does not avoid infringement. This is not so. The structures are mechanically different, and the distinction between them

does not consist in a mere reversal of parts. Each of the claims of the patent calls for a movable table and means for shifting the table step by step across the path of movement of the pin, while one of them calls for a movable carrier, and the other for a rotating carrier. Certainly neither these elements nor their counterparts are found in the defendant's device. In them, the glass being held in a fixed position, the movement required for chipping its edge in successive scallops is all devolved upon the chipping mechanism, which necessarily requires that the chipping tool be moved at right angles to the edge of glass being chipped, and also progressively along that edge, in order that the chipping mechanism shall be in the proper position to strike successive blows. Again, as expressed by defendant's counsel:

"But, even if it should be held that the forwardly advancing pin carrier of defendant's machine No. 3 is the equivalent or transposition of the movable table of Conroy, even then defendant's structure does not contain means for advancing the transposed part step by step, specifically called for in each claim. In defendant's machine No. 3 the horizontal movement of the pin carrying arm, S, is continuous or uninterrupted, and is not an intermittent step by step movement. The handle is simply grasped by the operator, and pulled around by a continuous and uninterrupted movement or swing. It cannot be said that the up and down ratchet-actuated vibrations of the pin comprise the step by step movement of the claims; for, if these vibrations correspond to or are the equivalent of anything in the Conroy machine, it is either the rotating or the vertical reciprocating movement of the pin carrier, the movement which carries the pin into engagement with the glass."

The step by step movement incorporated in both of the claims and fully described in the specifications can mean only that the glass is advanced by an intermittent movement as distinguished from a continuous movement. It is a progressive movement, broken by steps, and, as said by the learned judge below:

"In view of Conroy's earlier devices, and the restricted field open for the grant of this patent, the movable table will be regarded as one of its essential features. It is evident, if the patent depends for novelty simply on the use of a single pin on a carrier, instead of the multiple pins of the other device, a grave question of patentability would arise. The other feature of a shifting feed is required to confer patentability on the combination."

There is no room for speculation as to what is meant by the movable or rotating pin carrier and the movable table. Not only do they cooperate, but their method of co-operation is entirely clear. The rotation of the pin carrier is necessary to the patented device. It would be impossible in the complainant's machine to hold the glass immovable and at the same time advance the chipping mechanism around the glass, and produce a succession of chips. In our opinion the defendant's devices do not infringe this patent. There are elements in the claims of the Conroy patent which are not found in the defendant's device, nor are they mechanical equivalents. The case presented is therefore not one of a transportation of parts, but of different mechanical structures. The parts cannot be used interchangeably. The difference between the complainant's and defendant's devices are more fully discussed in the opinion of the court below, and it is unnecessary to repeat them here. It is sufficient to say that no one of them presents the elements of a movable table or means for moving it step by step across

the path of movement of the pin which the patent requires. Our conclusions upon the whole case are that, as to the patents involved in the first suit, the machine patent No. 735,949 is valid, and its first claim infringed by the defendant's machine No. 1, and that the method patent 723,139 is invalid.

The decree in that suit is therefore affirmed, but without costs, as neither party succeeded on appeal. In the second suit, based upon patent No. 731,667, we find that it has not been infringed. Consequently the decree in that case is affirmed, with costs.

GENERAL ELECTRIC CO. v. MORGAN-GARDNER ELECTRIC CO.

(Circuit Court, N. D. Illinois, E. D. October 24, 1907.)

No. 27,377.

PATENTS—INFRINGEMENT—ELECTRIC CONTROLLERS.

The Knight & Potter patents, No. 587,441, for an apparatus, and No. 587,442, for a method for regulating electrically driven mechanisms relating mainly to the regulation of speed and power in operating electric cars by means of controllers, construed, and *held* not infringed.

In Equity. On final hearing.

Betts, Sheffield & Betts (Edward Rector and L. F. H. Betts, of counsel), for complainant.

Gardner, Stern, Anderson & Davis (Glenn S. Noble, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant brings suit to restrain infringement of claims 1 and 2 of patent No. 587,441 for an apparatus, and claims 3, 4, and 9 of patent No. 587,442, for a method of regulating electrically driven mechanisms, both granted to Knight & Potter on August 3, 1897. Claims 1 and 2 of patent No. 587,441 are as follows:

"1. In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two electric motors, and a switch connecting them in series with each other and with a resistance, the switch provided with contacts and connections arranged to shunt one motor, leaving the other in series with a resistance, to disconnect one motor and to connect the two motors in multiple, all by successive steps.

"2. In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two motors, and a switch for placing them in series with each other and with a resistance, the switch provided with contacts and connections adapted to cut out the resistance, for one rate of speed, to again cut in the resistance, to shunt one motor, to disconnect one motor and cut out the resistance, and to connect the two motors in multiple."

Claims 3, 4, and 9 of patent No. 587,442 read as follows:

"3. The method of regulating a car or vehicle driven by a pair of electric motors, which consists in connecting the motors in series, shunting one motor while maintaining a circuit through the remaining motor and through a resistance protecting the same, opening the circuit of the shunted motor and connecting the two motors in multiple.

"4. The method of regulating the power and speed of mechanism driven by a pair of series-wound electric motors receiving current from a constant potential circuit, which consists in first connecting the motors in series and in circuit with resistance, then reducing the resistance until it is substantially cut out, then shunting one motor and again making use of the resistance to protect the unshunted motor, then disconnecting the shunted motor from circuit and finally reconnecting the motors in multiple."

"9. The method of regulating the power and speed of mechanism driven by two electric motors, which consists in placing the two motors in series for slow speed, and changing them from series to multiple for higher speed by first cutting one motor out of circuit, replacing it by a resistance in series with the other motor, and finally placing the two motors in multiple with the resistance cut out."

The two patents involve substantially the same thought, and may be considered together. The bill also alleges infringement of patent No. 507,547 for a controller, granted to A. P. Knight October 21, 1893; but complainant's brief does not seriously discuss it. There being 23 claims to this patent and the particular claims relied on not being specified, they are not here set out, but reference had to the record.

What complainant claims to have discovered is the transfer of motors from series to multiple and back again by shunting one of the motors and introducing dead resistance to offset its withdrawn motor and live resistance, and thus prevent the injury that might otherwise ensue to the unshunted motor, and then disconnect the shunted motor from its series portion and move it to multiple. Neither in the claims, the specifications, or the drawings does it appear that the resistance is kept in the circuit after the act of disconnection. The diagram position known as No. 7 of the drawings in the apparatus patent shows the resistance removed. The language of the claims and specifications is not inconsistent with its retention. It is this step which defendant claims differentiates the patents in suit from its device and method. It uses resistance until the multiple relation of motors is effected. Complainant's device relates mainly to the regulation of speed and power in operating electric cars by means of controllers, and, while it does not admit that it cuts out resistance in move 7, it insists that the shunted motor, being attached to the other axle, does not lose its live resistance, so that it is in condition to take its share of the current without undue sparking, as soon as it is switched into multiple, so that the two motors at once present the necessary live resistance.

If complainant's grantors were the first to provide for passing the motors from series to multiple by the shunting of one motor and at the same time, introducing dead resistance to compensate for the withdrawn resistance and thus protect the unshunted motor, it would not seem to be a matter of much moment for the purposes of this suit whether defendant added one more step or not. At most, it could only be an improvement on the devices in suit. Defendant would be using the ideas, and consequently the invention of the patents in suit. It is uncertain from the record whether complainant's move from series to multiple—the final step—does not employ the necessary resistance, whether dead or alive. The evidence does not satisfactorily disclose a practical advantage in defendant's method and apparatus over that in suit. Both find it necessary to use a blow-out. It seems clear that, assuming complainant's patents to be valid, defendant infringes.

Therefore it becomes necessary to look into the state of the art as it was on August 3, 1897. Switching from series to multiple was admittedly old at the time of this alleged invention. The great question in that field was to ascertain some way in which it could be done entirely without or with a minimum of friction. A number of prior patents are set up in the record dealing with this very question, of which only those of the British patent to Reckenzaun, 1884, Condict's patent of 1888, the British patents to Anderson, 1881 and 1889, the two patents to Wightman, 1890 and 1891, respectively, the Mason patent of 1893 and 1895, and the patent to Knight, 1893, in suit, need be considered. Reckenzaun is one of the first to suggest the regulation of speed and power by varying the motor connections from series to parallel or multiple. It does not disclose the method of making the change. Reckenzaun was among the first, if not himself the first, to suggest and provide for the use of two motors or more in both series and parallel for the regulation of speed. He says (page 1, line 70):

"By means of switches or commutators, I can arrange the circuit so that two or more motors may run in series, in parallel, or singly, or partly series and partly parallel or an independent current from that in the armature continually pass through the field magnets. The speed as well as the power can be varied in this manner; for, as the resistance of the whole circuit changes, so also changes the speed of the armature when the electro-motive of the supply-current is constant."

He nowhere discloses what precaution he takes, if any, in passing from series to multiple, and consequently cannot be held to have anticipated the idea of the patents in suit.

Condict brings his invention directly to the matter of protecting the motors in switching from series to multiple and return, and attempts to overcome sparking and short circuiting during the move. "To overcome these objections," he says, "I have constructed my switch so that at the time of changing the connections I insert resistances more or less great according as to the resistance of the motor connections; that is, to say if the motor resistance is great the auxiliary resistance would be small, and vice versa. I also so arrange the switch that the resistances are all cut out of circuit as soon as the new motor connection is made. Their function is to reduce the current flowing, so that at the time of making the change in the motor connections the current is small compared with what it would be if these resistances were not inserted, and, furthermore, these resistances are gradually cut in and out so as not to suddenly change the resistance to the current beyond a given amount. * * * This cutting in and out of the resistance-coils takes place with every new movement of the switch," etc. He provides for a device which he says avoids throwing too strong a current onto the motors at the time of the change. He does not, however, shunt the reduce to a practically dead condition, one of the motors, and at the same time protect the other by dead resistance, as claimed in the patents in suit, and there must be a point at which the circuit is opened in both motors. In the device of the patents in suit the circuit of the unshunted motor is never opened. The language of claims 30 and 31 would seem broad enough to have covered the device in suit, but it evidently was not in the inventor's mind at the time.

The diagram of the Anderson patents shown in evidence discloses one of the motors in a shunted relation, but without any resistance protection to the remaining motor.

Wightman short circuits one motor before making the change. This he provides shall be done "after its counter electro-motive force has been reduced to a point where the short-circuiting may be accomplished without sparking." He uses no auxiliary resistance to protect the unshunted motor.

No diagram of the Mason devices is shown in the record, except such as appear in the drawings. These are somewhat obscure. He seems to make the transition from series to multiple gradual by a rather intricate manipulation of the field magnet coils and armatures with relation to the several motors. In the absence of explicit descriptions of the workings of these moves, it is difficult to ascertain just what relation these steps bear to those of the device in suit. From such consideration as it has been reasonably possible to give to the matter, it is not believed that the Mason patents cover the exact and patented devices in suit.

As before noted, counsel for complainants give very casual attention to the Knight patent in suit. Very little or no material evidence was taken with regard to it, which leads the court to the conclusion that relief is not seriously sought as to it. However, the defendant insists that it contains the invention claimed by the Knight & Potter patents in suit, and it therefore becomes necessary to examine the patent and such evidence as appears in the record with regard to it, since it is in the prior art with regard to the Knight & Potter patents, application having been filed June 26, 1892. "This invention," says the patentee (page 1, line 9), "relates to means for controlling electric motors, and for transferring such apparatus from series to multiple relation, or vice versa, without at any time wholly breaking the circuit of either of such motors." It appears, however, that such is not strictly the case. The series circuit is broken after both motors have been shunted into multiple relations; the shunt circuits being each provided with a resistance. He says (page 1, line 20):

"This resistance is in fact preferably such that under the normal conditions of use at the time of transfer, each resistance branch will take about the same current that passes through each of the electric devices."

If this be so, manifestly there must be a breaking of the current which passes through the motors when the former series current is cut out. This must throw an additional current into the former shunt circuits, which now will be formed to be protected by the dead resistances placed therein. Thus both motors are shunted, and both are protected, by dead resistance. The circuit of neither of the motors is broken as claimed by the patentee. In the Knight & Potter patents the circuit of one motor is entirely opened. If, therefore, there is any invention in the Knight & Potter patents, it must be found in the fact that they accomplished one-half of what Knight covered. There is nothing in the record to show what the advantage of their alleged invention was over Knight's. In fact, there was rather a step backward than forward. It is true that in the field of electrical improvements

it requires oftentimes a very slight advance to work out large results; but it must be an advance. Perhaps the devices of Knight & Potter are of value to show what can be done with the electric current. The moves of the switch are so swift that we cannot follow it, but no doubt the current responds to every variation of its governors as clearly as though they were slow and distinct. The Knight & Potter patents may be based upon these instantaneous combinations effected by the switch. Their arrangement seems, at least theoretically, much inferior to that of Knight.

There is another matter urged by defendant. It appears that in their original application Knight & Potter laid no claim to the introduction of protection to the unshunted motor by means of resistance. In their original specifications they say that their "method in general consists in regulating the power and speed mechanism driven by two electric motors by placing the two motors in series for slow speed and changing them to multiple connection for higher speed, by first shunting one motor while its field magnet is still engaged, and then disconnecting one terminal of such motor and reconnecting it to the corresponding terminal of the other motor, whereby the two motors may be in multiple with each other. We accomplish this without the use of external means, such as a circuit breaker or resistance to interrupt or substantially reduce the current while the change is being made." We look in vain for any reference in the original claims and specifications to the use of external resistance in making the move from series to multiple. They seem to contemplate only the regulation of speed. The only suggestion of the use of resistance is found in the diagrams shown as figures 1 to 9 in each of the patents.

In Hobbs v. Beach, 180 U. S. 397, 21 Sup. Ct. 409, 45 L. Ed. 586, it has been decided that, where the original specifications and drawings of an application suggest the new claim, it may properly be tendered as an amendment. As above noted, the specifications expressly exclude dead resistance. It was clearly considered and rejected. An examination of the file wrapper and contents shows that it was this use of resistance that eventually saved the patent. No new specifications were added for several years. The amendment was never sworn to, but was a suggestion of the patentee's attorneys. The court is not advised of the matters required by the statute to be put in the form of an affidavit as to this new combination. It was held in Eagleton Mfg. Co. v. West Co., 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493, that where an inventor makes oath to an application and dies, and amendment, which is not a mere amplification of the application, must be sworn to by his administrator, and that, in the absence of such an oath, the grant was void. To the same effect are Railway Company v. Sayles, 97 U. S. 554, 24 L. Ed. 1053, and many other cases. See Walker on Patents, § 138. Surely the mere diagrams of the drawings cannot be held to warrant the express negation of the specifications and the silence of the claims.

For the above stated reasons, it is held that the defendant does not infringe either of the Knight & Potter patents. No relief being asked as to the Knight patent in suit, the bill is dismissed for want of equity.

In re COOPER BROS.

(District Court, E. D. Pennsylvania. March 14, 1908.)

No. 2,960.

1. BANKRUPTCY—EQUITY—PLEADING—RULES—DEMURRER—WAIVER.
General bankruptcy order 37 (89 Fed. xiv) declares that in proceedings in equity instituted to carry into effect the provisions of the act, or to enforce the rights and remedies given thereby, the rules of equity practice shall be followed, and equity rule 37 declares that no demurrer or plea shall be held bad and overruled on argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea. *Held*, that rule 37 only covers cases where the demurrer and answer each attacked only part of the bill and overlapped, and did not apply where a demurrer and answer to an involuntary bankruptcy petition were filed together, and both attacked the whole petition, in which case the demurrer would be regarded as waived.

2. SAME—PLEADING—TIME.
In a bankruptcy proceeding, defendant will be protected, notwithstanding his demurrer is filed too late, if it is not for delay only; and in proper cases time to plead or answer may be extended under Bankr. Act July 1, 1898, c. 541, § 18b, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], providing that five days after return shall be allowed within which the bankrupt or creditors may appear or plead, or within such time as the court may allow, and authorizing the judge to consider a meritorious pleading, though filed late.

In Bankruptcy. On demurrer and answer.

J. Howard Reber, for creditors.
Henry N. Wessel, for bankrupts.

HOLLAND, District Judge. To the creditors' involuntary petition in bankruptcy a demurrer and answer were filed together, the first and second paragraphs of which constitute a demurrer to the whole of the petition, and paragraph 3 an answer to the whole thereof. This case is on the list for trial at this term, and counsel for the petitioners insist that it is properly there, because, by answering to the whole of the petition at the same time a demurrer is filed to the whole thereof, the defendant has by his answer waived his demurrer, and the case is on the list on the petition and answer, at issue, ready for trial.

Bankruptcy proceedings, as distinguished from independent suits in law, are controlled by the equity rules established by the Supreme Court. It is provided by general order 37 (89 Fed. xiv) that any proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be; but the judge may, by special order in any case, vary the time allowed for the return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

Turning, now, to the equity rules of the Circuit Court, which were promulgated by the Supreme Court of the United States, nothing will

be found which deals with the question at issue. Equity rule 37, that "no demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea," is manifestly intended to cover only cases where the demurrer and answer each go to only part of the bill and happen to overlap, and not where both the answer and the demurrer are to the whole of the bill. Adams et al. v. Howard et al. (C. C.) 9 Fed. 347; Crescent City, etc., Co. v. Butcher's Union, etc., Co. (C. C.) 12 Fed. 225; Huntington v. Laidley et al. (C. C.) 79 Fed. 865; Mercantile Trust Co. v. Missouri, etc., Co. (C. C.) 84 Fed. 379; Strang v. Richmond P. & C. Co., 101 Fed. 511, 41 C. C. A. 474; Grant v. Phœnix Life Ins. Co., 121 U. S. 115, 7 Sup. Ct. 841, 30 L. Ed. 905.

As the prescribed rules do not apply, equity rule 90 of the Supreme Court directs that the practice of the High Court of Chancery in England, in 1842, shall govern. Rule 90 provides:

"In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England so far as the same may be reasonably applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules but as furnishing just analogies to regulate the practice."

In a note by the court to the case of Thomson and Others v. Wooster, 114 U. S. 112, 5 Sup. Ct. 788, 29 L. Ed. 105, Justice Bradley said:

"Reference is made to the first edition of Daniell (published 1837) as being, with the second edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our equity rules were adopted. Supplemented by the general orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own rules), they exhibit that 'present practice of the High Court of Chancery in England,' which by our ninetieth rule was adopted as the standard of equity practice in cases where the rules prescribed by this court, or by the Circuit Court, do not apply."

In the first edition of Daniell's Equity Practice, of which the first volume was issued in 1837, and the second volume in 1840, it appears, in the latter, at page 347, that:

"All or any of the several modes of defense before enumerated may be joined in a defense to one bill; thus a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim as to another." But "all these defenses must clearly refer to separate and distinct parts of the bill, for a defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred or pleaded; the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any further answer than that contained in the bill. * * * A plea or answer will therefore overrule a demurrer, and an answer, a plea," etc.

The general orders of Lords Cottenham and Langdale of August, 1841, modified the strictness of the above regulations by directing that:

"No demurrer or plea shall be held bad and overruled on argument * * * only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." Daniell's Chancery Pleading and Practice (Perkins' Ed., 1865) p. 792.

It is from these our rule 37 was taken; and in all cases not coming strictly within the terms of these orders the principles quoted above from Daniell's first edition still apply. Daniell's Chancery Pleading and Practice (Perkins' Ed.) 792. And this practice is sustained by nearly all the authorities on equity pleading.

In 16 Cyc. 259, it is said:

"Care should be taken not to cover any portion of the bill by two modes of defense, the rule being that one may not at the same time demur and plead to the same matter, or demur and answer to the same matter."

And on page 218:

"If defendant demurs, and afterwards answers as to the same matter, the demurrer is overruled or waived."

In Adams et al. v. Howard et al., supra, it is held:

"There is nothing that allows him to demur to the whole bill, and at the same time to answer to the whole bill, especially where the answer sets up everything that is in the demurrer. Putting in such an answer is a waiver of such a demurrer."

In Crescent City, etc., Co. v. Butchers' Union, etc., Co., supra:

"We do not understand that there is any rule that allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time. The effect of such pleading is that the plea is taken as waiving the demurrer, and the answer as waiving the plea."

In Huntington v. Laidley, supra:

"A plea containing a full defense to the bill is waived by also filing an answer which goes to the whole bill."

In Strang v. Richmond P. & C. Co., supra:

"The filing by a defendant at the same time of a joint demurrer to the bill and an answer denying all the allegations of fact made in the bill is not pleading in due form, and in such case the demurrer will be treated as overruled by the answer."

Grant v. Phœnix Life Ins. Co., supra:

"We concur in the disposition made, for the reasons thus stated, of these pleas. * * * The rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea is not applicable where the answer extends to the whole of the matter covered by the pleas."

It will thus be seen that equity rule 37 was intended to cover cases where the demurrer and answer go only to part of the bill and happen to overlap each other, and that, where both an answer and demurrer are to the whole of the bill, the answer is taken as waiving the demurrer. By subdivision "b," § 18, of the Bankruptcy Act (Act July 1, 1898, c. 541, § 18, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), five days after the return are allowed within which the bankrupt or creditors may appear or plead, or "within such time as the court may allow," and a meritorious pleading filed late may be considered, if so ordered by the judge. Collier on Bankruptcy, 246; Day v. Beck, etc., Co., 114 Fed. 834, 52 C. C. A. 468. By this provision the defendant will be pro-

tected where the demurrer was not simply for the purpose of delay, and in proper cases time to plead or answer may be extended.

From what we have said we do not regard it necessary to overrule the demurrer, because it is waived by the answer, and the case is properly upon the list for trial at this term.

CENTRAL TRUST CO. v. THIRD AVENUE RY. CO. et al.

(Circuit Court, S. D. New York. January 6, 1908.)

STREET RAILROADS—RECEIVERS—SUIT TO FORECLOSE MORTGAGE.

The bondholders of a street railroad company in a suit by the trustee to foreclose the mortgage *held*, on the face of the bill, entitled to the appointment of a temporary receiver.

In Equity. On motion for appointment of receiver.

Bowers & Sands, for complainant.

James L. Quackenbush, for defendant New York City Ry. Co.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge (orally). Manifestly upon the face of the bill, and counsel in the case do not in any way controvert it, the bondholders under this large Third avenue mortgage are entitled as of right to the appointment of a temporary receiver, to be made permanent when the time comes to declare the principal due, and to proceed with the foreclosure. Of course, whatever order is prepared will contain proper clauses for the return of the property and the cessation of the holding or activity of the receiver in the event of the payment of the interest before the expiration of the days of grace. That a receiver should now be appointed is certain. That there should be two receivers appointed at this stage of the case seems wholly unreasonable and unwarranted, and unnecessarily expensive. One receiver can discharge the functions perfectly well. If, in the future, it should become necessary to unite to the receiver, who is a lawyer, some other receiver who may be a business man or an operating or financial man, or for some other reason such as the circumstances that conflicting camps of bondholders, represented by their respective committees, reach such a stage of entanglement that it seems necessary that both should be represented in the management, the occasion can then be availed of, but to undertake now to appoint two receivers to discharge the functions about to be intrusted to a receiver of the Third Avenue Railway Company seems to me most unwise, and not to be considered.

There remains then only the question as to who the receiver shall be. Mr. Whitridge has been nominated by the trustee under the mortgage and by the committee of bondholders who represent substantially a majority of the bonds, even if through some technicality a number of bonds are not yet actually filed. From the stockholders, so far as we hear anything from them, there comes no objection to his selection, only from certain bondholders vague criticisms upon the propriety of the court making such an appointment upon the request of a majority of the bondholders. The court, on the contrary, has reason to feel

thankful that a gentleman of such professional and personal standing in this community is willing to accept the position. It is a thankless office, the receivership of a public service corporation; it is laborious and engrossing of time; it is fretting, irksome, and exasperating. The work is so large, and the details so manifold and complicated. There are so many diverse interests and such a multitudinous number of persons to be considered and planned for. And it grows still more wearisome, because it seems as if it must always be done in a constant atmosphere of suspicion and misrepresentation, and under an intermittent downpour of unfounded criticism, not malicious at all, save possibly in a few instances, but merely uninformed and thoughtless. For it seems to run with the popular humor to assume that no one who is discharging functions which affect the public, or large interests even, ever acts with a single desire to do his duty; that there must be some mysterious, some devious and hidden ulterior object to be unearthed, that he is striving to find what there is in it for himself or for his friends. It is a mistaken notion. There are in this community to-day as many men as there ever were who, whatever the work that may be alotted to them to do, public or private, are content to do it faithfully, with a scrupulous regard for the rights of all affected. It is a source of gratification and comfort to any court to know that when the occasion arises for the services of trustees in such matters it can always find men who for upwards of a generation have, within this community, practiced their profession or transacted their business not in a small way, but active, energetic, achieving success, broadening in experience, dealing with large affairs; and who yet throughout their whole career have so conducted themselves that no one can point a finger to any transaction of theirs in which they have not acted as upright and honorable men, and in accordance with the best ideals of their business or profession. This court has always been able to find such men, as undoubtedly it always will be, who, often at some personal sacrifice, are willing to accept such burdensome offices, and, when appointed, the court can rest assured that all interests committed to their charge are in safe hands.

INMAN & CO. v. SEABOARD AIR LINE RY. CO.

SAME v. ATLANTIC COAST LINE R. CO.

(Circuit Court, S. D. Georgia, E. D. January 20, 1908.)

1. PLEADING—AMENDMENT—INCONSISTENT CAUSE OF ACTION.

Where original declarations by shippers for damage to goods not only declared on special contracts evidenced by bills of lading, but attached copies thereof to the declarations and made them a part thereof, they could not thereafter file amendments claiming that they were not bound by the terms of such contracts, and that some of the provisions thereof were illegal and not supported by a sufficient consideration, such amendments being inconsistent with the original causes of action, and changing the nature of the actions from contract to tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 710–729.]

2. EVIDENCE—PAROL EVIDENCE—BILL OF LADING AS CONTRACT.
Where shipments in controversy were made under bills of lading as contracts expressing the terms and conditions on which the property was to be transported, such bills will be regarded as the sole evidence of the final agreement between the parties, so that parol evidence will be incompetent to vary or contradict the terms thereof in the absence of fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1826–1828.]

3. CARRIERS—BILL OF LADING—LIMITED LIABILITY.
While a carrier's common-law liability cannot be limited by conditions expressed in a mere notice to the shipper or to the general public, nor by the terms of a receipt for the goods, or where the conditions are printed on the back of the bill of lading or stamped across its face, yet conditions printed or written on the face and in the body of the bill will be presumed to have been assented to and to form part of a valid, enforceable contract, where the consignor receives the bill and ships the goods without complaint, if such conditions are not inimical to law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 687–696.]

4. SAME—UNILATERAL CONTRACT—SHIPPER'S SIGNATURE.
In the absence of a state statute requiring it, the shipper's signature is not essential to a bill of lading limiting the carrier's liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 677, 679, 682–685, 691–696.]

5. SAME—PLEADING—DEMURRER.
Where declarations in actions against certain carriers for injury to goods were based on written bills of lading containing limited liability clauses, such bills on demurrer to the declarations would be regarded as embodying the entire contract of the parties.

6. SAME—DUTY OF CARRIER.
Independent of special contract, a carrier is liable as an insurer of the absolute safety of goods intrusted to it for transportation, and is liable for any loss or injury thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 471–495.]

7. SAME—LIABILITY FOR NEGLIGENCE.
While a carrier may limit its common-law liability by contract, it cannot contract to relieve itself from liability for damages resulting either from its negligence or that of its servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 654–659.]

8. SAME—LIMITED LIABILITY STIPULATIONS—CONSIDERATION.
Where bills of lading for transportation of cotton abroad showed that the inland charges had been paid, and that a specific rate of 23 cents per 100 pounds ocean freight had been guaranteed by the carriers from Savannah to Bremen, and the bills provided that in consideration of the rate of freight named it was stipulated that the service to be performed should be subject to the conditions contained therein, there was a sufficient consideration to support the limited liability conditions in the bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 641–644.]

9. SAME—COMMON-LAW LIABILITY—REFUSAL TO SHIP.
Georgia Civ. Code 1895, § 2278, provides that a common carrier is bound to receive all goods offered that he is able and accustomed to carry, on compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public. *Held*, that a carrier is bound to receive ordinary merchandise for transportation with the full measure of

liability and at reasonable rates on demand, and that in case of its refusal so to do the shipper has a remedy in damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 98, 99.]

10. SAME—LIMITED LIABILITY STIPULATIONS—FRAUD.

The established rules against fraud, misrepresentation, or duress are applicable to the full extent to limited liability stipulations in bills of lading, and the contract, in order to be sustainable, must be fairly made by the carrier, and freely entered into by the shipper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 691, 695.]

11. SAME—REASONABLENESS—BURDEN OF PROOF—QUESTION FOR COURT.

The question of reasonableness of limited liability clauses in a carrier's bill of lading is for the court, the burden of proof being on the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 723.]

12. SAME—NEGLIGENCE—AVOIDANCE OF DAMAGE.

Carriers cannot exempt themselves from liability by stipulations against floods, fire, jettison, ice, delays, riots, strikes, leakage, breakage, or any human agency in which their negligence or that of their servants may be a factor, nor against other causes where their operation to cause loss or injury might be avoided by the exercise of extraordinary care and diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 651–662.]

13. SAME—WANT OF NEGLIGENCE—PLEADING.

Where foreign bills of lading under which cotton was transported provided that the carrier should not be liable for injuries caused by "wet or country damage," and declarations charged that the cotton was damaged by "water and mud" prior to the termination of the inland transportation, the shipper was bound to allege, in order to state a cause of action, that such damage resulted from some concurrent negligence of the carrier or its servants, or that the damage could have been avoided by the exercise of care, etc., and that the carrier was not therefore relieved by the exception in the bill of lading.

14. SAME—SPECIFIC ACTS OF NEGLIGENCE—PLEADING.

Where shippers of cotton sued on special transportation contracts for damage thereto by mud and water, and the contracts exempted the carrier from liability for "wet and country damage," a general allegation of injuries without some specific acts of negligence on the part of the carrier was insufficient.

15. SAME—"WET AND COUNTRY DAMAGE"—"WATER AND MUD."

Where special cotton transportation contracts exempted all carriers from liability for "wet and country damage," declarations alleging that the cotton was injured by "water and mud" prior to the termination of the inland transportation stated a cause of damage within such exemption, the terms "water and mud" and "wet and country damage" being synonymous.

16. SAME—NOTICE OF INJURY.

Where shippers had ample time and opportunity to notify the carriers of damage to cotton which occurred before ocean transportation began, a provision in the bills of lading requiring notice of damage within 30 days after delivery of the cotton at destination was not unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 669–672.]

17. SAME—ACTION FOR DAMAGE—INTEREST OF PLAINTIFF.

Where shippers of cotton brought actions against the carrier for damage thereto, they were required to allege their title or interest in the cotton giving them a right of action, the carriers in case such interest is alleged being estopped to deny the same as provided by Ga. Civ. Code 1895, § 2286.

18. PARTIES—PLAINTIFFS—REAL PARTY IN INTEREST.
Under Ga. Civ. Code 1895, § 4939, requiring all actions on contracts to be brought in the name of the party in whom the legal interest is vested, the interest of plaintiff in order to entitle him to sue on contract for injury to goods, may be either that of general or special owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 6-8.]

19. CARRIERS—INJURIES TO GOODS—DECLARATION.
Declarations in actions against carriers for injury to cotton alleged that the injury occurred while the cotton was in the possession of the carrier in Chatham county and before its contract of carriage had been completed, and declared that the loss was made up of "——— lbs. damaged cotton picked off, at ——— cents, loss of interest while cotton was being picked, loss, account of appearance of package and quality after picking, cost of picking, total $———, less value of pickings, $———." *Held*, that the declarations were defective for failure to fully state the injuries and losses complained of, the place where they occurred, and the facts necessary to indicate the method of computing the damages alleged.

20. SAME—EXTENT OF LOSS—STIPULATIONS.
A clause in a bill of lading that the value of goods lost or injured shall be computed at the place and time of shipment is reasonable and valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 663-667, 708-710.]

21. SAME—PLEADING.
Where bills of lading under which cotton was shipped provided that the value should be computed at the time and place of shipment and plaintiffs claimed damages by contact of the cotton with mud and water necessitating a quantity of the cotton to be picked off, and alleged values at certain fractional amounts per pound, but the declarations did not state the time of valuation nor the place where the market value was estimated, they were defective.

Actions for Damages upon Contracts.

William H. Barrett and Osborne & Lawrence, for plaintiffs.
J. Randolph Anderson, for Seaboard Air Line Railway Company.
W. L. Clay and Garrard & Meldrim, for Atlantic Coast Line Railroad Company.

SPEER, District Judge. Inman & Company, a firm of Augusta, have brought separate actions for damages for alleged breaches of contracts against the Seaboard Air Line Railway Company and the Atlantic Coast Line Railroad Company. As the terms of the contracts, and the issues raised by general and special demurrers by each of the defendants, are essentially the same, the causes are here considered as one. The amounts of the damages are gathered from alleged injuries to cotton, shipped from Augusta to "ship's side at Savannah, Ga., and thence to Bremen, Germany." Against the Coast Line, $33,251.49 is claimed, and against the Seaboard $4,629.23. The declarations are made up of numerous counts or causes of action, each based upon special contracts with the defendants in the winter of 1902 and the subsequent spring, in connection with the Charleston & Western Carolina Railway Company, the initial carrier. The plaintiffs allege that the cotton was delivered to that company at Augusta, in lots of several bales, and "in good order and free from damage," and was so received by the defendant carriers at connecting points in Yemassee

and Fairfax, S. C., and transported thence to Savannah. The damages are alleged as follows:

"That said bales of cotton, while in the possession of said common carrier ——— in Chatham county and before its contract of carriage had been completed, were damaged by exposure of said cotton to water and mud, to the loss of your petitioners in the sum of ——— dollars."

The items making the loss are then stated:

"Damaged cotton picked off at ——— cents; loss of interest while cotton was being picked ———; loss account of appearance of package and quality after picking; and the cost of picking off damage."

From this is then subtracted "value of pickings," and the added results in all the counts constitute the totals. The contracts, which are substantially identical for the several consignments of bales, are in the form of bills of lading. General and special demurrers to the declarations are filed, the former on the usual ground that no cause of action is stated, and that the carriers named are not the proper parties defendant. The special demurrers present objections in such detail, and so affecting the vital component parts of the counts in the two petitions, that to sustain a material number will in effect sustain the general demurrers also. The petitions charge:

"That said contract of shipment is set forth in a certain bill of lading, No. ——— (the number in each case being inserted), which, with the proper changes in the contract number, quantity, marks, and weights of bales, is substantially the same as the original bill of lading, of which the Exhibit A hereto annexed is a copy."

On the hearing of the causes, the plaintiffs offered to amend as follows:

"The said contract of shipment is contained in that language of said bill of lading designating the goods shipped, the rate, the receipt of the goods in their then condition, and the route. The alleged 'conditions' set forth in said bill of lading constitute no part of said contract because they were not agreed to by your petitioners, but were inserted merely as an effort to limit the legal liability of the carrier. Such conditions are void, even if they had been agreed to, for the reason that there was no legal consideration to support them. Such conditions, and especially the following, are void because unreasonable. * * *"

Then follow the conditions which are sought to be avoided. To the allowance of this amendment, the defendants again object, on several grounds: (1) That they introduce a new, additional, and independent cause of action. (2) That their effect, if allowed, will be to convert a suit upon contract into a suit in tort. (3) That the plaintiffs, having declared upon a special contract, now seek by the proposed amendment to claim they are not bound by the terms of that special contract; and for these reasons they ask that the amendments be disallowed and stricken. The plaintiffs, it will be seen, while conceding that there was a special contract with the defendants, contend that it was contained in only a part of the bill of lading, and that the conditions were neither part of the contract nor agreed to by them. Can the shippers, then, after not only declaring upon a special contract, and alleging that it was in writing, and at the same time attaching a copy and expressly making it a part of their petitions, be now

heard to deny the very basis of their causes of action, and insist that they did not agree to what they distinctly allege was their contract? A position so inconsistent seems forbidden both by reason and the rules of pleading. The plaintiffs are concluded by their original allegations. To permit the amendments would in effect not only introduce a new and independent cause of action, inconsistent with the first complaints, but would change the petitions from actions upon special contracts to actions in tort. The precise question recently arose before the Supreme Court of Georgia, in the case of Southern Ry. Co. v. Parramore, 119 Ga. 690, 46 S. E. 822. The plaintiff sought to introduce an amendment to the effect that, as the bill of lading had not been signed by him or any one authorized, none of its statements could be invoked in favor of the defendant. The latter objected that the effect of the amendment would convert a suit upon contract into one in tort, and it was held:

"A plaintiff cannot declare upon a special contract with a carrier, and then by amendment claim that he is not bound by the terms of such special contract, and add a new and distinct cause of action."

And the court further held that the effect of the amendment "would be to repudiate the contract upon which in the original petition (the plaintiff) based his cause of action." Besides, it is true that to allow the amendments would be to annul that salutary parol evidence rule, which forbids the admissibility of extraneous testimony to vary or contradict the terms of a written instrument. The doctrine is held applicable to cases of this character by the Supreme Court of Georgia, in Western & Atlantic R. Co. v. Trust Co., 107 Ga. 512, 517, 33 S. E. 823, where it was said:

"The general rule is that a bill of lading, as a contract expressing the terms and conditions upon which the property is to be transported, is to be regarded as the sole evidence of the final agreement, in which are merged all prior and contemporaneous agreements of the parties, and, in the absence of fraud or mistake, its terms or legal effect cannot be added to, explained, nor contradicted by parol."

Again, in Wetzell v. Dinsmore, 4 Daly (N. Y.) 195, we find the following:

"If the plaintiff relies upon the bill of lading as evidence of the contract to carry, he cannot adopt one part of it and reject the rest. If it is to be used at all as an instrument of evidence on his part, it must be taken altogether, and the contract collected from all that is contained in it."

What a plaintiff cannot introduce as evidence he cannot set up in his pleadings as the basis of his action. Near the outset of the bill of lading, and immediately following the written language, which the plaintiffs admit was part of the contract, appears the following:

"In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable."

Immediately below this are the "conditions" which the plaintiffs would avoid. That they are part of the contractual language is evident from the fact that they are followed by the subscribing clause of

the instrument purporting to be executed by R. A. Scott, Agent, "on behalf of carriers severally, but not jointly."

At this stage of the case, it must be presumed that the bill of lading expressed the contract between the parties. It is true that the common-law liability of a carrier cannot be limited by conditions expressed in a mere notice to the particular shipper, or to the general public, nor can this be effected in a mere receipt for the goods, or, generally, where the conditions are printed on the back of the bill of lading or stamped across its face. The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; Michigan Central R. Co. v. Mineral Springs Co., 16 Wall. 318, 21 L. Ed. 297; Doyle v. Baltimore & Ohio R. Co. (C. C.) 126 Fed. 841. That principle of law is embodied in section 2276 of the Civil Code of Georgia of 1895, which provides:

"A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given, or tickets sold. He may make an express contract, and will then be governed thereby."

Construing this statute, it was held in early decisions by the state Supreme Court that the onus of proving an express contract is on the carrier, and that no presumption of law arises merely from the shipper's receipt of a bill of lading. Southern Express Co. v. Barnes, 36 Ga. 532; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Express Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53. But later decisions, and the great weight of authority, are to the contrary. Central R. Co. v. Hasselkus, 91 Ga. 385, 17 S. E. 838, 44 Am. St. Rep. 37; Western & Atlantic R. Co. v. Ohio, etc., Trust Co., 107 Ga. 512, 33 S. E. 821; McElveen v. Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371. It is well settled that if conditions are printed or written on the face and in the body of the bill of lading, where the consignor receives the bill, and ships his goods without complaint, he is presumed to have consented to those provisions, and they become, if not inimical to law, a valid and enforceable contract. Unless the statute of the state so requires, the shipper's signature is unessential, and a unilateral bill of lading or receipt may express the contract. Moore on Carriers, 299; Hutchinson on Carriers, §§ 126, 238-242; Wheeler on Carriers, 273; York Co. v. Central Railroad, 3 Wall. 107, 18 L. Ed. 170; Wertheimer v. Pa. R. Co. (C. C.) 1 Fed. 232; Germania Fire Ins. Co. v. Memphis R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Merchants' Dispatch Co. v. Leysor, 89 Ill. 43; Illinois Cent. R. Co. v. Frankenburg, 54 Ill. 88, 5 Am. Rep. 92; Smith v. American Express Co., 108 Mich. 572, 66 N. W. 479; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Cox, Brainard & Co. v. Peterson, 30 Ala. 608, 68 Am. Dec. 145; 4 Am. & Eng. Enc. Law, 521. The principle has moreover been authoritatively determined by the Supreme Court in Cau v. Texas Pacific R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, where it was held:

"* * * The carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

This case arose by certiorari from the Fifth Circuit Court of Appeals. There, per curiam, reported in 113 Fed. 91, 51 C. C. A. 76, we find the following language:

"Shippers have been held bound by the fire clause in a bill of lading, even when they claim that they did not know that the clause was in the bill of lading. Failure to read the bill of lading has been held under such circumstances not to avail the shipper."

This opinion, as stated, was affirmed by the Supreme Court. See, also, Charnock v. Texas Pacific R. Co., 113 Fed. 92, 51 C. C. A. 78. Pretermitting, however, the presumption of law arising from the language of the bill of lading, and its acceptance by the plaintiffs, they must be held concluded by their pleadings, where they have expressly alleged that the bill of lading contains their contract, and have made it part of their petition.

For the purposes of this demurrer, the bill of lading then must be regarded as embodying the contract of the parties. It remains to be determined whether there be any rule of law or of public policy which renders that contract void or unenforceable. Independently of special contract, it is the law both in this country and in England that a common carrier owes a duty to the public to carry for a consideration the goods intrusted to it, free from negligence. Under the common law, the carrier was liable not only for the acts of negligence of its servants, but as an insurer of the absolute safety of the goods from loss or injury. This former rule of liability is expressed by Justice Field, in York Co. v. Central Railroad, 3 Wall. 107, 18 L. Ed. 170, as follows:

The common carrier "is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect upon his part, and he cannot by any mere act of his own avoid the responsibility which the law thus imposes."

Hannibal R. Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423; Johnson v. East Tenn. R. Co., 90 Ga. 810, 17 S. E. 121. The rigor of that doctrine upon the carrier has, however, been largely modified by statute in probably every state of the Union, so that it is now well settled that a common carrier may by just and reasonable contracts limit the extent of its common-law liability. But the rule is equally well settled, and obtains as universally, that a carrier cannot contract to relieve itself from damages resulting from its own negligence or that of its servants. Moore on Carriers, 287. From the quasi public character of their business, and the duties they owe to the public, contracts between carriers and shippers have always been subject to the closest scrutiny of the courts, with a jealous endeavor to guard the rights of the weak, ignorant, or inexperienced. For this reason, they are not to be construed by the ordinary legal rules which govern private contracts, but with due regard for the relative positions of shipper and carrier, and the common-law and statutory duties of the latter. We find, therefore, in the earlier cases and texts the principle laid down that a condition limiting common-law liability must not only be reasonable, and impose no unnecessary harshness on the shipper, but there must be a special consideration, such as a lower cost of transportation, additional to the

mere agreement by the carrier to receive and transport the freight to the connecting carrier or its destination. Where the consideration is a reduction of freight, the shipper must have had ample opportunity to choose between the two rates and their accompanying consequences. Thus we find the rule stated in Moore on Carriers, p. 302:

"A special contract between a shipper and a common carrier, or a stipulation in a bill of lading, qualifying or limiting the common-law liability of the carrier, must be supported by a valuable consideration apart from their mere acceptance of the property for carriage and agreement to transport it, such, for example, as an actual reduction from the usual freight rate, or additional facilities for transportation. Both rates of transportation offered the shipper must be reasonable, and he must be given the option to make his selection in order to render the consideration of a reduced rate valid and sufficient."

In the case of Georgia R. Co. v. Reid, 91 Ga. 377, 17 S. E. 934, it was held that a stipulation limiting liability was not valid unless made for reduced rates of shipment. See, also, Hutchinson on Carriers, §§ 404, 475; Elliott on Carriers, § 1504; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Mears v. New York R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884. But the construction by the Supreme Court of that theretofore essential element of validity seems to have considerably modified or annulled the former doctrine. Said Mr. Justice McKenna, expressing the unanimous decision of the Court in Can v. Texas Pacific R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053:

"It is urged that the contract must be upon a consideration other than the mere transportation of property, and an option and opportunity must be given to the shipper to select under which, the common law, or limited liability, he ships the goods. If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. * * * Primarily, the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, * * * and there can be no stipulation for any exemption by a carrier, which is not just and reasonable in the eye of the law. * * * The consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to the shippers in view of the limitation of the common-law liability of the roads."

The plaintiffs contend here that the conditions in the bill of lading are invalid because without any consideration to support them. But the bill of lading given to Inman & Co. shows that the inland charges from Augusta to Savannah were paid, and that a specific rate of 23 cents a 100 pounds ocean freight was guaranteed from Savannah to Bremen. The language of the contract itself leaves no doubt. It provides:

"In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions * * * herein contained. * * *"

The plaintiffs make no assertion of duress or hardship in their acceptance of these terms. Had they insisted, they might have demanded

that the defendant carriers transport their cotton with the full measure of liability, and a reasonable rate therefor, or additional facilities or advantages of carriage. Had the defendants refused to accept the cotton under these conditions, Inman & Co. could have had their remedy in damages. This is clearly provided for in section 2278 of the Civil Code of 1895 of the state, which provides:

"A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered, that he is able and accustomed to carry, upon compliance with such reasonable regulation as he may adopt for his own safety and the benefit of the public."

Nor could the defendants have limited their liability as insurers save by contract. Section 2276, Code Ga. 1895. Besides, it appears from the declarations that the Coast Line and the Seaboard received these bales of cotton, not as initial, but as connecting, carriers. Their duty to the plaintiffs was the more plain. The statutes of the state required them to receive from the Western & Carolina "all cars containing freight consigned to any point on the road to which the same is offered." Had they refused, the precise damages recoverable were readily ascertainable. The law of Georgia expressly gives a right of action to the consignee, shipper, or owner for any refusal to receive goods from connecting carriers, and affixes a penalty of "not less than ten per cent. nor more than twenty-five per cent. of the value of the goods so refused to be received." In view of these considerations, and the ruling of the Supreme Court, the contention that the conditions were unsupported by a consideration cannot be held maintainable.

It is, however, insisted that certain of the conditions in the bill of lading were unreasonable, and therefore must be regarded as void. As we have seen, stipulations for exemption must be "just and reasonable in the eye of the law," and "a carrier must take no advantage of a shipper, and practice no deceit upon him." Can v. Texas & Pacific R. Co., supra. The established rules against fraud, misrepresentation, or duress are applicable to the fullest extent. The contract must be fairly made by the carrier, and freely entered into by the shipper. Moore on Carriers, 302. The question of reasonableness is for the court, and the burden of proof is on the carrier. South., etc., Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578.

The second condition in the bill of lading is as follows:

"No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control or by floods or by fire; jettison, ice, collision, stranding or other accidents of navigation; or by delay, quarantine, or by riots, strikes, stoppages of labor, or by leakage, breakage, chafing, loss in weight, decay, vermin, changes in weather, heat, frost, wet or country damage on cotton, or for shrinkage of grain or seed carried in bulk; or from any cause, if it be necessary or is usual to carry such property upon open cars or upon deck."

The reasonableness of many of the causes inserted in this paragraph may at least be doubted, particularly the "omnibus" clause which is aimed to protect the carrier from liability "from any cause, if it be necessary or is usual to carry such property upon open cars or upon deck." It is also obvious that the carriers cannot exempt themselves by stipulations against floods, fire, jettison, ice, delay, riots, strikes, leakage,

breakage, or any human agency in which their negligence or that of their servants may be a factor, nor against other causes, where their operation to cause loss or injury might be avoided by the exercise of due precaution, care, and diligence by the carriers. The carrier must in all cases have used extraordinary care and diligence to avoid the damages, or it cannot avoid liability. Now, the defendants insist that the exemption against "wet or country damage on cotton" avoids the damages claimed by the plaintiffs. But, regardless of that exemption, the defendants must be free from any contributory negligence. The petition nowhere alleges that the damages to the cotton occurred on account of any negligence of the Seaboard or the Coast Line. It becomes, then, vital to the determination of these issues, to determine upon whom the burden of alleging and proving negligence or want of negligence must fall. If the burden is upon Inman & Co. to allege specific acts of negligence, since they have not done this, not only must the general demurrer be sustained, but the condition in the bill of lading against "wet or country damage" (since it appears on the face of the pleadings), would defeat the plaintiffs' cause of action. On the other hand, if negligence may be presumed from the mere allegations of injuries, and the burden is upon the railroads to show want of negligence of any kind, until this is shown by the proof, the condition against "wet or country damage" cannot protect them, and the general demurrers must be overruled. In other words, is negligence presumable per se from the general allegations of damage? The presumption of law and the burden of proof, by the great weight of national and state authority, is in favor of the shipper. The goods are presumed to have been received by the carrier in good order, unless the proof shows to the contrary. Henry v. Central R. & Banking Co. 89 Ga. 815, 15 S. E. 757; Forrester v. Ga. R. & Banking Co., 92 Ga. 699, 19 S. E. 811; Price v. Powell, 3 N. Y. 325. From the time of delivery of these bales of cotton to the Charleston & Western Carolina Railroad Company, and the receipt of the carrier's agent as "in apparent good order," the presumption operates against the carrier that, if any loss or damage is shown to have occurred, it was occasioned by some negligence. It is then incumbent on the carrier, upon such damage appearing, to rebut the presumption of negligence. This may be done by showing freedom from negligence, or that the injury occurred through some cause for which, under the provisions of the contract or general principles of law, the carrier is not liable. A prima facie presumption arises, from the carrier's possession, that the goods were injured by some default. To meet this, it may show that the damage was occasioned by some cause for which the bill of lading exempted it from liability. The shipper must then show some concurrent negligence by the carrier, and that the damage could have been avoided by the exercise of reasonable care and skill. Ceballos v. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; Wertheimer v. Pennsylvania R. Co. (C. C.) 1 Fed. 234; Hull v. Chicago, etc., R. Co., 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. Rep. 722. The rule is stated in Clark v. Barnwell, 12 How. 272, as follows:

"Although the injury may have been occasioned by one of the exempted causes in the bill of lading, yet still the owners of the vessel are responsible,

if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the onus probandi then becomes shifted on the shipper to show the negligence."

Since Inman & Co. declare upon special contracts, an essential part of which are conditions exempting the defendants from liability, if, as appears, "water and mud" and "wet and country damage" were synonymous, besides a general allegation of injuries, they must allege some specific acts of negligence in connection with the damages through "water and mud." This they have failed to do.

Another very material condition in the bill of lading is that which requires notice to the carriers of any injury suffered. It is as follows:

"Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

The plaintiffs contend that this condition is unreasonable, and imposes an unnecessary hardship upon them, and that, therefore, it is ineffective to relieve the defendant railroad companies of liability. The pleadings of the plaintiffs charge no notice, and it appears that none was given. If, then, the requirement that notice shall be given is reasonable, and controverts no principle of law, as it is an essential part of the contract (as we have seen), it must defeat the plaintiffs' right to recover. In determining the reasonableness of conditions, no universal rule has been announced, but the court must determine from the face of the pleadings, and if this is insufficient, after full proof, whether the condition is reasonable under the particular facts of each case. Where proof is submitted, the burden is upon the defendants to show that the rule imposed on the shipper is reasonable. Hutchinson on Carriers, §§ 443, 447; Elliott on Carriers, 1512, 1514. Where no hardship to the shipper appears, requirements of notice have been uniformly sustained by the courts. Such a stipulation is not an attempt to limit the common-law liability of the carrier. 4 Am. & Eng. Enc. of Law, 516. Notice may be waived by the carrier, but it is incumbent upon the shipper to show such waiver. Elliott on Carriers, 1514. The reason and justice of conditions of this character is stated in Hutchinson on Carriers (2d Ed.) § 259, as follows:

"The object of such a stipulation is to enable the carrier, while the occurrence is recent to ascertain what the facts are, and having made his claim, the owner may delay his suit to any time limited by the law. 'There is no hardship * * * in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is a great hardship in requiring the carrier to account for a parcel after a long time, when he has had no notice of any failure of duty on his part, when the lapse of time has made it difficult, if not impossible, to learn the actual facts."

See, also, Moore on Carriers, 333.

Under the particular facts in the cases involved, various courts have upheld conditions requiring notice by the shipper or consignee to the carrier, for times varying from 30 to as low as 3 days after the arrival of the goods. The condition in the case at bar has been often upheld

in other jurisdictions. In the case of B. & O. Southwestern Ry. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106, it was held:

"The carrier may lawfully stipulate that any claim for damages growing out of the carrier's negligence shall be made within a reasonable time, and ten days has been held to be a reasonable time."

The Court of Appeals of the state of Illinois has repeatedly held that a stipulation requiring notice within five days after the damage is reasonable and valid. Chicago & A. R. Co. v. Simms, 18 Ill. App. 68; Wabash, St. Louis, etc., R. Co. v. Black, 11 Ill. App. 465. In Sprague v. Railway Company, 34 Kan. 347, 8 Pac. 465, a similar question arose under a stipulation which provided "that as a condition precedent to the right (of the shipper) to recover damages for any loss or injury to horses while in transit, the shipper would give notice of his claim therefor to some officer of said railway company, or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery, to the shipper, and before such horses were mingled with other stock." It was held that this was reasonable, and binding upon the parties. A case involving the validity of a stipulation almost identical with this Kansas case recently came before the Supreme Court of Georgia, in Southern Ry. Co. v. Adams, 115 Ga. 705, 709, 42 S. E. 35, 36, and the court observed:

"* * * Such a stipulation prejudices no right of the owner or consignor, and, at the same time, protects the transportation company; and, following the authorities above cited, we must not only rule that the carrier could lawfully make a contract containing a stipulation of this character, but that such a stipulation is a reasonable one."

In Express Company v. Caldwell, 21 Wall. 264, 22 L. Ed. 556, the Supreme Court of the United States upheld a stipulation by an express company that a claim for loss should be made within 90 days after the delivery of the goods for consignment. There, Mr. Justice Strong observed for the court:

"A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee within the specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy, it excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever require."

The rule which was placed in the bill of lading now before the court was entirely reasonable. The plaintiffs had ample time and opportunity to notify the Seaboard and the Coast Line of their alleged injuries. The transit of the cotton from Savannah to Bremen would have required no more than 2 weeks, and the bills of lading only required notice within 30 days after the delivery of the property at Bremen. The alleged damages on account of mud and rain occurred in Savannah before the bales were loaded on the vessels. Inman & Co. in the exercise of proper diligence could have readily ascertained the damages, and notified the carriers before 30 days had elapsed from the time the

cotton reached Bremen. We conclude, therefore, that this stipulation was reasonable, and a condition precedent to recovery.

Voluminous objections were also raised by special demurrers, to sustain any material number of which must, as stated, in effect sustain the general demurrers. A material ground is that the plaintiffs have alleged no title or interest in the cotton giving them a right of action. Had Inman & Co. alleged such title, the defendants would be estopped to deny it. Code Ga. 1895, § 2286. Actions upon contracts "must be brought in the name of the party in whom the legal interest * * * is vested." Code Ga. 1895, § 4939. That interest may be one of either a general or special owner. In the case of Minturn v. Alexandre (D. C.) 5 Fed. 117, libel was brought for the recovery of damages to a cargo, and it was held by Judge Choate that the libel "should contain averments, showing unequivocally, and with reasonable certainty, that the libelants had such a special or general right of property in the cargo, that by its loss or injury they had suffered damage." See, also, New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465. To establish a good cause of action, it was essential for Inman & Co. to allege some ownership or interest. It is nowhere alleged that they had any connection with these bales of cotton other than contracting for their transportation. In justice to their right of protection against claims for the same injuries by other parties at interest, the defendants should know the connection of the plaintiffs. The bills of lading and the cotton may have been assigned or sold by the shippers after or even prior to the time the bales reached Bremen, or Savannah, and prior to these actions. While full detail was unnecessary, Inman & Co. should have put the railroad companies on notice of what interest they claimed, for it is vital in determining not only the right, but the amount of damages recoverable.

The petitions have been attacked upon the additional ground that they fail to properly allege a breach of contract, and that the charge that the cotton was damaged "while in the possession of said common carrier in Chatham county * * * and before its contract of carriage had been completed," is insufficient, as a mere conclusion of the pleader. The time, place, and manner of the injuries, as well as the specific acts of negligence, it is said must be stated. While the objection to the allegation of breach may be regarded as hypercritical, and, as we have seen, the rule in this state does not require the plaintiff ordinarily to allege specific acts of negligence, it is none the less true that the injuries or losses complained of must be definitely and fully stated. This is not done in these petitions. There is no statement where the injury occurred other than in "Chatham County," whether during its transportation to the defendants' depots by reason of improper protection, or by exposure after arrival there, or while being loaded aboard ships. A defendant is entitled, when he presents a special demurrer, to be fully informed of the facts upon which the plaintiff would hold him liable. Fontaine v. Baxley, 90 Ga. 428, 17 S. E. 1015; Railroad Co. v. Mitchell, 95 Ga. 85, 22 S. E. 124; Kemp v. Central of Ga. R. Co., 122 Ga. 562, 50 S. E. 465. Besides these defects, the petitions are open to further objections that the items of damage are

not stated. The total amounts claimed under each count appear, with items described as follows:

That said loss was made up as follows:
——— lbs. damaged cotton picked off, at ——— cents.....
Loss of interest while cotton was being picked.....
Loss account of appearance of package and quality after picking....
Cost of picking off damage.....
Total .....$———
Less value of pickings.....$———

It is not stated when, where, how, by whom, or by whose authority the damaged cotton was picked off, nor, if the cotton was in fact injured, the necessity for its picking. Nor is the item stated as "loss of interest while cotton was being picked" sufficient. To recover such damages, the necessity of picking must be shown, the time required, and that it was as expeditious as possible. Besides the method of computation, the principal, time, and rate of interest are undisclosed. The following item presents equally grave difficulties. It does not show how the appearance of the package was altered, nor the method of arriving at the damages. These must be exact and definite, remote and speculative damages are not recoverable. Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 153 Fed. 817. If the plaintiffs had to sell the cotton at reduced prices, under special contracts or subsequent sales, such contracts must have been in existence, or their contemplation made known to the defendants prior to the execution of these bills of lading. If the plaintiffs do not seek to recover under this measure of damages, they must show, in order to be entitled to these items, that the cotton was sold for the highest price obtainable by due diligence to sell, and that the difference in price was not due to their laches, but was directly connected with the injuries to the cotton. The other averments do not show either the necessity of picking, or that the pickings of cotton were sold as advantageously as possible. There is, moreover, a clause in the bills of lading which provides that the value of the goods lost or injured shall be "computed at the value of the property at the place and time of shipment." Such a clause has been held reasonable, and has been uniformly sustained. Central of Ga. R. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Louisville & N. R. Co. v. Oden, 80 Ala. 38; Chicago, R. I., etc., R. Co. v. Harmon, 17 Ill. App. 640; 5 Am. & Eng. Enc. of Law, 335.

The plaintiffs have not stated the quality or grade of the damaged cotton picked off. Certain values per pound, varying in different fractional amounts above 10 cents, are given, but the time of valuation, or the place where the market value was estimated, whether in Augusta, Savannah, or Bremen, does not appear. As the condition in the bill of lading required, the pleadings must show that the damaged cotton was estimated from market prices in Augusta, for each lot of bales.

These are material insufficiencies vital to the plaintiffs' right of recovery. There are in addition other serious defects, which in view of those hereinbefore stated, it is not essential to discuss. The demurrer of the defendants to the amendments offered by the plaintiffs will be sustained, and the amendments disallowed. The general and the special demurrers must, for the reasons stated, also be sustained.

Orders may be taken accordingly, dismissing the causes against both the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railway Company, with costs.

UNITED STATES ex rel. NORTHWESTERN WAREHOUSE CO. v. OREGON R. & NAVIGATION CO.

(Circuit Court, D. Oregon. February 24, 1908.)

No. 3,137.

1. WAREHOUSEMEN—NATURE OF BUSINESS.
Private warehousemen receiving grain on storage from producers to be held in storage until shipped to market are bailees for hire.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Warehousemen, § 12.]

2. SAME—WAREHOUSE RECEIPTS—NEGOTIABILITY.
Where warehousemen receive grain for storage and issue warehouse receipts therefor, such receipts are negotiable, and, when transferred, carry the title to the grain on storage to the transferee.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Warehousemen, § 31.]

3. SAME—ISSUANCE OF RECEIPTS—DELIVERY OF GRAIN.
The duty of a warehouseman receiving grain for storage is to issue receipts therefor as required by law, and to deliver the grain or a like quantity of similar grain represented by the receipts to the holder on demand on his complying with the conditions of the receipts.

4. SAME—NATURE OF WAREHOUSES.
Warehouses erected for the receipt and storage of grain pending shipment to market, though conducted by warehousemen in their private capacity, are quasi public institutions.

5. CARRIERS—INTERSTATE COMMERCE ACT—DISCRIMINATION.
Under the express provisions of interstate commerce act, Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], a common carrier is required not to make or give any undue or unreasonable preference or advantage to any particular firm, person, or corporation, or locality, or to any particular description of traffic, or subject any particular firm, corporation, or locality, or any particular description of traffic, nor to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, but this duty only applies where the circumstances or conditions are substantially similar.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 84.]

6. SAME—RULES.
In the absence of statutory interposition and regulation, a carrier may establish and promulgate reasonable rules and regulations governing the manner and form in which it will receive such articles of commerce which it is bound to carry as well as the manner in which they shall be packed and prepared for shipment, and may alter or modify such rules from time to time on reasonable notice to the public.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 98.]

7. SAME—ERECTION OF ELEVATORS—STATIONS—DISCRIMINATION.
A railroad company may establish a station for the special accommodation of a particular customer, and refuse to establish a like station elsewhere for the accommodation of others, and may also grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another, in the exercise of its right to private property.

8. SAME—DISTRIBUTION OF CARS—RULES.

Where a railroad having permitted the erection of grain elevators along its right of way for the storage of grain by producers and other owners, pending shipment, promulgated a rule requiring all orders for cars to be used in the shipment of grain from such warehouses to come through the warehousemen, the warehouseman in ordering cars for a storer of grain pursuant to such rule is the agent of the railroad company for that purpose, and not the agent of the storer, so that the railroad company is liable for the warehouseman's negligent or unfaithful performance of such duty.

9. SAME—DISCRIMINATION.

A railroad having permitted the erection of grain warehouses along its right of way in which grain was stored for producers and owners for hire as well as grain purchased and owned by the warehousemen promulgated a rule requiring all orders for cars for the shipment of grain from such warehouses to be made by the warehousemen. The rule operated to the prejudice of private storers of grain through the use of cars ordered by the warehousemen for the shipment of their own grain before cars could be obtained for the shipment of grain in the warehouse owned by storers, and by the appropriation of cars intended for storers by the warehousemen. *Held*, that the railroad company, under its duty to see that no discrimination was practiced, was bound either to change the rule, or to see that it was not permitted to operate in favor of one shipper and against another.

In Equity.

This is a proceeding by writ of mandamus to require the defendant railroad company to furnish cars for the transportation of grain for the relator in proportion to the number of cars furnished for a like service for the use of relator's competitors engaged in the same business. The relator's business consists in buying grain for export, and to some extent in storing the same for hire. The defendant is engaged in operating a railroad, extending from Portland up the Columbia river, and through the state of Oregon eastward, with branches reaching into Eastern Washington, over which road and its said branches it transports large quantities of wheat and other grain. The defendant also operates lines of water transportation, by means of which it engages in an export business, with Portland as its principal port of departure, for produce and merchandise, the transportation of which originates in Oregon and Washington. In the course of its business the relator purchased, during the latter half of the year 1906 and the early part of the year 1907 large quantities of wheat stored in the warehouses of private firms and corporations, situated at the stations and sidings along the defendant's branch roads, principally within Whitman and Adams counties in the state of Washington, for transportation to Portland, Ore., and export therefrom to foreign markets. The names of the stations and sidings are given in relator's petition for relief, as are also the names of the owners or managers of the private warehouses, and the amount of wheat purchased in each, with aggregates running from 15,000 to 17,000 tons. The warehousemen conducting such warehouses wherein the relator purchased wheat were instructed that the same should be shipped over the lines of the defendant company, and the relator, at divers times has demanded of the defendant to furnish cars for the shipment of relator's wheat, so purchased, on storage in such warehouses, but relator has been unable to obtain any sufficient number of cars for the transportation of its wheat, or any portion thereof except a small percentage. Demands were made for cars, upon the general freight agent of the road, the car service agent, and the general manager thereof, and all with but little avail. Some of the persons, firms and corporations, owners, proprietors, or managers of many, if not all, of the warehouses located at the stations and sidings specified are also engaged in buying and exporting wheat and other grain, and in the course of such business purchase largely of grain on storage in their own warehouses, and ship the same by defendant's railroad lines from such warehouses. Further than this, it is shown by the petition, in

effect, that relator has been discriminated against as it pertains to the number of cars furnished for its use, considering the relative business transacted over the road by relator and other wheat buyers, being principally the warehousemen engaged in the same business, in comparison with the number furnished such other shippers. During the time covered by the petition, there was a shortage of cars, so that the railroad company was unable to carry all the freight offered. A motion to quash was interposed, and a hearing had upon the motion.

Teal & Minor, for relator.

W. W. Cotton, Arthur C. Spencer, and James G. Wilson, for defendant.

WOLVERTON, District Judge (after stating the facts as above). The principal question involved by this litigation hinges about a rule of the defendant railroad company which requires that orders and requisitions for cars with which to make shipments of grain from these private warehouses shall be made through the warehousemen. And it is urged on the part of the railroad company that, because it has adopted and promulgated such a rule, it is not obliged to honor orders or demands for cars made in any other way or through any other persons or officers.

The warehousemen are bailees for hire. They receive the grain on storage from the farmer or producer, for which warehouse receipts are issued. These receipts are negotiable, and when transferred carry the title to the grain on storage to the transferee. Grain buyers, in purchasing from the producer, obtain a delivery of the receipts to them, which entitles such buyers to the grain, or a like quantity, represented by the receipts. The warehouseman's obligations appertaining to his business are, when he receives grain on storage, to issue the receipts therefor as required by law, and to deliver the grain to the holder of the receipt or receipts upon his demand; the holder, of course, complying with the conditions of the receipt before being entitled to the delivery. If cars are furnished by the holder, the delivery is made by loading the grain upon the cars, and with this service terminates the warehouseman's duty with reference to the bailment. These warehouses, although conducted in private capacity, are nevertheless in a sense public concerns. By the custom of the country, producers having grain to dispose of take it to these depositories and store it pending sale or shipment, and all persons are permitted to store upon like terms and conditions. They are usually located in proximity to railroad or water transportation, so that when the time is ripe and convenient for shipping the stored commodity, it may speedily be sent upon its way into the markets elsewhere. So it is of the warehouses in which the petitioner has its grain stored. They are located upon the lines of the defendant company, so as to afford convenient and speedy transportation from such depositories when it is desired that shipments shall be made.

The railroad company owes a duty to the shipper that it will not unduly and unreasonably discriminate against him in favor of another or other shippers. This duty is imposed by law, and requires that the carrier shall not make or give any undue or unreasonable preference or advantage to any particular person, company, firm,

corporation, or locality, or any particular description of traffic in any respect whatever, or subject any particular company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever. Such, in effect, are the provisions of section 3 of the interstate commerce act of Congress. Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]. This section has its near prototype in section 2 of the English Railway Traffic Act of 1854, and the courts of this country have adopted the English interpretation of that section. Interstate Commerce Commission v. Baltimore & Ohio R. Co. (C. C.) 43 Fed. 37; and the same case, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. Prior to the adoption of this act, "railway traffic in this country," says Mr. Justice Brown in Interstate Commerce Commission v. B. & O. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, "was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable." And later on in the opinion he continues:

"The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

This is a concise, but comprehensive, summary of the purposes of the act. The specific conduct or acts of a transportation company which will amount to discrimination are largely relative, and depend more or less upon the environments and the conditions attending them, and are resolvable into questions of fact. Says Mr. Justice Shiras, speaking with reference to the third section of the act, in Texas & Pacific Railway v. Interstate Com. Com., 162 U. S. 197, 219, 16 Sup. Ct. 666, 678 (40 L. Ed. 940):

"It forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact."

The inhibition against making or giving any undue or unreasonable preference or advantage, or subjecting any person or firm to any prejudice or disadvantage, is suggestive that there may be preferences or advantages given or suffered that may be perfectly lawful and proper. Indeed, such is the case in business and commercial experience and practice. Thus it was held in Interstate Commerce Commission v. Baltimore & Ohio R. Co., supra, that it was not an undue or unreasonable preference for a railroad to sell 10-party tickets for a less rate per person traveling than tickets to single persons, and this upon the basis that the sales were not made, nor the preference or advantage given, under the same or similar circumstances or conditions. Numerous other illustrations from adjudications might be

given, but this one is sufficient to point the moral. If there be elements existing which afford proper grounds for distinguishing one shipper or locality from another, then, as between them, there can be no undue or unreasonable preference or advantage, because each must stand in his own class, and each will be entitled to be accorded a different standard of treatment, and the fact that a different standard is accorded each, under dissimilar conditions, can afford no grounds of complaint. One person, having live stock to ship, could not demand to be allowed the same rate per ton as another having grain, because of the manifest difference in the commodity to be handled. But if both shippers were moving the same commodity in shipment, the carrier must give to the one the same rate of freight as to the other, for the reason that the classification of the commodity shipped by each must necessarily be the same, and if the carrier should not give the same rate, manifestly there would be discrimination, which would inevitably result in a preference or advantage to the one getting the lesser rate, and could not be tolerated, because there is no reason for it. The one subjected to the higher rate could not compete with the other, being deprived of equal advantage. So it is that a difference in distance affords a ground for differentiation as to the rate to be charged; but where the distance is the same and the route is the same, a like rate must be given to all. The element of time of shipment or in transit, and other conditions and environments, may also affect the result. It is essential, therefore, in the consideration of whether there has been discrimination, or undue or unreasonable preference given or suffered, to find, as a basis for the inquiry, whether the attending conditions and circumstances affecting the respective shippers, and the service required and demanded, are substantially the same; that is to say, whether there is to "be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions." If it be so ascertained, then the investigation can proceed, for the standard of comparison and estimate is then present, and it may be further ascertained whether the competing shipper is being discriminated against. But if the contrary appears, there is an end of the investigation, for there can be no discrimination where there is no proper basis of comparison as to the services required.

In the absence of statutory interposition and regulation, the carrier is entitled to establish and promulgate reasonable rules and regulations governing the manner and form in which it will receive such articles of commerce as it is bound to carry, as well as the manner in which they shall be packed and prepared for shipment, so that they may be handled with convenience, safety, and dispatch; and it follows as a corollary to such authority that the carrier has also the power to alter or modify such rules from time to time, as it may deem proper and expedient, upon reasonable notice to the public, so that interested parties may be apprised of what is required when seeking service at the hands of such carrier. Harp v. Choctaw, O. & G. R. Co., 125 Fed. 445, 61 C. C. A. 405; Robinson et al. v. Baltimore & O. R. Co., 129 Fed. 753, 64 C. C. A. 281; Rhodes v. Northern Pacific R. Co., 34 Minn. 87, 24 N. W. 347. So the carrier may promulgate rules regulating the manner of conducting its own business, having due

regard under the law for the rights of persons and the public entitled to its services. Says Mr. Justice Jackson, sitting in the Circuit Court of Appeals in the case of Interstate Commerce Commission v. Baltimore & Ohio R. Co., supra:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

And further on in his opinion, quoting from the report of Amalgamation Committee of 1872, p. 13, he continues:

"As regards the 'undue preference' branch of the English acts, 'the effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such condition as may incidentally have the effect of favoring one class of traders, or one town or one portion of their traffic, provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company.'"

While the Supreme Court has not adopted the language, yet it has affirmed the decision of the eminent jurist, and I take it that his reasoning and enunciation of the law is sound.

Other principles are advanced as having some bearing upon the controversy, namely, a railroad company may establish a station for the especial accommodation of a particular customer, and refuse to establish a like station elsewhere for the especial accommodation of another or other persons. A., T. & S. Railroad v. D. & N. O. Railroad, 110 U. S. 667, 682, 4 Sup. Ct. 185, 28 L. Ed. 291. A railroad may grant to one person a right to erect upon its right of way a warehouse for the storage of grain, and may not be compelled to grant the same privilege to another similarly situated. Let it be observed that this is upon the ground that private property cannot be thus appropriated. Missouri Pacific Railway v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. And a railroad company may designate as its loading place for live stock the stock yards of a private corporation, and may refuse to deliver or receive live stock to or from other stock yards, whether they be public or private. Central Stock Yards v. Louisville, etc., Ry. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565. And so may the company route cars as it may seem to its best advantage when to be carried beyond its own lines, a through rate of tariff being agreed upon. Southern Pacific v. Interstate Com. Com., 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585. These latter cases determine the absolute rights of the railroad company in the instances disclosed by the record. They have but little bearing, however, upon the manner of rule the company is entitled to adopt for its convenience and dispatch in the furtherance and management of its own business with its patrons and those who may require its services.

Now, the precise inquiry here is whether, as between the petitioner

holding wheat in these warehouses for shipment and the warehousemen as shippers of their own grain from the same warehouses under the unusual condition of a car shortage, there exists any substantial difference in condition or circumstance, the service required or demanded being the same, which will warrant the railroad company in furnishing the cars to the latter upon their order, and not to the former unless the order therefor is made through the latter also, and whether, considering the duty of the railroad company and its right of regulating and conducting its business in its own way, subject to the requirements of the public service, it can require of the petitioner by rule that it make its request for cars through the warehousemen as a condition to the company furnishing the same. The contention of the railroad company seems to be that, as these warehouses are owned in private capacity, were constructed and now remain upon the company's right of way by its consent and sufferance, and are not recognized by it as public depots for the receipt and shipment of freight generally, it is rightfully entitled to adopt and insist upon an observance of the rule inveighed against by the relator. At the same time the company insists that its arrangements with the warehousemen for setting out cars for their use in the shipment of grain are of purely private concern between the company and the warehousemen, and that depositors other than the warehousemen are without right to insist upon a like service to that extended to the warehousemen. The warehouses in question, though owned and conducted in private capacity, are yet, as has been previously stated, in the larger sense public depositories for the storage of grain. They are open for the use of all who desire the service, and all, it might be said, are accorded the privilege offered without discrimination. The railroad company, of course, was perfectly cognizant of the nature of the business to be conducted by the warehousemen when it entered into arrangement with them for maintaining the warehouses upon its right of way; and the principal purpose to be subserved was to afford the company added facilities for shipping the particular kind of produce to be received therein on storage.

As shown by the petition herein, the traffic in grain from the particular stations and sidings enumerated is very large, and hence it is a thing of great importance to the company that it secure these added facilities from which to make shipments. The ordinary station houses or freight depots are not of sufficient capacity, nor do they afford the requisite means for shipping the great quantities of grain offered for transportation. So, therefore, to meet the situation, and knowing that warehouses are necessary for the storage of grain, as well as affording facilities for its shipment, the company has consented with the warehousemen that they may maintain the warehouses on its right of way. There is complete harmony of purpose between the warehousemen and the carrier as it pertains to the maintenance of these depositories, it being, first, to afford a depository for the producer for storing his grain, and, second, to afford to the railroad company an added facility for handling the same, that it may be readily transported elsewhere. Here, then, are two public, or rather,

quasi public agencies operating together. Both are performing a public service—one the storer, and the other the carrier, of a staple commodity of large volume, taking its course in the channels of commerce. The storer has a specific duty to perform, namely, to receive and receipt for, and to load aboard cars when furnished; and the carrier, to furnish the cars and transport the commodity when required so to do. While it might be, in strict legal right, that the former could refuse service to whomsoever it would, yet offer it to all, the railroad company cannot refuse its service to any requiring it, under like or similar circumstances and conditions.

Now, as a means of regulation pertaining to its business of furnishing cars to shippers, the railroad company has required by rule that all orders for cars to be used in the shipment of grain from these warehouses shall come through the warehousemen engaged in the operation of such houses. In what capacity does this place the warehousemen? Do they become the agents for the shipper or for the carrier? The primary duty of the warehousemen, as has been observed, is to place the grain on board the cars when furnished. When they have done this, then their services as bailees are at an end. It is not their undertaking to provide cars, or to ship the grain away. They could be required to load the grain on wagons or other vehicles of conveyance as well as upon the cars, providing they were conveniently placed for the receipt of the grain from the warehouses. There is no other obligation or duty under the conditions of storage, which requires of the warehousemen anything beyond loading the grain out of the warehouses. Thus far, therefore, the storer, who becomes also the shipper, whether the title to the grain has shifted by sale and purchase or not, has not made the warehousemen his agents to furnish cars for the shipment of his grain there on storage. The warehousemen are only, so far as he has any contractual relations with them, to load the grain aboard cars when furnished. Can the carrier, by rule, make of the warehousemen agents for the storer and shipper without his consent? It would seem not. Ordinarily, and it is a rule of the railroad company, I presume, that where freight is offered for shipment at the regular freight depots, it is made the duty of the station agents to make requisition for cars necessary for the shipments, and such is made the regular channel through which cars are supplied. In that case no doubt can be entertained as to whose agent the station agent is. He is the agent of the carrier, and not of the shipper. When the shipper has offered his freight at such depot, it is the duty of the carrier to furnish the shipping facilities, and hence it requires of the station agent that he make the proper requisition for the necessary cars, and the station agent is made the railroad's agent for that purpose, and that it may perform its duty to the shipper. Now, are the conditions greatly different when the shipments are being made from warehouses maintained, as these in question are maintained, as facilities to enable the railroad company to ship the freight offered through them for transportation? The company must have means of communication with the shipper with reference to the freight offered, so that it may be enabled to perform its duty to the public. And to meet this condi-

tion it says, "We will take orders for cars through the warehousemen. Place your orders with them." Now, who is responsible for any dereliction in duty on the part of the warehousemen when orders are thus placed? Suppose the warehousemen arbitrarily say, "We will not transmit your orders to the company," who is responsible for such an act of the warehousemen? And suppose the shipper is greatly damaged by reason of the warehousemen's refusal to transmit the order, would not the company be liable for a failure to provide the appropriate transportation for shipment? It can scarcely be controverted that the railroad company would be held liable. If so, then the warehousemen are the agents of the carrier; and I think this to be the true relation. The railroad company, having a public duty to perform, could not reasonably say to the persons to whom it owes the duty that it will perform it, providing a request therefor is made through certain designated personages, and then shift responsibility because those personages refused to act, or were negligent or unfaithful to their duty. The railroad company cannot shift duty and responsibility in that way. So it must be that the warehousemen become the agents of the railroad company under the rule. The rule, it must be assumed, was conceived in good faith, and under ordinary conditions is well calculated to subserve the business demands of the company and the public in moving the freight from these warehouses; but when the unusual condition of the shortage of cars arose, so that all freight could not be moved in the ordinary course, the warehousemen having grain of their own to ship succeeded in obtaining a vastly better car service in proportion to the volume of shipment than other purchasers and holders of grain in the same warehouses. The rule while designed to subserve the exigencies fairly, has become an instrumentality in the hands of the warehousemen whereby they are obtaining an advantage in the shipment of grain over other storers and shippers.

It is stated in the argument that it often happens that, when the storers have succeeded in having cars set out for their use, such cars are loaded with the grain of persons other than those who have procured them, and that the latter are thus deprived of the service—a sort of theft of the use of cars; and the practice is said to have obtained quite generally. The result is that the warehousemen, the agents of the railroad company, are being benefited by reason of the rule complained of, to the detriment of other storers and shippers from the same warehouses, their competitors as dealers in the purchase and exportation of such grain. In substantiation of the practice, I need only to quote from two letters, one written March 5, 1907, to J. F. Meyer, car service agent of the defendant company, and the other March 11, 1907, to J. P. O'Brien, the general manager of such company, by Charles E. Curry. By the first he writes:

"If we were accorded the same rights as other shippers and which we contend we are entitled to, we could handle our business as it should be, but your forcing us to look to the warehouse systems for a share of the cars placed for them results in their loading all or practically all the cars so placed for their own account."

And by the second:

"We are compelled to call your attention to the manner in which your company is discriminating against us in the way of supplying cars for wheat loading, at the present time, on the Washington Division. Within the last ten days, Balfour, Guthrie & Co., Kerr, Gifford & Co. and Pacific Coast Elevator Co. each have received in Albina upwards of 100 cars, while during the same period we have received less than ten, and out of this number but three have been loaded out of the warehouses operated by the above-named firms, with whom we have stored at the present time upwards of 15,000 tons of wheat. * * * As it is to-day, a person or corporation not operating a line of houses on your line is practically shut out from doing a wheat business at Portland, due entirely, we think, to the co-operation of the railroad company with the warehouse systems."

Nor are the relative circumstances and conditions of the warehousemen as purchasers and exporters materially dissimilar to those of the storer, purchaser, and exporter. The warehousemen, it is true, are the proprietors or managers of the warehouses; but these, in so far as it concerns the railroad, merely furnish it with the facilities for shipping—filling the place and purpose, as respects the commodity handled, of the public freight houses at the stations. So that these conditions furnish no grounds for a reasonable distinction as to the relative shippers offering freight to be carried from these warehouses. It is plain that the carrier cannot claim that it is serving the warehousemen in a private capacity, because many others are induced to store with the warehousemen, who expect and are entitled to a like service on the part of the railroad company as the warehousemen. Indeed, the entire service, the storage and the carriage, is of quasi public character, and the railroad company can make no discrimination unless there exist other conditions of a dissimilar nature; and this cannot be maintained. The statute imposes upon the railroad company a duty, not only that it shall not make or give any undue or unreasonable preference or advantage, but also that it shall not subject any one to any prejudice or disadvantage. The rule inveighed against, while primarily and ordinarily not unreasonable, does not meet the exigencies of the present situation. The duty of the railroad company is to see that no one is discriminated against. It is clear that, under the present operation of the rule, the warehousemen are obtaining preferences and advantages, while the other storers and shippers are being subjected to prejudice and disadvantage. The railroad company should remedy this inequality, for it is altogether unjust and unreasonable. It should, therefore, see that the warehousemen—its agents—deal fairly with all shippers, themselves included with the number, in ordering and distributing cars according to the respective shippers' proportionate share, and that the parties for whom they are assigned have the privilege of their use. Or it should see to it directly, without the interposition of such agencies, that justice be done to all shippers according as its duty requires it to do. The railroad company should either require absolutely fair treatment at the hands of the warehousemen, or it should abrogate the rule, and formulate one to meet the exigencies of the situation. This duty the company cannot evade under

the guise of a business regulation. It is a positive duty, and must be observed.

As it relates to the sufficiency of the petition and affidavits, there is ample set forth therein to show, prima facie, that the railroad company has been guilty of an evasion of its duty, imposed upon it by law; that it is, by the manner adopted of distributing its cars for the service, subjecting the storers and exporters to an undue and unreasonable prejudice and disadvantage, and thereby discriminating against them and in favor of the warehousemen engaged also in the business of buying and exporting.

The motion to quash should therefore be denied, and the defendant will be granted leave to make such answer as may seem proper.

RICHMOND COAL CO. v. COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENGLAND.

(Circuit Court, N. D. California. January 24, 1908.)

No. 14,199.

1. INSURANCE—CONSTRUCTION AND OPERATION OF CONTRACT—LIABILITIES INSURED AGAINST—EARTHQUAKE CLAUSE IN FIRE POLICY.
   A provision in a fire insurance policy exempting the insurer from liability for any loss or damage by fire caused directly or indirectly by earthquake is valid and enforceable.

2. SAME—ACTION ON POLICY—DEFENSES—BURDEN AND SUFFICIENCY OF PROOF.
   In an action on such a policy, the burden rests on the defendant to bring the case within the exception by a preponderance of evidence that the loss was proximately, either directly or indirectly, caused by earthquake—that is, that if the loss was directly due to fire such fire would not have occurred but for an earthquake—and it is not sufficient to prove that an earthquake produced conditions but for which the loss would not have occurred if it did not directly or indirectly cause the fire; but, if it did so cause the fire, it is immaterial that the fire started in other property if it spread continuously to and burned the property insured.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1660.]

3. WORDS AND PHRASES—"PROXIMATE CAUSE."
   By "proximate cause" is meant a cause which naturally, by continuous sequence, unbroken by a new cause, produces a result; it need not necessarily be the nearest or immediate cause which may be merely an instrument of the dominant or efficient cause.
   [Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5758–5769; vol. 8, p. 7771.]

At Law. Charge to jury.

E. B. Young and L. A. Redman, for plaintiff.
T. C. Van Ness and H. B. M. Miller, for defendant.

VAN FLEET, District Judge (orally). The time has now arrived when it becomes my duty to submit to you the principles of law that must govern you in your consideration of the evidence in this case for the purpose of reaching a verdict. and I shall ask your very careful attention while I do so. And when I have submitted to you the law it will be your duty to follow it. No matter whether some of

you may entertain an idea that such should not be the law, in any particular, nevertheless, for the purposes of this case, you are obligated by your oath to observe that which is submitted to you by the court as the controlling principles to govern you in your consideration of the evidence.

In this action the plaintiff seeks to recover from the defendant insurance company the sum of $19,955.84, under a policy of insurance issued by the defendant to the plaintiff on certain property described therein, which the contract recites was a quantity of coal situated on the northwest corner of Howard and Spear streets in the city and county of San Francisco. Under the admissions made by the defendant in open court there is left but one main issue of fact for your consideration in order to arrive at a verdict. The defendant admits that the property insured was destroyed by fire, but it pleads as a defense that under the policy sued upon it was stipulated and agreed between the parties that the defendant should not be liable for a loss to plaintiff caused directly or indirectly by earthquake; and it is alleged that the fire which destroyed the plaintiff's property was caused by earthquake, within the terms and meaning of the policy, and that but for such earthquake neither said fire nor the loss would have occurred, and for that reason that the defendant is not liable to the plaintiff on the policy in suit. The finding you shall make on the issue involved in this defense will therefore be determinative of your verdict, since if the plaintiff's loss resulted directly or indirectly from the effect of an earthquake the defendant is, by the terms of its policy, exempt from liability; while on the other hand, if the defendant has failed to sustain its defense in the manner hereinafter stated, your verdict must, under the admissions made, be for the plaintiff.

As alleged by the defendant in its defense, by the terms of the policy in suit, the defendant did insure the plaintiff on the property described therein against all direct loss or damage by fire, but excepted from the operation of the policy any loss or damage by fire which might be caused directly or indirectly by earthquake. This exception from liability for loss that should be thus caused was a perfectly valid and legal one, which the defendant had a right to provide for in its contract, and the plaintiff in accepting the policy signified its assent to that provision equally with the other terms set forth therein, and the defendant therefore has a right to have that condition enforced as the facts may warrant. Policies of insurance are contracts, and, like other contracts, must be construed according to the sense and meaning of the terms used by the parties, and those terms are to be taken and understood in their plain, ordinary, and popular sense. The defendant has admitted that the plaintiff's loss resulted directly or immediately from fire, the peril insured against; but it contends that the proximate or efficient cause of the loss was earthquake, notwithstanding the insured property was burned. Upon this issue I instruct you that if you find from the evidence that the loss was proximately, either directly or indirectly, caused by earthquake, your verdict, notwithstanding the insured property was destroyed by fire, should be in favor of the defendant; but if, upon

the other hand, you find from the evidence that fire and not earthquake was the proximate or efficient as well as the direct cause of the loss, your verdict should be for the plaintiff. By proximate cause is meant a cause which naturally, by continuous sequence, unbroken by a new cause, produces a result. The proximate cause of an effect is not necessarily the cause which is nearest to—that is, immediately or directly produces—the effect; but it is the efficient dominant factor in the production or bringing about of the effect. The nearest or immediate cause of an effect may be merely an instrument of the dominant or efficient cause; and if, upon the evidence in this case, you find that the fire which destroyed the insured property was a mere instrument of an earthquake, and that the loss by necessary or natural sequence was due to the earthquake, your verdict should be for the defendant notwithstanding the property was burned. If, however, you find from the evidence that plaintiff's loss was directly or proximately caused by fire, which was the peril insured against, and that earthquake was not directly or indirectly the cause of the loss, your verdict should be for the plaintiff. The law does not inquire into the cause of a proximate cause. When the proximate cause of an effect has been ascertained, the law ceases to make further inquiry and ascribes the result exclusively to such cause. While the proximate cause of an effect frequently is and generally may be the nearest cause, yet mere distance in time or space is not the exclusive factor in the determination of the question whether or not a given cause is proximate or remote. Other elements are involved, any one of which may be of such character as to subordinate the element of distance. The proximate cause of an effect is the cause to which the effect is attributed by the rational judgment of mankind.

Your inquiry, therefore, in this case, should be whether or not the earthquake of April 18, 1906, was the predominating and operating cause of the fire which burned the property of the Richmond Coal Company. The question, as I have said, is not what cause was nearest in time or place, but what was the cause which set the other causes, if any there be, in operation. The causes, if any there be, which were merely incidents or instruments of a superior or controlling agency are not the responsible ones, though they may be nearer in time and place, and if you believe from all the evidence in this case that the earthquake caused the fire which spread to and burned the property of the plaintiff, it will be your duty to render a verdict in favor of the defendant insurance company and against the plaintiff coal company no matter how many buildings or blocks such fire may have burned through or consumed before it reached the plaintiff's property. The origin of the fire which destroyed the property in question may be shown by direct or circumstantial evidence, and in reaching your conclusion as to the cause of the fire which destroyed that property, you will bear in mind that the law does not require demonstration—that is, such a degree of proof, as excluding possibility of error, produces absolute certainty, because such proof is rarely possible; nor does it require proof beyond a reasonable doubt, as is the rule in criminal cases. Moral certainty only is re-

quired, or that degree of proof which produces conviction in an unprejudiced mind. Therefore, while, as I shall hereafter state more particularly, it is for the defendant to prove that earthquake was directly or indirectly the cause of the destruction of plaintiff's property, it is not necessary that the defendant should show that plaintiff's loss could not possibly have occurred from any other cause than from earthquake. If, taking the testimony as a whole, it has been shown that the fire or fires and plaintiff's loss or damage therefrom were either directly or indirectly caused by earthquake, then your verdict should be in favor of the defendant. It is not sufficient, however, that the evidence show merely that plaintiff's loss would not have occurred but for the earthquake; in order for defendant to prevail, it must appear by satisfactory evidence that plaintiff's loss was caused by earthquake. The earthquake may have produced conditions but for which plaintiff's loss would not have occurred, such, for instance, as the destruction or disconnection of the city's water supply; but if you find, for instance, that the plaintiff's loss was directly caused by fire, the peril insured against, and that that fire, and the loss resulting therefrom, was not directly or indirectly caused by earthquake, then plaintiff is entitled to a verdict, notwithstanding it appears that the earthquake produced conditions remotely contributing to that loss.

If you find and believe from the evidence in this case that the earthquake of April 18, 1906, caused directly or indirectly in the city and county of San Francisco a fire in the vicinity of Fourth and Natoma streets; or a fire in the vicinity of Third and Minna streets; or a fire in the vicinity of Third and Howard streets; or a fire in the vicinity of First and Mission streets; or a fire in the vicinity of Market and Fremont streets, in what has been testified to as Mack & Company's drugstore; or a fire on Fremont street, between Howard and Mission streets, in what was known as the Martel Power Company's plant; or a fire at No. 117 Steuart street, in the place known as Alice's; or a fire at No. 48 Steuart street, between Market and Mission streets, in what was known as Brown's store; and that those fires, or any one or more of them so-caused, spread by flame, spark, or heat, and burned uninterruptedly from building to building, or block to block, until they or any one or more of them reached and destroyed plaintiff's property located and situated on the northwest corner of Howard and Spear streets—then I charge you that it is your duty, and you must be governed by what the evidence shows, to return a verdict in favor of the defendant insurance company and against the plaintiff coal company. If you find and believe from the evidence that the fires, or any one or more of the fires mentioned by the witnesses, or as to which testimony has been introduced, were caused directly or indirectly by the earthquake of April 18, 1906, and that such fire or fires thereafter spread to and burned uninterruptedly from building to building, or block to block, until it reached and destroyed the property of plaintiff, then, and in that case, I instruct you that your verdict should be in favor of the defendant.

In reaching your conclusion as to whether or not the fire by which

plaintiff's loss was brought about was caused by the earthquake of April 18, 1906, you must consider the evidence impartially and without favor towards plaintiff or bias towards the defendant. The defendant insurance company having contracted with the plaintiff, and the plaintiff by accepting the policy having agreed, that the company was not to be liable for loss by fire caused directly or indirectly by earthquake, the right of the company to set up by way of defense that the loss was so caused cannot be questioned. The single thing for your determination in this case, without regard to either of the parties, is the origin of the fires by which plaintiff's property was destroyed. If the evidence has established that the fires by which plaintiff's property was destroyed, no matter at what point, or from where they started, were caused by the earthquake of April 18, 1906, you must, without hesitation, render your verdict in favor of the defendant insurance company.

In arriving at a conclusion as to whether or not any fire testified to by any of the witnesses in this case was caused by the earthquake, your inquiry, as I have indicated, should be whether or not the earthquake was the predominating and operating or producing cause, whether or not such fire would have occurred had the earthquake not happened, and in so doing it will be your duty where a fire is not proven by direct evidence to have been caused by the earthquake, to consider all the surrounding facts and circumstances which are proven by the testimony in the case, such as the location and character of the building where it started, the effect of the earthquake upon such building, the nature of its occupancy, whether any gas, electric, coal oil or other lights were burning in it at the time of the shock; or whether at the time of the earthquake there was any stove or other confined fire, or other means which could cause fire in such building. Not only these facts should be considered, but also there should be kept in mind the large number of fires which started shortly after the earthquake compared with the usual number of fires at the time in the morning when those which are shown by the testimony to have started actually occurred, and whether or not there is any probable cause other than the earthquake for the starting of such fires. All these facts and circumstances should be considered, and in the light of all of them you will decide whether any fire not proven by direct evidence to have been started by the earthquake was or was not caused thereby. In this regard you are not permitted to indulge in conjecture or mere hearsay as to the origin of any fire shown to have occurred on the date in question or as to the course or spread of such fire, but in determining as to the origin of a fire, or the manner in which it was started and as to its course or spread and the property destroyed thereby, if any, your finding must in each instance be based upon the evidence in the case alone and wholly unaffected by anything you may have heard elsewhere.

The policy of insurance sued upon provides in effect that defendant will indemnify the plaintiff against direct loss or damage by fire ensuing upon explosion of any kind; and there is evidence in the case tending to show that immediately following the first or great earth-

quake shock of April 18, 1906, certain explosions or explosive sounds were heard, apparently emanating from the direction of the premises occupied by the drughouse of Mack & Company, referred to in the evidence, just about the time of or immediately preceding the discovery of the fire upon those premises. On this subject I instruct you that if you find that the fire originating on those premises ensued upon an explosion or explosions of any kind, and you also find that the fire was the one that destroyed the plaintiff's insured property, then your verdict should be for the plaintiff, unless you find that the destruction of such property was directly or indirectly caused by earthquake. If, as I have already explained to you, the earthquake was the proximate, efficient cause of the fire, the defendant will not be liable, even though the means by which the earthquake caused such fire was an explosion. In other words, if such explosion was caused directly or indirectly by and was a mere instrument of the earthquake, and the loss by a necessary or natural sequence was solely due to the earthquake, then your verdict should be for the defendant as to any loss caused by such fire.

The law imposes upon the party having the affirmative of any issue what is denominated the burden of proof. By that phrase is meant, in a civil case, such as this, no more than that the party holding the affirmative must produce, in support of an issue which he is called upon to prove, a preponderance of the evidence. In this case, as before indicated, the defendant holds the affirmative in proving its defense that the fire or fires that destroyed the plaintiff's property were caused directly or indirectly by earthquake, and upon that issue, therefore, the evidence must preponderate in the defendant's favor or it cannot prevail. By preponderance of evidence is meant that greater or superior weight of the evidence which satisfies your minds. Preponderance does not necessarily mean the greater number of witnesses; for you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a less number or against a presumption or other evidence which does satisfy your minds. But in determining the question of preponderance you may and should take into consideration, not only the number of witnesses testifying to any fact or given state of facts for the one side or the other, but also the opportunities of the different witnesses for seeing, hearing, knowing, and remembering the facts to which they have testified, the probability or improbability of the truth of their statements, in the light of the other evidence; the relation or connection, if any has been shown between any of the witnesses and the parties to the suit; their interest or lack of interest, if any, in the result of the suit, and their conduct or demeanor while on the stand. The number of credible and disinterested witnesses testifying to any material fact or state of facts in dispute, for the one side or the other, is therefore a proper matter for the jury to consider, together with all the other circumstances in the case, in determining on which side the evidence predominates. The jury have no right to capriciously disregard the testimony of a larger number of witnesses, nor to refuse to give whatever effect in their judgment should be

attached naturally to the fact that the greater number have testified one way and the smaller number the other; but this fact should be given its due weight by the jury in determining where the greater strength of the evidence lies. While, as I have indicated, the testimony of a lesser number of witnesses to a given fact or state of facts may be taken by the jury in preference to that of a greater number, obviously this should not be done unless the jury can say, conscientiously and on their oaths, that, from all the facts and circumstances in the case, the testimony of the lesser number is more reasonable, more trustworthy, truthful, disinterested, and credible.

Evidence alone will sustain a verdict. You are not permitted in any instance, in reaching your verdict, to indulge in mere conjecture, surmise, or speculation as to the facts; but in so far as they have not been admitted, they must be established by satisfactory evidence, as I have indicated. And I should state to you, gentlemen, that in so far as facts have been admitted, of course, that is conclusive evidence of the existence of such facts and you need not inquire any further as to such. When a fact is admitted, that is taken as established for the purposes of the case. Under these principles, therefore, if you are unable to find, from a preponderance of the evidence, that the plaintiff's loss was caused directly or indirectly by earthquake, or if in your judgment the evidence is equally balanced upon that question, or if, after a careful consideration of all the evidence, you are unable to conclude, either from the facts proved or from proper inference from such facts, that the loss was caused directly or indirectly by earthquake, then your verdict should be for the plaintiff, for the reason, as I have stated, that the defendant must establish, by a preponderance of the evidence, the fact which is essential to a verdict in its favor. In this connection I should suggest to you that while in certain cases the law receives the evidence of men expert in certain lines as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness, or to give a controlling effect to the opinion of scientific witnesses; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to, but you are not bound or concluded by the testimony of any witness, expert or other.

You are the sole judges of the credibility of the witnesses; what the evidence establishes is a matter entirely for your consideration. It is your province to find the facts, but, as I have stated, it is the province of the court to state the law. And if it shall have happened during the course of the trial, or during this charge, that the court has made any remark or used any language from which you have received an impression as to its views upon the questions of fact, or as to the weight or credibility to be given to any witness, it is your duty to disregard such suggestion or impression unless found to accord with your own judgment, your own independent views, reached as a conclusion from your own examination of the evidence.

And in this connection, gentlemen of the jury, perhaps I might pertinently suggest to you, in view of the characteristics of much of the evidence in the case, that in passing upon the evidence of the witnesses you are to presume primarily that the witness is telling the truth; the law clothes him with that presumption. You are entitled, however, in determining whether that presumption is to be sustained, to regard the manner of the witness, as I have indicated, and the character of his testimony. Notwithstanding, however, that a witness may make upon the witness stand a statement which does not accord readily with your belief, that is not necessarily to discredit him unless you believe from his manner or from the other circumstances which have appeared in the case that the witness is willfully telling a falsehood. If a witness is merely telling what he believes to be true, and is simply mistaken as to the fact, you should not necessarily discredit him as to the balance of his evidence, excepting, of course, that it should make you more careful in weighing his evidence. There are certain things that have come by experience to be known in the law as subjects upon which the minds of men will differ, and honestly differ, so that a discrepancy between two or more witnesses upon such a subject is not regarded as necessarily casting discredit upon the testimony of the witness you do not fully credit. That has been very pertinently and strongly illustrated in this case as to the matter of time with reference to which most every witness upon the stand has testified as to what he did and what time he did it; what he saw and what time he saw it on the morning of this memorable occasion when this great disaster occurred in San Francisco, and during which the property that is now in suit was destroyed. Men's minds operating under a state of high excitement are not as capable of that cool and mathematical thought and measurement of the ordinary circumstances of time or place as they are under normal conditions. Men do not see things as they would under normal conditions; they may see things with the eye, but the mind is not directing the eye, and therefore the brain is not impressed with any such vision as the eye perhaps may have taken in; and therefore a witness will come upon the stand, and, under conditions which you think very remarkable, perhaps will say that he did not see such and such a thing, although a number of other witnesses similarly situated have testified that they did see them. Now, the fact is that that man may, as I have said, have seen them with his eye, but his mind has not seen them, and therefore he is truthfully telling you that he did not see them, because a man sees nothing the impression of which is not left upon his brain. And therefore I say that in passing upon the credibility of the different witnesses in this case you must use your good judgment and common sense and the experience that has come to all of us in our dealings with our fellow men in making up your minds as to whether the witnesses have been telling the truth; not only telling the truth, but how far they are correct in their statements. To my mind not one single witness has come upon this stand with the purpose or exhibited the inclination of telling other than fully and fairly what he believed to be the truth as to the facts about which he was

questioned, but, of course, some of them have made statements which have struck you, as they did me, with incredulity. You are simply to eliminate such statements that do not fall in with your good judgment, but you must give the balance of the testimony such credit and weight as you deem under all the circumstances it is entitled to. It occurred to me as proper to make these suggestions in view of the fact that with reference to almost every witness in the case statements were made as to the time when things occurred that were decidedly at variance with the statements of his fellow witnesses. You should understand that these things are not necessarily to discredit the entire testimony of a witness that you think is thus mistaken, for the reasons I have before indicated to you.

Now, gentlemen, there is another subject that should be called to your attention. I hardly think it necessary, but still suggestions have occurred in the argument which make it pertinent that the court should perhaps impress upon you that you are to sit in this case and judge of the rights of these parties absolutely impartially and free from any bias or prejudice whatsoever coming to your minds from any outside source whatsoever. If you have received impressions from publications in the press or from popular sentiments that you have heard expressed upon the streets as to the rights of either of the parties in this suit, those things are to be absolutely eliminated from your consideration. You are to take this case and determine it from the evidence that has been presented to you from the witness stand, and from that alone. It will be a reproach to justice unless you are governed absolutely and solely by the evidence in this case. It is one of the boasted privileges of our modern civilization that we have established enlightened systems of jurisprudence, and one of the jewels of our system is regarded as that of the trial by jury because it is believed that in certain classes of cases at least men of the general walks of life, not educated and versed in the subtleties and refinements of the law, are more capable of reaching just conclusions upon matters of fact than the mind of the trained jurist or lawyer, because they are not bound down and circumscribed by those rules which become imbedded in the mind of the educated lawyer, and which at times prevent him from giving that flexibility to his judgment of which the mind of the layman is capable for the very reason that the latter is entirely ignorant of those rules, and therefore is not in any wise influenced by them. Therefore it is that the experience of ages has demonstrated the value of the jury as an arm of the court in determining certain classes of questions, and, of course, that feature of our system can only remain with credit while juries continue to base their verdicts solely upon those things which they have a right under the law to consider.

Now, gentlemen of the jury, very little remains to be said. If your verdict in this case, under the principles which I have given you, should be in favor of the plaintiff, it will be substantially in this form: We, the jury, find in favor of the plaintiff, and assess the damages against the defendant in the sum of blank dollars, and that blank, if you find in favor of the plaintiff, will be filled in by

the amount sued for—$19,955.84—with interest calculated thereon from the 15th day of August, 1906, at the legal rate of 7 per cent. because under the admissions in this case, as I have heretofore indicated to you, there is no question as to the amount plaintiff is entitled to recover, if you find that the plaintiff is entitled to recover. If your verdict should be in favor of the defendant, then its form will be: We, the jury, find in favor of the defendant.

You will bear in mind, gentlemen of the jury, that your verdict must be unanimous; you cannot, as under the state system, find a verdict by a less number than the entire 12.

BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO v. ALLIANCE ASSUR. CO., Limited.

(Circuit Court, N. D. California. February 3, 1908.)

No. 14,198.

1. INSURANCE—FIRE—ACTION ON POLICY—ANSWER—SUFFICIENCY.
   Under general rules of pleading, in an action on a fire policy exempting insurer from liability for loss caused directly or indirectly by earthquake, an answer is sufficiently definite and certain where it alleges (1) that the fire and the loss thereby caused were caused directly by earthquake, and that but for such earthquake the fire and loss would not have occurred; and (2) that the fire and loss thereby were caused indirectly by such earthquake, and that but for such earthquake the fire and loss would not have occurred.

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—FIRE INSURANCE—ACTION ON POLICY—PLEADING.
   Code Civ. Proc. Cal. § 437a, Act Cal. March 21, 1907, St. 1907, p. 836, c. 447, providing that in an action on an insurance contract wherein defendant claims exemption from liability because, though the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract, defendant must specify in his answer the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and, if he claims that the peril excepted caused the peril insured against, upon what premises or at what place the peril excepted caused the peril insured against, does not compel a disclosure of defendant's evidence in advance of the trial so as to deprive him of the equal protection of the laws, on the theory that other litigants are not compelled to disclose their evidence.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—FIRE INSURANCE—ACTION ON POLICY.
   But the section is unconstitutional as depriving defendant of the equal protection of the law, in that it discriminates against a particular class of actions and against defendants therein, without apparent reason for the distinction.

4. COURTS—FEDERAL COURTS—ACTIONS ON INSURANCE CONTRACTS—PLEADING.
   The section is not inapplicable to the federal courts in actions at law, as compelling a disclosure of evidence in advance of the trial, while Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], provides that 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 thereinafter provided.

5. STATUTES—SPECIAL LAWS—PLEADING—CONSTITUTIONAL LAW.
   The section is also invalid as violating Const. Cal. art. 4, § 25, subd. 3, prohibiting special laws regulating the practice of courts.

6. WORDS AND PHRASES—"EVIDENCE"—DEFINITION.
"Evidence" is the means by which a fact is proved.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2521–2524; vol. 8, p. 7655.]

7. STATUTES—"GENERAL LAW"—WHAT CONSTITUTES.
An act applying uniformly to the whole or any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a "general law."
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 70–76. For other definitions, see Words and Phrases, vol. 4, pp. 3065–3071; vol. 8, pp. 7669–7670.]

8. SAME—CLASSIFICATION.
To make a law applying to a class of individuals or objects general, the classification must not be arbitrary, but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 70–76.]

9. SAME.
Although a law is general when it applies equally to all individuals of a class founded upon a natural intrinsic or constitutional distinction, it is not general if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 72.]

William G. Burke, City Atty., for plaintiff.
T. C. Van Ness, for defendant.

VAN FLEET, District Judge. This is an action on a policy of fire insurance upon property in the city and county of San Francisco which, among other exemptions from liability stated therein, provides that:

"This company shall not be liable for loss caused directly or indirectly by earthquake."

Relying on this exception, defendant in its answer sets up two separate defenses: (1) "Defendant alleges the fact to be that the fire mentioned in the complaint, and the loss thereby and by reason thereof in the complaint specified and alleged, was caused directly by earthquake, and that but for such earthquake said fire and said loss would not have occurred." (2) "Defendant alleges the fact to be that the fire mentioned in the complaint, and the loss thereby and by reason thereof in the complaint specified and alleged, was caused indirectly by earthquake, and that but for such earthquake said fire and said loss would not have occurred." To these defenses plaintiff has demurred, and claims that the pleas are not sufficiently definite and certain, either under the general rules of law or under section 437a of the Code of Civil Procedure of this state, enacted March 21, 1907. St. 1907, p. 836, c. 447. The defendant, on the other hand, claims that the pleas are good under the general rules of pleading, and that said section 437a is invalid. These propositions will be considered separately.

1. In pleading the breach of a contract it is well settled that it is sufficient to plead the breach in the language of the contract. So,

if a liability is to attach upon a certain condition, that condition may be pleaded in the language of the contract. Thus, if defendant's liability depends upon the destruction of the property by fire, a general allegation in the complaint that at a certain time the property was destroyed by fire is sufficient. It is not necessary to allege how the fire originated or how it spread to the property insured. So, if a policy insures property against damage by earthquake a general allegation that at a particular time the property was damaged by earthquake would be sufficient. It would not be necessary to allege the manner in which the earthquake operated to damage the property, whether it opened up the earth and swallowed the building, or merely shook it down or caused another building to fall upon it, or short-circuited electric wires or overturned a stove and set it afire, nor where any of its manifestations occurred or originated. If this is the correct rule of pleading as regards the plaintiff, it would seem to be equally so as regards the defendant. If the policy provided that the company should not be liable if the property should be destroyed by fire, a general allegation in the answer that it was destroyed by fire would seem to be sufficient, without alleging the place where the fire originated or the manner in which it destroyed the property. So, if the policy, as in the case at bar, provided that the company should not be liable if the property should be destroyed by earthquake, a general allegation that it was so destroyed would seem to be sufficient. That such pleas are sufficient is amply supported by authority. Thus, where the policy insured against the fraud or dishonesty of an employé, a general allegation of loss by reason of "various acts of fraud and dishonesty on the part of" the employé was held sufficient. Bank of Timmonsville v. Fidelity, etc., Co. (C. C.) 120 Fed. 315. So, where the policy insured against "physical bodily injuries effected * * * by external, violent, and accidental means," a general allegation that "the insured was killed, his death resulting solely from physical bodily injuries proceeding from and inflicted by external, violent, and accidental means," was held sufficient. Railway Officials', etc., Ass'n v. Armstrong, 22 Ind. App. 406, 53 N. E. 1037. See, also, to same effect, McElfresh v. Odd Fellows' Acc. Co. of Boston, 21 Ind. App. 557, 52 N. E. 819; Railway Officials', etc., Ass'n v. Beddow, 112 Ky. 184, 65 S. W. 362. The same rule has been applied to a plea. Thus, in Seebass v. Insurance Company (C. C.) 82 Fed. 792, the defendant pleaded that the deceased had failed to pay a certain mortuary call. To this plea plaintiff demurred upon the ground that "it does not legally appear that the plaintiffs' intestate was obligated by the contract of insurance to pay the mortuary call specified in the plea, and that by reason of such nonpayment the contract became null and void." In overruling this demurrer the court said:

"An assignment of a breach, in the words of the contract, when no question of law is involved, is good. 1 Chit. Pl. 332. It is only necessary that the plea contain sufficient matter which, if substantiated by proof, will sustain defense. Dewees v. Insurance Co., 34 N. J. Law, 244. Whether the mortuary call in this case was properly made, or whether the assured had the required notice, or failed to pay in due time, are questions of fact, to be determined by the jury from the evidence. No doubt, the burden is on the defendant to

prove the facts showing valid assessments made in strict conformity with the contract and the by-laws, but that is a matter of proof, not pleading. The plea in this case gives notice to the plaintiffs of the matter which the defendant sets up in defense of its action, and a joinder therein will, upon the trial of the cause, put the defendant to its proof that it has been absolved of its obligation by the failure of the assured to perform some duty imposed upon him by the contract."

The cases relied upon by plaintiff contain nothing contrary to this rule.

In the case of Studwell v. Insurance Co., 17 Hun, 602, the defendant pleaded that the insured had been guilty of fraud in answering "No" to a question relating to a great number of diseases. The court held that the plea should have stated in respect to which of the many diseases the answer was false. In that case the contract in fact contained as many separate warranties as there were diseases enumerated, and, of course, defendant was compelled to specify which particular warranty it relied upon.

In Insurance Company v. Bailey (Ky.) 78 S. W. 119, the defendant relied upon a false representation as to the business of the insured, alleging that the additional business not disclosed materially increased the risk without alleging the facts from which such increase could be inferred. This was held insufficient on the ground that fraud cannot be pleaded generally, but every fact constituting the fraud must be alleged. That rule has no application here.

The cases of Reed v. Insurance Co. (N. J. Sup.) 65 Atl. 1053, and Insurance Co. v. Overturf, 35 Ind. App. 361, 74 N. E. 47, held that a plea that the loss was caused by "civil authority," without showing that the person making the order for the destruction actually had civil authority to do so, is insufficient. The reason of this is that where a term used in a contract involves a mixed question of law and fact, the pleader will not be permitted to draw his conclusions as to the law as well as the fact. As to what is a "fire" or an "earthquake," or "dishonesty," or "bodily injury by violent and accidental means," is a pure question of fact, but loss by "civil authority" involves, first, the legal question of authority and, second, the fact of destruction by that authority. The first cannot be decided by the pleader, the second may. After the authority is established by proper allegation, the destruction may be alleged generally. These are the only cases relied upon by plaintiff as showing that the answers are insufficient under general rules of pleading, and none of them, in my opinion, supports the contention. On the contrary I am satisfied that under general rules of pleading the answers are sufficient.

2. The law relied upon as changing this general rule of pleading is found in the act of the Legislature of California approved March 21, 1907 (St. 1907, p. 836, c. 447), which reads as follows:

"Sec. 437a. In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against,

and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against."

It may be observed that this act was passed shortly after the late disastrous conflagration in San Francisco, and at a time when, according to common report, many insurance companies were denying liability on the ground that the fire was caused by earthquake; and it is stated in plaintiff's brief that it was inspired by those circumstances. The validity of this statute is attacked on several grounds. It is first claimed that it deprives the defendant of the equal protection of the law, because it compels it to disclose its evidence in advance of the trial, while other litigants are not compelled to do so. For the same reason it is claimed that it cannot apply to the federal courts in actions at law, because of section 861 of the Revised Statutes of the United States [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."

If the effect of this act is to compel the production of evidence in advance of the trial, there would be great weight in these objections; but I think the objections are based upon a misapprehension of the effect of the act. It is clear that the act has given no effect to the facts required to be alleged different from other allegations of pleadings. Evidence is the means by which a fact is proved (section 1823, Code Civ. Proc. Cal.), and this act does not require these to be divulged. To require a pleader to state how or where a certain thing happened does not require the pleader to divulge the means by which he intends to prove the happening of the event. Undoubtedly a plea under this statute would be sufficient if it stated that at a certain place an earthquake shock short-circuited an electric wire and set fire to a building, and the fire spread to and destroyed the property insured. Such a plea clearly would not disclose the evidence by which the facts relied upon as a defense were to be proved.

It is next claimed that the act deprives defendant of the equal protection of the law, and is also a special law "regulating the practice of courts of justice," within the meaning of section 25, subd. 3, art. 4, of the Constitution of California. This presents the most difficult question in the case. Before considering it in detail, it will be well to ascertain precisely in what respect the act attempts to change the rules of pleading.

The act in effect does four things: First, it changes a general rule of pleading; second, it changes it only in so far as it applies to one class of actions, viz., to actions respecting insurance policies; third, it does not change the rule as to all actions respecting insurance policies, but only as to actions at law to "recover upon a contract of insurance"; fourth, it does not apply to all pleadings in such actions, but only to pleadings on behalf of the defendant.

While it is often difficult to determine whether in a given case a legislative enactment is violative of the constitutional provisions which are herein invoked, certain general rules may be taken as well settled.

These general rules have been aptly stated thus: (1) An act applying uniformly to the whole of any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a general law. (2) In order to make the law general, the classification must not be arbitrary, but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes. (3) Although a law is general when it applies equally to all individuals of a class founded upon a natural intrinsic or constitutional distinction, it is not general if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. See Treadwell's Constitution of California (2d Ed.) pp. 113–114, and cases cited.

In applying these general rules to pleading and practice in judicial proceedings, the right of the Legislature to provide different rules for different classes of proceedings is upheld; but it is also held that the mere fact that the class is founded on some intrinsic difference does not necessarily justify a special rule. There must be some relation between the difference in class and the difference in the rule of practice involved. A brief consideration of the cases in this state on this subject will illustrate the meaning of this rule.

In Cullen v. Glendora Water Company, 113 Cal. 503, 45 Pac. 822, 1047, it was held that an act requiring a motion for a new trial in a proceeding to confirm the organization and bonds of an irrigation district to be made upon the minutes of the court was a special law, and invalid on the ground that there was no "reason or necessity for the difference arising from any peculiar characteristic of the class of proceedings to which it is applied." This case was approved in Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73. In that case the court upheld the law requiring the entry of an interlocutory decree in actions for divorce and the entry of the final decree one year thereafter. This was put upon the ground of the interest of the public in the marriage relation and in preventing a remarriage while the judgment was subject to review on appeal. It was not placed on the mere ground that the act applied to all actions of divorce. On the contrary, the court said:

"If the action were the ordinary action between two parties who alone were interested in the result, it might be difficult to give any good reason for a special rule as to the giving of final judgment, or indeed for any of the provisions specially applicable to divorce cases."

So, in the case of Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, upholding special legislation as to pleading and practice in suits to establish title to real estate where the records have been destroyed by fire, the court carefully pointed out that each of the different provisions was based upon differences in the nature of the proceeding which were sufficient to justify the Legislature in establishing special rules.

Another case which clearly enforces this rule is Builders' Supply

Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982, holding invalid the statute allowing the plaintiff an attorney's fee in suits to foreclose mechanics' liens. This decision was based on two grounds: First, that there was nothing in the nature of the case justifying the allowance of attorney's fees which are not allowed in other cases; and, second, that if there were any basis for the distinction the defendant, if successful, was as much entitled to an attorney's fee as the plaintiff. From these cases it results that this act cannot be upheld simply because it applies to all cases of a class. It must be shown that there is something in the nature of the action that justifies the distinction, and it must further be shown that there is something peculiar in the position of the defendant that requires the rule to apply to him and not to the plaintiff.

There are many actions, other than actions on insurance policies, in which the question might arise as to the cause of the destruction of property. It might arise in an action between landlord and tenant, or between contractor and builder. Why should they not be required to state the manner in which, and the place where, the named peril caused the loss? Is there anything in the nature of an insurance company which gives it peculiar knowledge on this subject, and requires or enables it to plead in this manner? Ordinarily, the insurer has no personal knowledge of the origin of the fire, while the insured generally has such knowledge. So the contractor or tenant would presumably have such knowledge. Why then should the insurer be required to plead in this manner, but the insured, the tenant, and the contractor allowed to plead generally? No reason has been or well could be suggested for this distinction. The plaintiff, who under ordinary circumstances presumably knows how and where the fire originated, pleads merely the ultimate fact that the property was destroyed by fire, but the insurance company, which presumably knows nothing of the matter, must plead the exact manner in which the fire in question operated and the place where it originated. Take a concrete case: Suppose a policy exempted the company from liability for loss caused by the explosion of gasoline on the premises. The company might know that gasoline was on the premises, but would know nothing of the manner in which or the place where it was caused to be exploded. It might expect to prove these things out of the mouth of the plaintiff. Why should it be compelled to plead the matter more in detail than the plaintiff would be required to plead the same thing? No reason for the distinction can be imagined, and a law imposing such an additional burden upon the defendant is obviously, to my mind, special, and deprives the defendant of the equal protection of the law. It follows that the demurrer should be overruled, and it is so ordered.

NATIONAL WATER CO. v. O'CONNELL et al.

(Circuit Court, E. D. Pennsylvania. January 15, 1908.)

No. 38.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION OF LABELS.

Complainant, as proprietor of a spring from which it and its predecessors in business had for many years sold water throughout the United States and foreign countries under the name of "White Rock Lithia Water" in bottles having distinctive body and neck labels, *held* entitled to an injunction to restrain defendants from putting up and selling city water in competition under the name of "High Rock Lithia Water" in bottles similar to those of complainant, having body and neck labels of the same coloring and style of lettering, and so nearly resembling complainant's in general appearance as to be likely to deceive purchasers using ordinary care, and as to indicate beyond reasonable doubt to a person comparing them that the simulation was intentional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 81.

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 final hearing.

C. B. Fraley and Philipp, Sawyer, Rice & Kennedy, for complainant.
F. Carroll Fow and John H. Fow, for defendants.

J. B. McPHERSON, District Judge. This is a bill to restrain unfair competition in the sale of drinking water. The complainant is now the owner of the White Rock spring near Waukesha in the state of Wisconsin, having acquired a title in June, 1906, that goes back for 25 years. At the same time it acquired also the business and good will of preparing the water of the spring for consumption, and selling it in bottles and other receptacles; and the trade-names, trade-marks, and labels used by its predecessors in title in connection with the business. Among other trade-marks and trade-names thus acquired were the name "White Rock" and two distinctive labels, one for the body of a bottle, and the other for its neck. These labels have been continuously used since 1893. Specimens are herewith presented, the first being the neck label, and the second being the body label.

The bill avers, in the tenth paragraph—and there is no dispute concerning the truth of these averments:

"10. That great care, skill, and judgment were at all times exercised by your orator's predecessor, as your orator is informed and believes and therefore alleges, and have been exercised by your orator since it succeeded to the business as aforesaid, in the protection of the spring aforesaid and the waters thereof from contamination, in the preparation of the water therefrom for consumption, and in the bottling or other packaging of the water, with the end in view that the water should reach the consumer in the best possible condition, and in bottles and other receptacles free from dirt and other objectionable matter; that large sums of money and a great amount of time and labor were expended by your orator's predecessor, as your orator is informed and believes and therefore alleges, and have been expended by your orator, in carrying on the business of marketing and selling such water un-

der the said trade-mark 'White Rock,' the 'body' label and 'neck' label referred to in paragraphs numbered 7 and 8, and in the distinctive package referred to in paragraph numbered 8 of this bill of complaint, throughout the United States and in foreign countries, and in advertising the same under said trade-mark and 'body' label throughout the United States and in foreign countries; and that by reason of the excellent quality of said water marketed and sold by your orator's predecessor and your orator, the care, skill, and judgment exercised by them as aforesaid, and the expenditure by them of the time, labor, and money as aforesaid, in carrying on said business and in advertising said water throughout the United States and in foreign countries, a high reputation was established many years ago by your orator's predecessors for said water, which has since been maintained by your orator, and said water is now and has been for many years past widely and favorably known to, and very popular with, the public generally throughout the United States and in foreign countries, who are and have been familiar with the trade-mark and 'body' label under which, and the distinctive package in which, said water has been marketed and sold; and that the high reputation established by your orator's predecessors aforesaid, and since maintained by your orator, for such water and the favorable acquaintance therewith of the public throughout the United States and in foreign countries was a source of great pride, benefit and advantage to your orator's predecessors, and is a source of great pride, benefit and advantage to your orator; that the business in such water carried on by your orator's predecessors was, as your orator is informed and believes and therefore alleges, a large and continuously growing one, and that since your orator succeeded to the said business as aforesaid the growth of the same has continued."

In violation of the complainant's rights, the defendants, who are bottlers of drinking water in Philadelphia, are charged with selling, and with threatening to continue to sell, drinking water put up in "labeled bottles simulating and counterfeiting in general appearance and dress your orator's distinctive package referred to in paragraph 8 of this bill of complaint, and bearing 'body' and 'neck' labels which, in size, color and style of type and ornamental matter are imitations and counterfeits of your orator's 'body' and 'neck' labels referred to in paragraphs numbered 7 and 8 of this bill of complaint, said defendants' 'body' and 'neck' labels being as follows": [See opposite page.]

The gravamen of the charge against the defendants is contained in the thirteenth paragraph, which is as follows:

"13. That, as your orator is informed and believes and therefore alleges, said defendants (who, as your orator is informed and believes, sell only to retail dealers, cafés, drinking places, and restaurants, and not to consumers direct) well knew of the trade and business of your orator and its predecessors in the marketing and sale of water under the trade-mark 'White Rock,' and the 'body' and 'neck' labels referred to in paragraphs numbered 7 and 8 of this bill of complaint, and in the peculiar and distinctive package referred to in paragraph numbered 8 of this bill of complaint, and of the acquiescence of the public in the rights of your orator and its predecessors as aforesaid, and that your orator and its predecessors had built up a large and growing business in the marketing and sale of such water in the city of Philadelphia, and other parts of the state of Pennsylvania, as well as throughout the United States generally and foreign countries, and that the sole object of the defendants in adopting for the water sold by them, as aforesaid, the labeled bottle referred to in paragraph numbered 12 of this bill of complaint, and bearing the 'body' and 'neck' labels referred to in said paragraph, was and is to take advantage of this established trade of your orator and to deceive the public and consumers of 'White Rock' water into the belief that they are purchasing the said 'White Rock' water of your orator when they are purchasing 'High Rock' water of the defendants, which, your orator is informed

and believes and therefore alleges, is inferior to said 'White Rock' water, and is in fact taken by the defendants from the city water supply of the city of Philadelphia; and that, in view of the similarity between the labeled bottles or packages, 'body' labels and 'neck' labels of your orator and the defendants, it is an easy matter for avaricious, unscrupulous and unprincipled dealers and keepers of cafés, drinking places and restaurants to palm or pass off on their customers in single drinks and in bottles the 'High Rock' water of the defendants as and for the 'White Rock' water of your orator, and that dealers and keepers of such cafés, drinking places, and restaurants have, with the knowledge and at the suggestion of the defendants, passed or palmed off on said customers such 'High Rock' water of the defendants as and for the aforesaid 'White Rock' water of your orator; and that customers of such dealers and keepers have been deceived into taking, and have taken, said 'High Rock' water of the defendants as and for the 'White Rock' water of your orator."

An answer having been filed and testimony having been taken on behalf of the complainant—no evidence was offered by the respondents—the case came on for final hearing, and the facts charged in the bill were satisfactorily shown to be true. The defendants do not dispute the complainant's title, or the validity and value of its trade-marks, but content themselves with a denial of infringement; declaring the important question to be—as the brief of their counsel states it—"whether such trade-mark has been unlawfully used or appropriated, making it possible to deceive a person using ordinary care and judgment and intelligence."

It is no doubt true, that the complainant does not have, and I do not understand it to claim, an exclusive right to the following elements in its package, taken singly, namely, the dark color or the shape of its bottle, or the shape of its labels, or the colors used in the words, letters, and figures thereon; but, while it may not be able to claim successfully a property in any one of these elements to the exclusion of all other persons, it has established, in my opinion, an exclusive right to the general effect produced by all of them, taken together, and especially to the general effect of the two labels in their proper place upon the complainant's bottle. Upon the labels alone, thus placed, I rest the decision of the court; and I venture to affirm that, with few exceptions, the observer of ordinary care and intelligence would readily mistake one for the other; and that, if his attention should be called upon closer inspection to the differences between the two sets of labels, he would be satisfied beyond reasonable doubt, that the defendants' set was deliberately devised, and was well calculated, to deceive purchasers and users into the belief that they were receiving the White Rock water of the complainant, instead of the High Rock water of the defendants. No doubt, some differences exist. Few imitations are so stupidly designed as to be free from differences, but the resemblances are so many and so pronounced as to leave no doubt in my mind that the defendants intended to profit by the reputation of the water sold by the complainant, and to insinuate their own product where it might not be able to make its unaided way. To sell plain Schuylkill water—not even filtered, so far as appears—as "lithia water," adding the other statements and suggestions concerning its virtues that appear on the defendants' labels, goes, I think, somewhat beyond the latitude allowed to a merchant who is commending his wares, and sensibly approaches the province over which the district attorney of the county presides. One

who is willing to commit himself to these statements is not likely to be very scrupulous concerning the degree of resemblance between the labels upon his product and the labels upon the product of a more successful competitor, and, as I have already said, I have no doubt that the defendants went deliberately as far in this direction as they thought it prudent to go. How far they were willing to go, may be seen from an examination of the labels themselves, and from the following accurate description of the two packages, which I quote from the brief of complainant's counsel:

"Complainant's Package.

"An amber colored bottle bearing (1) a large four-lobed label on its body portion; and (2) a small label on its neck just above the body of the bottle.

"The body label and neck label have bright yellow grounds—both of the same shade.

"On the body label, between the lower and upper lobes thereof, is pictured, in black, a pool of water. Above the latter and in the upper lobe appears, in white, a woman kneeling on a rock and looking into the pool, with other rocks in black as a background, the general effect of this part of the label being that of black and white in strong contrast.

"Across that part of the label where the pool appears are printed, in large red letters, with black and white shading, the words 'WHITE ROCK,' and below them, in large black letters, with white shading, the word 'WATER,' preceded by the word 'Lithia' in small black letters.

"The body label also bears the words, in red letters, 'PURE, SPARKLING, HEATHFUL,' in the lower part of the label, and in the lower part it also bears the words 'White Rock Mineral Spring Co., Waukesha, Wis., U. S. A.,' in black letters.

"All the type, pictorial and ornamental matter on the body label is inclosed by a yellow border, separated from the body of the label by a black line following the outline or shape of the label.

"The neck label bears, in large red letters, with black shading and extending the length of the label, the words 'WHITE ROCK.'"

"Defendants' Package.

"An amber colored bottle bearing (1) a large four-lobed label on its body portion; and (2) a small label on its neck just above the body of the bottle.

"The body label and neck label have bright yellow grounds—both of the same shade.

"On the body label, between the lower and upper lobes thereof, is pictured, in black, a pool of water. Above the latter and in the upper lobe appears, in white, a waterfall passing over rocks and emptying into the pool, with other rocks in black as a background, the general effect of this part of the label being that of black and white in strong contrast.

"Across that part of the label where the pool appears are printed in large red letters, with black and white shading, the words 'HIGH ROCK,' and below them, in large black letters, with white shading, the word 'WATER,' preceded by the word 'LITHIA' in large black letters.

"The body label also bears the words, in red letters, 'PURE, SPARKLING & HEALTHFUL,' in the upper part of the label, and in the lower part it also bears the words 'Louis O'Connell & Co.,' in black letters and 'Philadelphia, Pa.,' in red letters.

"All the type, pictorial and ornamental matter on the body label is inclosed by a yellow border, separated from the body of the label by a black line following the outline or shape of the label.

"The neck label bears in large red letters, with black shading and extending the length of the label, the words 'HIGH ROCK.'"

It is scarcely necessary, I think, to cite and discuss other decisions. If an inspection of the two sets of labels in question does not satisfy the ordinary observer that confusion and mistakes are certain to occur

frequently if the continued use of both sets in the market is permitted, a comparison with other cases will hardly be convincing.

Something appears in the defendants' brief concerning the alleged laches of the complainant, based upon a delay of several months in bringing the present suit. I do not understand the position to be seriously urged, but if it is relied upon as one of the defenses, I am obliged to overrule it. As it seems to me, reasonable diligence has been shown by the complainant in the effort to vindicate its rights.

A decree, with costs to the complainant, may be drawn in accordance with this opinion.

THE GEORGE W. ELDER.

(District Court, D. Oregon. February 24, 1908.)

No. 4,879.

1. STATUTES—SUBJECT AND TITLE OF ACT—ACT CREATING PORT OF PORTLAND.
The statute of Oregon creating the port of Portland as a municipal corporation, as amended by Laws 1901, p. 417, authorizing such municipality to construct and maintain a dry dock, is not in violation of the state Constitution because the subject of dry docks is not expressed in the title of either act, such subject being germane to the general purposes of the act expressed in its title, nor is the amendment unconstitutional because it authorizes the levy of taxes for the construction of such dock, which is a public purpose.

2. MARITIME LIENS—ENFORCEMENT—ADMIRALTY—JURISDICTION.
Under B. & C. Comp. Or. 1901, § 5706, giving a lien on vessels for all debts due by virtue of a contract for construction, repairs, etc., a lien in the nature of a maritime lien exists against a domestic vessel of the state navigating the waters of the United States for furnishing dockage to such vessel in a dry dock at the request of the owner, which lien is enforceable in the admiralty courts of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 98.

Jurisdiction of admiralty to enforce maritime liens under state laws, see note to The Electron, 21 C. C. A. 21.]

In Admiralty. On exceptions to libel.

This is a libel in rem to recover against the steamship George W. Elder —the averments showing, in effect, that the libelant is a municipality, with power to sue and be sued, and with power, among other things, to operate a dry dock within the limits of the port of Portland; that the George W. Elder is a vessel plying the waters of the United States; that between May 29 and September 18, 1906, at the instance and request of her owner, and upon the faith and credit of the vessel, the libelant lifted the vessel upon its dry dock, and furnished "dry dockage" therefor for the period of time intervening said dates, and performed extra labor, and suffered damages, the reasonable value of which services and the amount of damage being set out; that by the statute of the state of Oregon a lien is created upon the vessel enforceable in admiralty, and that demand for payment has been made and payment refused.

Williams, Wood & Linthicum, for libelant.
Milton W. Smith, for claimants.

WOLVERTON, District Judge (after stating the facts as above). The libel is challenged by exceptions thereto upon grounds following:

First, that the act constituting the port of Portland as a municipality is unconstitutional, and especially as it respects the authority attempted to be conferred by which it is designed that the municipality shall construct and operate a dry dock; and, second, that this court is without competent jurisdiction, for the reason that the cause is not of a character cognizable in admiralty. The constitutionality of the act incorporating the port of Portland as originally enacted has been set at rest by the judgment of the Supreme Court of the state of Oregon in the case of Cook v. Port of Portland, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533. Such judgment has been adopted by this court in The John McCraken (D. C.) 145 Fed. 705, and it is not essential that the subject be again reviewed here.

But it is insisted that the amendatory act of the legislative assembly of the state of Oregon, which authorizes for the first time the erection and maintenance of a dry dock (see Gen. Laws 1901, p. 417), is unconstitutional, in so far as it relates to such authority, because the subject thereof, namely, dry docks, is not expressed in the title. It may be at once conceded that any amendment to an act which introduces a subject not included in the title of the original act or the title of the amendatory act, nor germane to the subject embraced in either of such titles, operates in contravention of article 4, § 20, Const. Or., and is therefore nugatory and void. The question here, however, is whether a subject has been introduced by the amendatory act not connected with or germane to the subject expressed in the title of the original act. The title of the act is:

"An act to establish and incorporate the port of Portland, and to provide for the improvement of the Willamette and Columbia rivers, in said port, and between said port and the sea."

The title of the amendatory act is:

"An act to revise and amend an act entitled an act," etc.

So that there is nothing added to the original title; no other subject introduced. The plain purpose of the act is to incorporate a municipality like a city is incorporated, and yet in the case of the incorporation of a city, with all of its complexity of powers conferred, the title is a very simple thing. I note, by turning to page 796 of the Special Laws of 1891, the next act following the port of Portland act, "An act to incorporate the city of Portland." This is all there appears of the title, notwithstanding the municipality is empowered, through its common council, to assess and levy taxes, to grant licenses, to prevent and remove nuisances, to appoint a harbor master, to regulate the building of wharves, to provide for the establishment of market houses, and to do the multitude of things incident to the regulation and welfare of a city and its government. All these, and other kindred matters of control and regulation, are always considered to be embraced by the one central subject—the incorporation of a city. Now, it seems perfectly natural that a municipality created for the purpose of improving and keeping open great waterways in aid of commerce should be given the authority to construct and maintain a dry dock. It is as easily germane to the subject embraced by the title, as the construction or maintenance of

wharves and docks is connected with the simple title for the incorporation of a city, or of the many and diverse other subjects of specific power conferred by the various provisions of the charter. Section 2 of the original act (Sp. Laws 1891, p. 792) purports to set forth in brief order the "object, purpose, and occupation" of the corporation, which was to improve and maintain a ship's channel of a depth of 25 feet from the cities of Portland, East Portland, and Albina to the sea; while section 2 of the amendatory act states the "object, purpose, and occupation" to be to promote the maritime shipping and commercial interests of the port of Portland. Section 3 reiterates the object and purpose as stated in section 2 of the original act.

It is urged that the additional object and purpose as set forth in section 2 of the amendatory act is the adding of another subject for legislation under the old title, and therefore demonstration that the amendatory act is unconstitutional. There is, it seems to me, a palpable vice in the premise. Section 2 of the amendatory act combines no new or distinct subject, but does suggest new matter, which is, by reasonable intendment properly connected with the principal subject, that of the incorporation of the port of Portland. It is as nearly allied to that subject as the provision for the improvement of the Willamette and Columbia rivers between the port and the sea. The central idea attending the entire act, with all of its amendments, is to establish and incorporate a port under the designation of the port of Portland. This is the real and paramount subject for legislation. The improvement of the channel of the two rivers and the promotion of maritime shipping and commercial interests of the port are incidental, and matters naturally and truly connected with the establishment and maintenance of the port, as naturally and truly so as the opening of streets, the establishment and maintenance of wharves, the providing of water and lights, the establishment of a fire and police system, and the maintenance of public parks by an incorporated city, incorporated under the simple title of "An act to incorporate the city of ———." It is a most natural thing for a port organized as such to deepen, if need be, and improve, its harbor, to remove obstructions, and deepen the channels entering such harbor, to maintain and operate dredges for the purpose, and to promote shipping and all commercial interests connected with the coming and departure of vessels laden with the products and fabrics of the home market and elsewhere. All these things are connected with and manifestly germane to the central subject. So with the objection interposed that the libelant is without power to construct and operate a dry dock. The power is plainly conferred by the very letter of the amendatory act; and it would seem clear that the construction and maintenance of a public dry dock is as nearly allied, and as directly germane, to the central subject of incorporating a port as the construction and operation of dredges for improvement of the channels of the rivers leading into the harbor, and of the harbor itself; and, being so, the objection that the amendatory act, construed with the original, embraces more than one subject is clearly untenable. The principle involved is supported by David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174.

It is further insisted that the amendatory act is also void because it authorizes the levy of taxes for the erection of such dry dock, asserting that, when so levied, it is not for a public purpose. It is of manifest persuasion that a city may construct and maintain wharves for the use of the public, and it may charge tolls therefor. It could lawfully maintain a ferry across the stream adjacent to or passing through the city limits, and charge tolls, which being so the port of Portland could as consistently maintain and operate a dry dock, which is in equally as large a sense for public use and purpose, to subserve the interests of shipping. The following authorities by strong analogy attest the public character of the enterprise of constructing and operating a dry dock: Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455; Township of Burlington v. Beasley, 94 U. S. 310, 24 L. Ed. 161; Blair v. Cuming County, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457.

One other point is made in this relation, which is that the board of control of the port of Portland is made appointive and self-perpetuating, rather than elective, and that, therefore, the entire act, with all the amendments, is unconstitutional and nugatory. The Oregon Supreme Court seems to have settled the question otherwise (David v. Water Committee, supra; State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; Eddy v. Kincaid, 28 Or. 537, 41 Pac. 156, 655), and I feel bound by the adjudication.

We come now to the question of the jurisdiction of a court of admiralty to take and maintain cognizance of the cause. Is the cause maritime? This depends upon whether the contract set out in the libel, implied though it is, is maritime. We are informed by the libel that at the instance and request of the owner, and upon the faith and credit of the vessel, libelant lifted the steamship George W. Elder upon its dry dock, and furnished dockage therefor for a time specified. It is previously alleged that the Elder is a vessel plying the waters of the United States. The contract, therefore, was one for the dockage of a vessel plying the waters of the United States. It does not specifically appear in the libel whether the port of Portland is the home port of the steamship Elder, or whether her home port is within the state or district of Oregon, but it seems to be conceded, and I am warranted, therefore, in treating the cause as if such were the case in fact. It is said in The J. E. Rumbell, 148 U. S. 1, 11, 13 Sup. Ct. 498, 37 L. Ed. 345, that:

"In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:

"(1) For necessary repairs or supplies furnished to a vessel in a foreign port a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. * * *

"(2) For repairs or supplies in the home port of the vessel no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. * * *

"(3) Whenever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. * * *

"(4) This lien, in the nature of a maritime lien, and to be enforced by

process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty."

The same eminent jurist who announced these principles as settling the law in the United States—Mr. Justice Gray—in a still later case (The Glide, 167 U. S. 606, 624, 17 Sup. Ct. 930, 42 L. Ed. 296) sums up the entire jurisdiction, maritime and admiralty, under the federal Constitution, in the following language:

"A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States or by a local statute, is a jus in re a right of property in the vessel, and a maritime lien to secure the performance of a maritime contract, and therefore may be enforced by admiralty process in rem in the District Courts of the United States."

This seems to comprise the whole law upon the subject as it can have relation to the present controversy. The statute of Oregon (section 5706, B. & C. Comp. 1901) provides that:

"Every boat or vessel used in navigating the waters of this state or constructed in this state shall be liable and subject to a lien. * * * (2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel * * * to construct, repair, or launch such boat or vessel, on account of labor done or material furnished by mechanics, tradesmen, or others in the building, repairing, fitting, and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launch ways constructed for the launching of such boat or vessel. (3) For all sums due for wharfage, anchorage, or towage of such boat or vessel within this state."

A maritime contract may extend to repairs made or supplies furnished a vessel while actually employed in shipping, or, in other words, engaged in commerce.

As to the question of jurisdiction, regard is had to two factors only, which are determinative, namely, the purpose for which the craft was constructed, and the business in which it is engaged. When it is alleged that the vessel is plying the waters of the United States, which must be taken as the fact for the purpose of the exceptions, the business in which it is engaged appears to be maritime in character, and therefore the contract was with reference to a ship actually engaged in commerce. So it is that, during the repair of a vessel, it is often necessary that she be at a wharf, dock, or pier to be most conveniently and safely accessible. "The pecuniary charge in the nature of rent to which vessels are liable for the use of a dock or wharf is called wharfage or dockage, and is the subject of admiralty jurisdiction." Benedict's Admiralty (3d Ed.) § 283. The term "dry dockage" is employed by the libel, by which I presume is meant given dockage in a dry dock. The statute alluded to seems broad enough to comprise this kind of service; and, the contract being for maritime services with reference to a ship engaged in commerce, there can remain no further question that she is subject to the lien intended to be imposed by the statute, and also that this court of admiralty has jurisdiction in rem to enforce the lien.

Some question was made that, the ship being in a dry dock, the service was on land; but the contrary is true, as is held by Mr. Justice Brown in The Robert W. Parsons, 191 U. S. 17, 33, 24 Sup. Ct. 8, 48 L. Ed. 73. This case is valuable in its bearings upon other phases of the case at bar. As it pertains to the authority of the port of Port-

land to charge compensation for the service of dockage, I am of the opinion that it is conferred by the general power granted under section 4636, B. & C. Comp. 1901. The court is not at this time concerned with the causes conducing to the necessity for docking the vessel. All it can know is what appears from the libel.

The exceptions will be overruled.

In re MARTORANA.

(District Court, E. D. Pennsylvania. March 26, 1908.)

No. 585.

1. ALIENS—NATURALIZATION — PETITION — VOUCHING WITNESSES — HUSBAND AND WIFE—COMPETENCY.

Under the express terms of Act Cong. March 2, 1907, c. 2534, § 3, 34 Stat. 1228, c. 2534 [U. S. Comp. St. Supp. 1907, p. 381], respecting the expatriation of citizens, an American woman became an alien by marrying an alien, though she continued to reside in the United States, and hence was incompetent to act as a witness in support of his petition for naturalization, since Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420], relating to naturalization, expressly requires such vouchers to be citizens.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 299–301; vol. 8, p. 7571.]

2. SAME—SUBSTITUTE WITNESSES—RIGHT TO CALL.

Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420], relating to naturalization, provides that aliens may be naturalized only in accordance with such act; and subdivision 2, par. 3, of such section requires a petition for naturalization to be verified by at least two citizens, who must state that they have known applicant to be a resident of the United States for at least five years, etc. Section 6 (34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423]) forbids final hearing until the petition with the names of the vouchers has been filed and notice thereof has been posted at least 90 days. Section 5 provides that if applicant's witnesses, who have been posted as those whom he expected to summon, fail to appear at the final hearing, other witnesses may be summoned. *Held*, that substitute witnesses may only be called and the final hearing proceeded with when all the preliminary provisions of the act have been strictly observed; and hence, where one of an applicant's vouchers was incompetent, because an alien, applicant could not call a qualified substitute at the hearing.

3. SAME—AMENDMENT OF PETITION.

But, it appearing that there was an honest mistake as to the competency of the disqualified witness, the petition may be amended by allowing applicant to have the petition verified by one who is qualified and have it reposted as required by section 6 (Act June 29, 1906, c. 3592, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423]), after which the petition can be finally heard.

On Petition for Naturalization.

William S. Gregg, Sp. Asst. U. S. Atty.

HOLLAND, District Judge. At the time of filing his petition for naturalization, viz., September 20, 1907, Martorana produced as one of the witnesses in his behalf Lorella S. Martorana, his wife. It developed at the hearing on January 13, 1908, that Mrs. Martorana was born in the United States and resided here all her life, and that she was mar-

ried to petitioner on May 7, 1907. The government contends she thereby became an alien, and was incompetent to be a voucher for her husband on September 20th, when the petition was filed; that no substitution, under the circumstances, can be allowed at the hearing; that the petition cannot be amended, but that it should be dismissed.

A review of the decisions of the courts, the opinions of the Attorneys General, the State Department, and of the International Claim Commissions, to which the United States has been a party, shows that the authorities were not entirely uniform; but the decided weight was to the effect that a marriage of an American woman to an alien conferred upon her the nationality of her husband. Annie Comitis v. W. S. Parkerson et al., 22 L. R. A. 148, where all the authorities are collected in a note; s. c. 56 Fed. 556. See, also, cases of Jenns v. Landes (C. C.) 85 Fed. 801, and Ruckgaber v. Moore (C. C.) 104 Fed. 947. To resolve any doubt that might exist because of the variant decisions of the courts and departments as to the effect of such a marriage, the citizenship committee of 1906 recommended, and Congress passed, Act March 2, 1907, c. 2534, 34 Stat. 1228 [U. S. Comp. St. Supp. 1907, p. 381], entitled "An act in reference to the expatriation of citizens and their protection abroad," section 3 of which act provides:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

This law serves to settle definitely the citizenship of married women in this country, and to settle it in accord with the adjustment of the same question by statute in most civilized countries. Whatever her status would have been, under the same circumstances, before the passage of this act, it is clear Mrs. Martorana was when she became a voucher, and is now, an alien, as the act provides an "American woman who marries a foreigner shall take the nationality of her husband"; and as it appears from the terms of the act that this change shall be effected by such marriage, without regard to domicile, it is obvious Mrs. Martorana, by her marriage to Santi Martorana on May 7, 1907, became an alien, and took the nationality of her husband, who was a subject of the King of Italy, and was incompetent to act as a witness in support of her husband's petition for naturalization, as the act of June 29, 1906, requires the vouchers to the petition to be "citizens of the United States." The facts as to her alienage appeared at the hearing. There was evidently no intention to deceive, nor was there any carelessness on the part of the applicant in securing witnesses supposed by him to be competent. There was an honest mistake as to her citizenship after the marriage. The petitioner offered a competent substitute at the hearing; but this was objected to by the United States attorney, and a motion made to dismiss the petition. The questions, then, to be determined, are (1) whether, under the circumstances, the petitioner should have been allowed to call a qualified substitute at the hearing; and, (2) if not, what disposition should be made of the petition?

Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp.

1907, p. 419], entitled "An act to establish a Bureau of Immigration and Naturalization to provide a uniform rule of naturalization of aliens throughout the United States," has provided a somewhat elaborate code of procedure for the naturalization of aliens, and it is declared (section 4) that aliens may be admitted to become citizens as therein required, and "not otherwise." The parts of the act material to the determination of the questions above stated are as follows: Paragraph 3 of the second subdivision of section 4 provides:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted a citizen of the United States."

The fourth subdivision of section 4 provides:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record."

Section 5 provides:

"That the clerk of the court shall, immediately after filing the petition, give notice by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

Section 6, in part, provides:

"That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition."

These portions of the act indicate what proofs are necessary, in addition to the statement made by the applicant, and they also indicate who are competent to furnish these proofs, and the time and manner of its introduction. There was nothing in the summary and indifferent method of naturalizing aliens under the old law to prevent fraud. The court depended entirely upon the truthfulness of the applicant and his

witnesses, and experience has amply demonstrated that while, as a rule, their statements and representations could be relied upon, yet thousands of fraudulent certificates were obtained, because there were no means provided to verify the statements made and no danger of detection. If, for any reason, an alien became anxious for citizenship, he could easily secure a certificate by making application, whether qualified or not, so long as his conscience and that of his witnesses were sufficiently elastic to make the necessary representations. It was no one's business to inquire as to the right of the applicant to be naturalized, and in fact there was no possible opportunity afforded under the law for such an investigation. No one was apprised of the intention of the alien to apply for citizenship until he appeared in court with his witnesses, neither of whom, as a rule, was known to the court or any of the officers. Their statement as to the right of the applicant to be naturalized was accepted as true, with absolutely no inquiry, either before or after the final hearing. Under these circumstances, there could be but one result: Frauds increased as citizenship became more desirable.

That this might be prevented the act of 1906 was passed, the dominant feature of which is publicity. The applicant can no longer come into court without notice and swear to statements, whether true or not, and secure his papers without danger of detection. The code of procedure pointed out by the act must be strictly followed to entitle him to a hearing. The statements required in his declaration of intentions and in his petition for naturalization, and the form of the same, are specifically provided for in the act, as well as the qualification of the vouchers, and the statements required to be made by them, and the form of their affidavit. It is necessary that the petition be verified by the affidavit of at least two witnesses (1) who are citizens of the United States; (2) who shall state that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously; (3) and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition; (4) and each must have personal knowledge that the person is of good moral character. The sixth section forbids final hearing until after the petition, with the names of the vouchers, has been filed for at least 90 days. This affords the authorized officials time for investigation and enables inquiry to be made of competent witnesses who are citizens and know of their personal knowledge the facts to be established by the applicant; and, as a further precaution, it is required that the witnesses whom the applicant expects to summon in his behalf at the final hearing of his petition, together with other information, shall be posted at a conspicuous place in the clerk's office. This further affords an opportunity of investigation, insuring the naturalization of those only who are qualified under the law. When all these preliminary requirements are strictly complied with, and the applicant appears upon the day set for final hearing, and his witnesses, who have been posted as those whom he expected to summon, fail to appear, he is permitted to call in others for the purpose of testifying before the court, as provided by subdivision 4 of section 4. But substitutes can only be called and the fi-

nal hearing proceeded with when all the provisions of the act have been strictly observed as to the qualification of the vouchers and notice to be given. In these particulars the act is mandatory, and no final hearing can be had (except as provided in section 10) until the applicant has been vouched for by witnesses who are citizens and possessed of certain knowledge concerning the applicant which will enable the official charged with the work of investigation to obtain reliable information as to the applicant's right to be naturalized. If it should appear that both or either of the vouchers are not strictly qualified as required by the act, the opportunity for prior inquiry, contemplated by the act, has not been afforded. It is no answer to say that inquiry is not made in every case, or that, in the case of Mrs. Martorana, her disqualification is technical. The knowledge that reliable sources of information exist and inquiry may be made has the desired effect to prevent frauds, and as to the citizenship of the voucher there is no middle ground, the act expressly requiring "two credible witnesses who are citizens," etc.; and there is no exception in favor of one who, as in this case, is undoubtedly qualified to give reliable information as to the qualification of the applicant, yet is technically disqualified by the fact of her marriage.

Section 6 requires the petition, supported by competent vouchers, to be on file 90 days, and the fifth section requires that the clerk give notice of the filing the same by posting, stating, among other information, the "names of the witnesses whom the applicant expects to summon" at the final hearing, and this section provides that "in case such witnesses cannot be produced upon the final hearing, other witnesses may be summoned," but these substitutions can only be summoned after all the preliminary requirements have been observed, and the final hearing can lawfully be had. Where, as in this case, an honest mistake has been made, there is no reason why the petition should not be amended by allowing the applicant to have his petition sworn to by one who is qualified, and have it reposted, as required by section 6, after which he can be finally heard.

The motion to dismiss the petition is overruled, and the applicant allowed to amend, and have same reposted, as required by law.

In re WELSH et al.

(Circuit Court, E. D. Pennsylvania. March 26, 1908.)

1. ALIENS—NATURALIZATION—VOUCHERS—COMPETENCY.

Naturalization Act June 29, 1906, c. 3592, § 4, subd. 2, par. 3, 34 Stat. 597 [U. S. Comp. St. Supp. 1907, p. 421], provides that the petition shall be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least a year immediately preceding the date of the filing of the petition. *Held*, that a voucher who had not known the petitioner for five years continuously immediately preceding the filing of the petition was disqualified, though he had known the petitioner for such period at the time of the hearing.

2. SAME--WITNESSES—DISQUALIFICATION.

Such witness was also disqualified as a witness at the final hearing, even though the petition was supported by qualified vouchers under Act June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 422], providing that it shall be made to appear to the satisfaction of the court admitting the alien to citizenship that immediately preceding the date of the application he had resided continuously within the United States; the date of the application being fixed by subdivision 2, par. 3, 34 Stat. 597 [U. S. Comp. St. Supp. 1907, p. 421], as the date of filing the same.

On Petitions for Naturalization.

Wm. S. Gregg, Sp. U. S. Atty.

HOLLAND, District Judge. Edward Welsh—Petition No. 775. This petition was filed on September 25, 1907, and at the hearing on January 14, 1908, Edward Goldman, who made affidavit to the petition at the time it was filed, failed to show he had known the petitioner to be a resident of the United States for five years continuously immediately preceding the date of filing, as the law specifically requires.

Armin Rosenberg—Petition No. 155. This petition was filed on October 25, 1906, and was called for hearing on February 24, 1908. It appeared from the examination of the United States attorney that both of the witnesses who signed the petition had only known the applicant personally for a period of four years and some months prior to the date of filing, although at the date of the hearing they had known the applicant for the requisite five years. It is contended by the government that they are incompetent, that the petition is fatally defective, and that it must be dismissed, and the applicant required to file a new petition, properly verified.

Carl H. Kaufman—Petition No. 857. This petition was filed on October 25, 1907, and was called for hearing on February 24, 1908, when it developed under cross-examination that Walter Fehr, one of the vouchers, had only known the applicant for four years and some months. The hearing was accordingly continued, and later in the day the applicant returned with a new witness, Harry Fehr, who, upon examination, proved to be a qualified witness. The government moved for a dismissal of the petition on the ground that Walter Fehr, the original witness, was incompetent; that there could be no substitution.

Much of what is said in the Case of Santi Martorana (filed this day in the District Court), 159 Fed. 1010, applies to these applications, especially as to the necessity of strictly complying with the express provisions of the sections quoted as to the qualification of vouchers to the petition and the right to amend. In the case, however, of Armin Rosenberg the vouchers, while not acquainted with the applicant five years before filing the petition, had known him the required five years before the final hearing, and claimed to be competent witnesses; but paragraph 3 of subdivision 2 of section 4 (Act June 29, 1906, c. 3592, 34 Stat. 597 [U. S. Comp. St. Supp. 1907, p. 421]) requires that the vouchers (except as provided in section 10) must be

able to state that "they have personally known the applicant to be a resident of the United States for a period of five years continuously * * * immediately preceding the date of the filing of his petition." He was, therefore, disqualified as a voucher, and the final hearing could not be had. He was also disqualified as a witness at the final hearing, even if the petition had been supported by qualified vouchers, because the fourth subdivision requires that "it shall be made to appear to the satisfaction of the court admitting the alien to citizenship that immediately preceding the date of the application he has resided continuously within the United States five years," etc., and the date of the application under paragraph 3 of subdivision 2 of section 4 is impliedly fixed at the time of filing the same; but, as was held in the Martorana Case, all these petitions can be amended, and in each case the applicant will be given leave to amend, and have the same reposted, as required by law, before final hearing.

THE SOMERS N. SMITH.

(District Court S. D. New York. December 11, 1907.)

TOWAGE—BREACH OF TOWAGE CONTRACT—EXECUTORY CONTRACT.

Libelant engaged respondent tug to tow three barges, which were then anchored together, to a port. The tug proceeded to the place where the barges were, reaching there in the morning and, although they were ready to be towed, she went into a harbor and remained until the next day. In the meantime one of the barges slipped her chain and drifted on shore and was injured. On the next day the tug took the remaining two barges and towed them to the port agreed upon. *Held* that, when the tug went to the place where the barges were for no other purpose than to take them in tow, she entered upon performance of the contract, and having subsequently performed it in part it was not executory, and that a suit in rem could be maintained against her to recover damages for its breach in negligently failing to take the barges in tow when she should have done so.

In Admiralty.

James J. Macklin and La Roy S. Gove, for libellant.
Robinson, Biddle & Benedict, for claimant.

ADAMS, District Judge. This action was brought by The P. Dougherty Company, against the tug Somers N. Smith to recover the alleged loss, said to have been $7,500, which arose from the failure of the Smith to carry out the contract of towage described in a libel of which the following is the material part:

"Second: That during the times hereinafter mentioned the libellant was and is now a corporation duly organized and existing under the laws of the State of Maryland, and at the time of the happening of the occurrences hereinafter set forth was the owner of the Barge Dendron.

Third: On information and belief libellant alleges that on or about the 23d day of March, 1906, the Steamtug Margaret owned by the libellant herein left the harbor of New York at about 12.15 P. M. having in tow the said barge Dendron which was loaded with cargo, and the barges Norfolk and Annie E. Embrey, which latter barges were light, the said tug and tow being bound for Norfolk, Virginia, the said barge Dendron was next to the said Steamtug on

a hawser astern, the Norfolk following and the Annie E. Embrey being the hind barge. That on said trip aforesaid and on the day following at about 7.45 P. M. the said tug and tow, during the prevalence of a north east strong gale and heavy snow storm, endeavored to get into Tom's Cove, Virginia, and while said tug was attempting to make said cove, the captain of the said tug stopped the engines thereof and blew whistles for the barges to anchor, which they did, but that the hawser run from said steamtug to the barge Dendron fouled the said tug's propeller wheel, which made the said tug helpless, causing her to drift on to the beach, the said barges remaining at anchor and afloat.

That on the 25th day of March, the wind having moderated, the libellant made a contract with the representatives of the Steamtug Somers N. Smith in consideration of the payment of five hundred dollars to tow the said three barges from where they were at anchor to Norfolk, and to receive the sum of seven hundred dollars if said tug Smith succeeded in safely rescuing the said steamtug Margaret with said barges the said tug Smith to be dispatched immediately to the scene where said barges were afloat and the said steamtug Margaret on the beach, and to take said barges in tow, and if practicable to rescue the said steamtug Margaret.

That said Steamtug Smith arrived in the vicinity of said barges on the morning of March 26th, the day being clear on the morning she arrived, sea calm and said barges still afloat, and having manœuvred about without communicating with those in charge of said barges, at about noon, proceeded into Assateague harbor and remained therein without making any effort to take any of said barges in tow, which she could easily have done. That those in charge of said barges did not know the mission of the said Steamtug Smith on said day; that said barges remained afloat until 8 o'clock P. M. of the said 26th day of March, when the chain on said Barge Dendron was slipped, and she also brought up on the beach. That on the next day, to-wit, the 27th day of March, the said tug Smith came out of Assateague harbor and then took the two remaining barges in tow and proceeded into said Assateague harbor with them where said barges safely anchored.

Libellant alleges that as a result of said Barge Dendron taking the beach as aforesaid, serious damage followed her as a consequence."

The claimant of the tug excepts on the ground that the libel shows no cause of action. It is not contended that no cause of admiralty action is alleged but that no cause of action in rem is stated, the contract set forth being entirely executory.

It is conceded by the libellant that if the action were wholly executory there would be no lien in rem and the exception would be good but it is urged that the tug, according to the pleading, had actually entered upon the contract by proceeding to the vicinity of Tom's Cove, Virginia, and by subsequently taking two of the three barges, and that as the contract was indivisible it was partly executed and not within the executory rule.

It is well settled that in order to defeat the jurisdiction of the court it must appear that the contract is wholly executory and that the vessel against which a lien is claimed "never entered upon the performance of the contract or any part of it." Judge Brown in The Monte A. (D. C.) 12 Fed. 331, 332. The exceptant here has been very industrious in citing authorities but none of them seems to be in point. The nearest is The Francesco (D. C.) 116 Fed. 83, decided May 20, 1902, by Judge McPherson in the Eastern District of Pennsylvania, where an action was brought for the breach of a towage contract and the jurisdiction of the court questioned upon an allegation that the contract was executory. The facts appear to have been that a tug, then in Philadelphia, was engaged to tow a ship from New York to

Philadelphia and in proceeding to New York took another vessel in tow which was abandoned on the voyage to assist a capsized schooner. The result was that the vessel in New York was delayed several days for which she sought to recover demurrage. It was contended that the fact of the tug having started for New York made a contract a partially executed one. It was held, however, that the fact of the tug starting for New York under the circumstances did not sustain the jurisdiction. Judge McPherson said:

"I am unable, however, to agree to the correctness of this position. It was necessary that the tug should proceed to New York in order that it might take hold of the Francesco, and the fact that the parties may have expressly agreed that the tug should proceed to that port and tow the bark thence to to Philadelphia imposed no more obligation upon the tug than if nothing had been said about proceeding to New York. The voyage thither would have been necessary, whether anything was said about it or not. What both parties had in mind was simply that the tug should furnish the motive power to bring the bark to the port of Philadelphia, and (except perhaps under unusual circumstances) the execution of such a contract would not be begun until the tug should be actually attached to the tow. Moreover, in the case now before the court, the tug was executing a contract of towage with the Bianchi, when it abandoned both contracts and took hold of the schooner. I think it would be an unwarranted refinement to hold that these two separate, independent contracts were being executed at the same time."

In this case there was no intervention of another vessel. The tug proceeded to the place where the vessels were and neglecting to take them in tow, proceeded into the harbor herself, where she remained until the next day, when coming for her tow, found only two vessels, one of the three having slipped her chain and gone ashore. The tug then took the remaining part of the tow and proceeded with it to destination. The case does not appear to be within The Francesco, and it seems to me that when this tug started to get the tow, she actually entered upon the contract. There was no reason for the tug to go to the tow except for the purpose of fulfilling the contract and in that sense it ceased to be executory from the time she started. It was provided that the tug should be "dispatched immediately to the scene where said barges were afloat * * * and to take said barges in tow." When the vicinity of the tow was reached, the barges were afloat and in readiness to be towed under the contract. It was only through the neglect of the tug to take hold, in consequence of which one of the barges was lost, that full performance was rendered impossible. For these reasons I conclude that the libel was properly brought in rem.

Judge Benedict had a similar question to the one under consideration before him in The Tow-boat James McMahon, 10 Ben. 103, 107, Fed. Cas. No. 7,197. There the McMahon was engaged to tow a a boat from New York to Troy for $15, which was paid in advance. It was alleged that the tug entered upon and performed the voyage but neglected to tow the boat although she was waiting at the place agreed upon in readiness to be towed. On exceptions to the libel it was alleged that the case was one of executory contract and that no lien attached to the tug under the circumstances, but this contention was overruled and Judge Benedict said:

"In this case, then, it is a mistake to suppose that the fact that the canal boat was never taken hold of by the tow-boat, is sufficient to exempt the tow-boat from liability. That fact is not material in a case like this, where the tow-boat agreed to come and take the canal boat and tow her to Troy, on a certain voyage, and where the voyage agreed on was paid, and the voyage not abandoned, but made; the canal boat not being taken, simply because the tow-boat neglected to stop for her. In such a state of facts, the liability of the tow-boat was complete from the moment of her omission to stop for the Mars, and she is liable to be proceeded against in rem for the damages resulting from such violation of the contract."

It is doubtful if the allegations here would constitute an averment of payment but I do not see that it makes any difference. In many other respects the case is in principle similar to the one under consideration.

Exception overruled.

PETRIFIED BONE MINING CO. et al. v. ROGERS et al.

(Circuit Court, E. D. Pennsylvania. March 2, 1908.)

No. 39.

1. COURTS—FEDERAL COURTS—EXECUTION—STAY—FEDERAL PRACTICE.
   Rev. St. § 988 (U. S. Comp. St. 1901, p. 708), taken from Act Cong. May 19, 1828, c. 68, § 2, 4 Stat. 281, provides that in any state where judgments are liens upon the property of defendants, and where, by the laws of such state, defendants are entitled to a stay of execution for one term or more, defendants in federal actions shall be entitled to a stay for one term. The Pennsylvania codifying statute of June 16, 1836 (P. L. 762, §§ 3, 4; 2 Purd. Dig. [Stewart's Ed.] 1517, pars. 9, 10) provides that certain judgment defendants may give security for the sum recovered with interest and costs, and thereupon be entitled to a stay, to be computed from the first day of the term to which the action was commenced, from 6 to 12 months, depending upon the size of the judgment. Act Pa. 1873 (P. L. 60; 1 Purd. Dig. 1519, par. 16), changed the time from which the stay is to be computed to the return day of the writ by which the action was commenced. No term of state court in Pennsylvania lasts six months. 1 Purd. Dig. (Stewart's Ed.) 629, 630, pars. 59, 60. *Held* that, so far as a stay of execution is concerned, defendants in the federal courts in Pennsylvania have the same privilege as those in the state courts, and upon the same conditions, except that the stay cannot last longer than one term, and that either the Pennsylvania act of 1836 or that of 1873 fixes the time when the stay begins in the federal courts, as well as in the state courts.

2. EXECUTION—RIGHT TO STAY.
   A stay of execution is not a right, but a privilege, which the lawmaking body may grant upon such easy or burdensome conditions as are deemed wise.

Petition for Leave to Enter Security for Stay of Execution.

See 150 Fed. 445.

Francis S. Laws, for the petition.

James Collins Jones, opposed.

J. B. McPHERSON, District Judge. This petition presents a question which seems to be of the first impression. It calls for the construction of section 988 of the Revised Statutes (U. S. Comp. St. 1901,

p. 708), under which, although its provisions have been in force for 80 years, either by virtue of the act of 1828, c. 68 (4 Stat. 281), from which the section was taken, or by virtue of the Revised Statutes themselves, no decision appears to have been made, or at least to have found its way into the Reports. The section is as follows:

"In any state where judgments are liens upon the property of the defendant, and where by the laws of such state defendants are entitled in the courts thereof to a stay of execution for one term or more, defendants in actions in the courts of the United States held therein shall be entitled to a stay of execution for one term."

In the state of Pennsylvania a judgment is a lien upon the property of the defendant, and the laws of the state provide for a stay of execution under certain conditions. When the federal act of 1828 was passed, the Pennsylvania statute then in force upon this subject was the act of March 21, 1806 (P. L. 563), of which the seventh section is as follows:

"And be it further enacted by the authority aforesaid, that in all suits instituted either by capias or summons, in any court of record within this commonwealth, the writ of execution shall be stayed on the judgment, whether it is obtained by the confession of the defendant, by the report of referees, or by the verdict of a jury, if the judgment shall not exceed two hundred dollars, six months, if not exceeding four hundred dollars, nine months, and if exceeding four hundred dollars, twelve months, counting from the first day of the term to which the original process issued is returnable, if the defendant, in the opinion of the court, is possessed of a freehold estate, worth the amount of such judgment, clear of all encumbrances, but if the defendant is not a freeholder as aforesaid, then execution may immediately issue, unless the defendant shall enter surety in the nature of special bail, in which case, there shall be stay of execution for thirty days, and if at or before the expiration of that term the defendant shall give security for the amount of debt, interest and costs, such defendant shall be entitled to the same stay of execution as if he was a freeholder, and the like stay of execution shall be had upon judgments obtained in amicable actions, unless when it is differently provided by the parties in the terms of their agreement, counting from the date of their agreement."

This act was substantially re-enacted by sections 3 and 4 of the codifying statute of June 16, 1836 (P. L. 762; 2 Purd. Dig. [Stewart's Ed.] p. 1517, pars. 9, 10). In some particulars those sections differ from section 7 of the act of 1806, but for the present purpose the differences are not material, as will be seen by examining their provisions:

"9. In all actions instituted by writ for the recovery of money due by contract, or of damages arising from a breach of contract, except actions of debt and scire facias upon judgments, and actions of scire facias upon mortgages, if the defendant shall be possessed of an estate in fee simple within the respective county, worth in the opinion of the court the amount of the judgment recovered therein, or the sum for which the plaintiff may be entitled to have execution by virtue thereof, clear of all encumbrances, he shall be entitled to a stay of execution upon such judgment, to be computed from the first day of the term to which the action was commenced, as follows, to wit:

"I. If the amount or sum aforesaid shall not exceed two hundred dollars, six months.

"II. If such amount or sum shall exceed two hundred dollars, and be less than five hundred dollars, nine months.

"III. If such amount or sum shall exceed five hundred dollars, twelve months.

"10. Every defendant in any judgment obtained as aforesaid, may (upon entering security, in the nature of special bail) have a stay of execution thereon during thirty days from the rendition of such judgment; and if, during that period, he shall give security to be approved of by the court or by a judge thereof for the sum recovered together with interest and costs, he shall be entitled to the stay of execution hereinbefore provided in the case of a person owning real estate."

Section 4 (10) is applicable in the pending case, and declares that any such defendant, whether or not he be a freeholder in fee, may give security for the sum recovered, together with interest and costs, and thereupon shall be entitled to the same stay of execution as is provided by section 3 in the case of a person owning a freehold estate in land. But the time from which the stay is to be computed has been changed by the act of 1873 (P. L. 60; 1 Purd. Dig. p. 1519, par. 16) from the first day of the term to which the action was brought to "the return day of the writ by which such action was commenced." These provisions gave, and still give, defendants in the common pleas courts of the state the privilege to have execution stayed for one term or more. The minimum stay is six months, and no term of court in any judicial district of the state lasted then, or lasts now, as long as six months (1 Purd. Dig. [Stewart's Ed.] p. 629, par. 59, p. 630, par. 60 and note). It follows, therefore, that if nothing is to be regarded except the bare words of the federal law, the petitioners are entitled to "a stay of execution for one term." But, from what time is the stay in the federal court to be computed? This is the exact point now in controversy, and, as the Revised Statutes say nothing on the subject, the court is left to infer the meaning of Congress from such considerations as seem to be applicable. If section 988 is to be taken by itself, without reference to the law of the state, it gives to all defendants in the federal court a stay of execution for one term, but makes no definite provision concerning the time when the stay shall begin. But, as an execution may ordinarily issue immediately after judgment has been obtained (or within a short time thereafter), it would certainly not be a forced construction to hold that the stay should begin from the time when execution might be taken out against the defendant's property. And—still considering the federal law by itself—the privilege of a stay is apparently given without requiring any security whatever, thereby putting the plaintiff in many instances to the serious hazard of loss. Such a result may be within the legislative competence, but to produce it should require the clearest language, and any reasonable construction that would avoid it ought to be preferred. It can only be avoided by implying the need to enter security as the state law provides; and to this construction the present defendants agree, for they offer to give bond as required by the Pennsylvania statutes; but they object to the direction to compute the stay from the return day of the summons, or from the first day of the term to which the action was begun. The reason for this objection is plain. The suit was brought on December 8, 1903, to the October term of that year, the summons being returnable on January 4, 1904, and the period of stay allowed by the Pennsylvania acts has therefore long gone by. I am asked therefore to reject this provision of the state law, and to grant a stay for the term of the circuit court beginning the

first Monday of April, 1908, this being the term next succeeding the pending application. In my opinion, such an order would be improper. Section 988 is incomplete in several particulars, and I see no way to construe it reasonably except to hold that, so far as a stay of execution is concerned, defendants in the federal courts shall have the same privilege that is enjoyed in the courts of the state, and upon the same conditions, with the single exception that the stay in the federal courts cannot last longer than one term, while in the state courts it may last as long as one year. If this view is correct, either the Pennsylvania act of 1836 or the act of 1873 fixes the time when the stay shall begin in the federal courts, as well as in the courts of the state. In either aspect a stay now would be useless. It is true that defendants, in cases that are actually tried, either in the courts of the state or in the federal courts, are not likely to profit by the provisions of the Pennsylvania law upon this subject, since their cases can rarely be disposed of before a jury, or afterwards on appeal, in time to permit the stay to be of any benefit; but this is a matter for the Legislature or for Congress, and not for the courts. A stay of execution is not a right, but a privilege, and the lawmaking body may grant it upon easy or upon burdensome conditions as they may think to be wise.

The petition is refused.

MEMORANDUM DECISIONS.

ÆTNA INS. CO. et al. v. ALBANY & S. R. CO. et al. (Circuit Court of Appeals, Second Circuit. April 23, 1908.) No. 241. Appeal from the Circuit Court of the United States for the Southern District of New York. Charles F. Brown and James M. Beck, for appellants. A. H. Joline and E. P. Prentice, for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. A question which must be decided before any others should be considered is whether upon the facts disclosed in the record the bill can be maintained under equity rule 94. This has been held by the Supreme Court to be a jurisdictional question. City of Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504; Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606. We have decided to certify such question to that court, reserving all other matters in controversy until answer thereto is received. The parties may agree upon the form of certificate, or, if they cannot agree, may submit their respective proposed forms at the opening of the May session. See 156 Fed. 132.

THE BRILLIANT. (Circuit Court of Appeals, Second Circuit. April 14, 1908.) No. 219. Appeal from the District Court of the United States for the Eastern District of New York. J. Parker Kirlin and Charles R. Hickox, for appellant. Wallace, Butler & Brown and F. M. Brown, for appellees. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree (138 Fed. 743) affirmed, with interest and costs.

DIGGS et al. v. LOUISVILLE & N. R. CO. (Circuit Court of Appeals, Sixth Circuit. November 5, 1907.) No. 1,684. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. Pickle, Turner & Kennerly and Black & Black, for plaintiffs in error. Cornick, Wright & Frantz and James G. Johnson, for defendants in error. No opinion. Writ of error dismissed for want of jurisdiction. See 158 Fed. 97.

LOUISVILLE NATIONAL BANKING CO. v. PFAFFINGER. (Circuit Court of Appeals, Sixth Circuit. January 7, 1908.) No. 1,729. Appeal from the District Court of the United States for the Western District of Kentucky. Wm. M. Smith, for appellant. Joseph E. Conkling, for appellee. No opinion. Appeal dismissed for want of jurisdiction. See 154 Fed. 523.

NATIONAL TUBE CO. et al. v. AIKEN. (Circuit Court of Appeals, Sixth Circuit. November 16, 1907.) No. 1,764. Petition for Revision of Proceedings in the Circuit Court of the United States for the Northern District of Ohio. J. Snowden Bell and James I. Kay, for petitioners. Christy & Christy, for respondent. No opinion. Petition denied. See 157 Fed. 691.

THE SITKA (two cases). THE ELIZA H. STRONG. (Circuit Court of Appeals, Second Circuit. April 14, 1908.) Appeals from the District Court of the United States for the Western District of New York. Albert J. Gilchrist and George S. Potter, for appellant. Harvey L. Brown and J. B. Richards, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree (156 Fed. 427) affirmed, with interest and costs. A majority of the court concur with the District Judge.

END OF CASES IN VOL. 159